## ORDERS FROM APRIL 1 THROUGH APRIL 27, 1985

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### April 1, 1985

*Appeal Dismissed*

No. 84–724. Texas A & M University et al. *v.* Gay Student Services et al. Appeal from C. A. 5th Cir. Motion of appellants to disqualify counsel for appellees and to strike appellees' motion to dismiss or affirm denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 737 F. 2d 1317.

*Certiorari Granted—Vacated and Remanded.* (See also No. 84–436, *ante*, p. 148.)

No. 83–2034. United States Department of Justice *v.* Falkowski. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Chaney*, 470 U. S. 821 (1985). Reported below: 231 U. S. App. D. C. 226, 719 F. 2d 470.

No. 83–2035. United States *v.* Schmucker. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wayte* v. *United States*, 470 U. S. 598 (1985). Reported below: 721 F. 2d 1046.

No. 84–5035. Spikes *v.* Indiana. Sup. Ct. Ind. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hayes* v. *Florida*, 470 U. S. 811 (1985). Reported below: 460 N. E. 2d 954.

*Vacated and Remanded After Certiorari Granted*

No. 84–823. United States *v.* Doe No. 462. C. A. 4th Cir. [Certiorari granted, 469 U. S. 1188.] Judgment vacated and case remanded with instructions to dismiss the cause as moot.

*Miscellaneous Orders*

No. D–453. In re Disbarment of Nothstein. Disbarment entered. [For earlier order herein, see 469 U. S. 808.]

No. D–467. In re Disbarment of McGlasson. Disbarment entered. [For earlier order herein, see 469 U. S. 1083.]

No. 102, Orig. Indiana *v.* United States et al. Motion of plaintiff to expedite consideration of motion for leave to file bill of complaint denied.

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.] Case restored to calendar for reargument. Justice Powell took no part in the consideration or decision of this order.

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 to permit Bruce N. Kuhlik, Esquire, to present oral argument *pro hac vice* granted. Justice Marshall took no part in the consideration or decision of this motion.

No. 84–806. Buckingham Corp. *v.* Odom Corp., dba Arizona Distributing Co. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84–836. Vasquez, Warden *v.* Hillery. C. A. 9th Cir. [Certiorari granted, 470 U. S. 1026.] Motion for appointment of counsel granted, and it is ordered that Clifford Earl Tedmon, Esquire, of Sacramento, Cal., be appointed to serve as counsel for respondent in this case.

No. 84–1231. Strickland, Warden, et al. *v.* King. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

*Certiorari Granted*

No. 84–1070. Witters *v.* Washington Department of Services for the Blind. Sup. Ct. Wash. Certiorari granted. Reported below: 102 Wash. 2d 624, 689 P. 2d 53.

No. 83–2004. Matsushita Electric Industrial Co., Ltd., et al. *v.* Zenith Radio Corp. et al. C. A. 3d Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 723 F. 2d 238.

No. 84–1181. NEW YORK *v.* CLASS. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 63 N. Y. 2d 491, 472 N. E. 2d 1009.

No. 84–5786. MILLER *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 741 F. 2d 1456.

No. 84–6270. GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 742 F. 2d 277.

*Certiorari Denied.* (See also No. 84–724, *supra.*)

No. 83–138. GOLD CROSS AMBULANCE CO., INC., ET AL. *v.* KANSAS CITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 1005.

No. 83–825. CENTRAL IOWA REFUSE SYSTEMS, INC. *v.* DES MOINES METROPOLITAN AREA SOLID WASTE AGENCY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 419.

No. 83–1959. EKLUND *v.* UNITED STATES; and MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 1287 (first case); 733 F. 2d 1309 (second case).

No. 83–2098. SASWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 84–360. SCOTT ET AL. *v.* CITY OF SIOUX CITY, IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 1207.

No. 84–378. GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 1430.

No. 84–480. P. I. A. ASHEVILLE, INC., ET AL. *v.* NORTH CAROLINA EX REL. THORNBURG, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 274.

No. 84–643. ARKANSAS *v.* BAIRD ET AL. Ct. App. Ark. Certiorari denied. Reported below: 12 Ark. App. 71, 671 S. W. 2d 191.

No. 84–667. LYONS *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 430, 683 P. 2d 504.

No. 84–767. CARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 339.

No. 84–809. MCGUIRE *v.* UNITED STATES; and
No. 84–1107. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 1197.

No. 84–832. HYBUD EQUIPMENT CORP. ET AL. *v.* CITY OF AKRON, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 949.

No. 84–982. CHAPMAN *v.* THOMAS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 743 F. 2d 1056.

No. 84–1003. SAILORS' UNION OF THE PACIFIC, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* SECRETARY OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 1426.

No. 84–1252. GUERIN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 458 So. 2d 286.

No. 84–1253. GEORGE ET UX. *v.* LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE. Ct. App. Ky. Certiorari denied.

No. 84–1267. MICHIGAN *v.* CARLTON. Ct. App. Mich. Certiorari denied.

No. 84–1268. KFC NATIONAL MANAGEMENT CO. *v.* BROWN. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–1276. GRACE *v.* BILLS AUTO REPAIR & TOWING. C. A. 8th Cir. Certiorari denied.

No. 84–1277. DUNCAN, DBA TV NEWS CLIPS *v.* PACIFIC & SOUTHERN CO., INC., DBA WXIA–TV. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1490.

No. 84–1295. PATTON *v.* THOMSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84–1297. MONTGOMERY CITY-COUNTY PERSONNEL BOARD ET AL. *v.* WILLIAMS. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 586.

No. 84–1298. QUANSAH *v.* BISCO INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84–1302. SHELL OIL CO. *v.* PINEY WOODS COUNTRY LIFE SCHOOL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 225.

No. 84–1311. BONIN *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 435.

No. 84–1381. FICALORA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 85.

No. 84–1383. BRYN MAR, LTD., ET AL. *v.* CARLTON BROWNE & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1484.

No. 84–1396. KRAMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–1408. RENNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–5857. CUMMISKEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 278.

No. 84–5938. WALLACE *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84–5958. HARVEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84–5968. BREWER *v.* CITY OF CLAYHATCHEE. Sup. Ct. Ala. Certiorari denied. Reported below: 459 So. 2d 1015.

No. 84–6151. ZEISLER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 558, 465 N. E. 2d 1373.

No. 84–6160. ANTONELLI *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–6165. HARROD *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 84–6194. ANTONELLI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1159, 481 N. E. 2d 360.

No. 84–6195. JONES *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6198. FLORES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1482.

No. 84–6199. ABDI *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1500.

No. 84–6210. MEALER *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 741 F. 2d 1451.

No. 84–6211. HOLSEY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–6212. HOPGOOD *v.* HOPGOOD. Sup. Ct. Ga. Certiorari denied.

No. 84–6213. GUERRERO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 391.

No. 84–6226. MORET *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied.

No. 84–6233. HOOK *v.* FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6235. IN RE BAILEY. C. A. 8th Cir. Certiorari denied.

No. 84–6236. SMITH *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 84–6238. TYSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 283 S. C. 375, 323 S. E. 2d 770.

No. 84–6293. Black *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–6299. Lewis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84–6308. Caldwell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 341.

No. 84–6336. Gage *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6338. Ligon *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6341. Green et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 83–1896. Mobil Oil Corp. *v.* Blanton et al. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 1207.

Justice White, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit affirmed a jury verdict that petitioner had attempted to monopolize in violation of § 2 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 2, and was therefore liable to respondents for treble damages. 721 F. 2d 1207 (1983). Ordinarily, a finding of attempted monopolization depends on a showing that there was a dangerous probability that the defendant would succeed in monopolizing a relevant market. See *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965); *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F. 2d 263, 271–275 (CA2 1979), cert. denied, 444 U. S. 1093 (1980). In this case, the jury found that the relevant submarket that petitioner had attempted to monopolize consisted of sales of "Mobil-branded and non-Mobil-branded oil, lubricants, and [tires, batteries, accessories and specialties] to Mobil dealers."

On appeal, petitioner contended that, as a matter of law, sales to Mobil dealers only could not constitute a relevant submarket. The Court of Appeals found it unnecessary to address this contention, for it concluded that the finding of attempted monopolization could be sustained without reference to the effects of petitioner's conduct in any relevant market. The court relied in part on the Ninth Circuit's earlier ruling in *Lessig* v. *Tidewater Oil Co.*, 327

F. 2d 459, cert. denied, 377 U. S. 993 (1964), in which the court had held that the relevant market was not an issue in an attempted monopoly case. In subsequent cases, the Ninth Circuit had refined the holding of *Lessig* to allow avoidance of the issue of effects in a relevant market only in cases where the plaintiff had proved "either predatory conduct or a *per se* violation of § 1 [of the Sherman Act, 15 U. S. C. § 1]." *Gough* v. *Rossmoor Corp.*, 585 F. 2d 381, 390 (1978), cert. denied, 440 U. S. 936 (1979). Relying on the "*Lessig* doctrine" as modified in *Gough*, the court held that because respondents had proved that petitioner had engaged in practices that constitute *per se* violations of § 1 of the Sherman Act, the attempted monopolization verdict could be sustained without reference to the probability that petitioner's conduct would lead to monopolization of any relevant market.

Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 767 (1984).

Because the *Lessig* doctrine allows a violation of § 2 to be found on the basis of a *per se* violation of § 1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles. In addition, the doctrine, although accepted within the Ninth Circuit for over 20 years, has been explicitly rejected by a number of Courts of Appeals outside the Ninth Circuit. See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 117 (CA3 1980), cert. denied, 451 U. S. 911 (1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F. 2d 704, 711–712 (CA7 1979), cert. denied, 445 U. S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F. 2d 256, 276, and n. 69 (CA5 1978), cert. denied, 440 U. S. 939 (1979); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F. 2d 1019,

1030 (CA2 1976), cert. denied, 429 U. S. 1097 (1977); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F. 2d 296, 305 (CA10 1975), cert. denied, 425 U. S. 907 (1976); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (CA1 1974), cert. denied, 421 U. S. 1004 (1975); *Agrashell, Inc.* v. *Hammons Products Co.* 479 F. 2d 269, 287 (CA8), cert. denied, 414 U. S. 1022 (1973). The questionable validity of the doctrine on which the decision of the Ninth Circuit in this case rested and the longstanding conflict among the Circuits over the issue indicate that this case is one that this Court ought to resolve. I would therefore grant the petition for certiorari.

No. 83–6298. McDonald *v.* Missouri. Sup. Ct. Mo.;
No. 84–6006. Mason *v.* Sielaff, Director, Virginia Department of Corrections. C. A. 4th Cir.;
No. 84–6036. Garrett *v.* Texas. Ct. Crim. App. Tex.;
No. 84–6098. Session *v.* Texas. Ct. Crim. App. Tex.;
No. 84–6131. Devier *v.* Georgia. Sup. Ct. Ga.;
No. 84–6167. Groover *v.* Florida. Sup. Ct. Fla.;
No. 84–6183. Huffstetler *v.* North Carolina. Sup. Ct. N. C.;
No. 84–6186. Ferrell *v.* South Carolina. Sup. Ct. S. C.;
No. 84–6189. Chaffee *v.* South Carolina. Sup. Ct. S. C.;
No. 84–6223. Daniel *v.* Alabama. Sup. Ct. Ala.;
No. 84–6230. Truesdale *v.* South Carolina. Sup. Ct. S. C.; and
No. 84–6254. Bannister *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: No. 83–6298, 661 S. W. 2d 497; No. 84–6006, 748 F. 2d 852; No. 84–6036, 682 S. W. 2d 301; No. 84–6098, 676 S. W. 2d 364; No. 84–6131, 253 Ga. 604, 323 S. E. 2d 150; No. 84–6167, 458 So. 2d 226; No. 84–6183, 312 N. C. 92, 322 S. E. 2d 110; Nos. 84–6186 and 84–6189, 285 S. C. 21, 328 S. E. 2d 464; No. 84–6223, 459 So. 2d 948; No. 84–6230, 285 S. C. 13, 328 S. E. 2d 53; No. 84–6254, 680 S. W. 2d 141.

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. 84–1179. TAVONE *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 482 A. 2d 693.

No. 84–1262. FEDERATION INTERNATIONALE DE BASKETBALL AMATEUR *v.* BEHAGEN. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 744 F. 2d 731.

No. 84–1294. VILLAGES, INC. *v.* METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY. Ct. App. Ind. Motion of National Association of Homes for Children for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 464 N. E. 2d 367.

*Rehearing Denied*

No. 84–5307. THETFORD *v.* UNITED STATES, 469 U. S. 1218;

No. 84–5626. DUFOUR *v.* MISSISSIPPI, 469 U. S. 1230; and

No. 84–5945. WATKINS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 469 U. S. 1223. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

APRIL 15, 1985

*Dismissal Under Rule 53*

No. 84–1387. MOORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari dismissed under this Court's Rule 53.

*Appeals Dismissed*

No. 84–1093. WELCH ET AL. *v.* CLAIBORNE COUNTY BEER BOARD ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 678 S. W. 2d 52.

No. 84–1299. ARANGO *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 455 So. 2d 1037.

No. 84–1441. KAY *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of jurisdiction. Treating the papers

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 330 Pa. Super. 89, 478 A. 2d 1366.

No. 84–6425. White *v.* McGoff, Superintendent, Fremont Correctional Facility. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1329. Crea *v.* New York. Appeal from App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists., dismissed for want of substantial federal question.

No. 84–1346. Heinrich *v.* Illinois. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Reported below: 104 Ill. 2d 137, 470 N. E. 2d 966.

No. 84–6256. Mack *v.* American Telephone & Telegraph Co., Long Lines, et al. Appeal from D. C. N. D. Ga. dismissed for want of jurisdiction.

No. 84–1382. Stern et al. *v.* Weiss et al. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Justice Blackmun would note probable jurisdiction and give this case plenary consideration. Reported below: 312 N. C. 486, 322 S. E. 2d 771.

*Certiorari Dismissed.* (See No. 84–501, *ante*, p. 154.)

*Miscellaneous Orders*

No. — — —. Furman *v.* Commissioner of Internal Revenue. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with Rule 33 denied. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–674 (84–6082). Attwell et al. *v.* United States Postal Service et al., 470 U. S. 1008. Application to suspend the effect of the order denying certiorari pending action on a petition for rehearing, addressed to Justice Marshall and referred to the Court, denied.

No. D–455. In re Disbarment of Phillips. Disbarment entered. [For earlier order herein, see 469 U. S. 914.]

No. D–472. In re Disbarment of Miller. Disbarment entered. [For earlier order herein, see 469 U. S. 1186.]

No. D–475. In re Disbarment of Padell. The order of this Court entered February 19, 1985 [469 U. S. 1203], suspending Bert Padell from further practice of law in this Court is vacated and the rule to show cause issued February 19, 1985, is discharged.

No. D–488. In re Disbarment of Rouse. It is ordered that Arthur J. Rouse, of West Nyack, 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. 100, Orig. Webber *v.* Oklahoma et al. Motion for leave to file bill of complaint denied.

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 the Solicitor General to permit Paul J. Larkin, Jr., Esquire, to present oral argument *pro hac vice* granted.

No. 84–310. In re Snyder. C. A. 8th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of United States Court of Appeals for the Eighth Circuit to supplement the joint appendix granted.

No. 84–320. National Farmers Union Insurance Cos. et al. *v.* Crow Tribe of Indians et al. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1032.] Motion of Sac and Fox Tribe of Indians of Oklahoma for leave to file a brief as *amicus curiae* out of time denied.

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 National League of Cities for leave to file a brief as *amicus curiae* granted.

No. 84–589. Dowling *v.* United States. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1157.] Motion of Recording Industry Association of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–648. Sedima, S. P. R. L. *v.* Imrex Co., Inc., et al. C. A. 2d Cir. [Certiorari granted, 469 U. S. 1157.] Motions of American Institute of Certified Public Accountants, Alliance of American Insurers et al., and Securities Industry Association for leave to file briefs as *amici curiae* 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.] Motions of Interinsurance Exchange of the Automobile Club of Southern California and John Grado et al. for leave to file briefs as *amici 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 respondent to permit John Burke III, Esquire, to present oral argument *pro hac vice* 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 American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 84–1023. United States *v.* Rojas-Contreras. C. A. 9th Cir. [Certiorari granted, 469 U. S. 1207.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84–5909. Adams *v.* Fulcomer et al., 469 U. S. 1205. Motion of petitioner to reconsider the order denying leave to proceed *in forma pauperis* denied. Justice Powell took no part in the consideration or decision of this motion.

No. 84–6317. In re Antonelli;

No. 84–6368. In re Brown; and

No. 84–6429. In re Ross. Petitions for writs of habeas corpus denied.

No. 84–6297. In re Hellwarth. Petition for writ of mandamus denied.

*Probable Jurisdiction Noted or Postponed*

No. 84–1360. City of Renton et al. *v.* Playtime Theatres, Inc., et al. Appeal from C. A. 9th Cir. Motion of

National League of Cities et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted. Reported below: 748 F. 2d 527.

No. 84–495. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL. Appeal from C. A. 3d Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 737 F. 2d 283.

No. 84–248. PINO *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT'S CHILDREN'S COURT IN AND FOR THE COUNTY OF BERNALILLO. Appeal from Sup. Ct. N. M. Motion of Navajo Nation for leave to file a brief as *amicus curiae* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

*Certiorari Granted*

No. 84–1340. WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 746 F. 2d 1152.

No. 84–1321. NIX, WARDEN *v.* WHITESIDE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 744 F. 2d 1323.

No. 84–1361. UNITED STATES *v.* LOUD HAWK ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 741 F. 2d 1184.

*Certiorari Denied.* (See also Nos. 84–1299, 84–1441, and 84–6425, *supra*.)

No. 82–1841. BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, HAWAII *v.* NAKATA ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 65 Haw. 531, 656 P. 2d 57.

No. 84–881. BAKER ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 744 F. 2d 1438.

No. 84–930. CHEREK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1248.

No. 84–932. CED'S, INC., DBA PRODUCTS FOR POWER *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 1092.

No. 84–943. ELVRUM ET AL. *v.* WILLIAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 549.

No. 84–971. KAPNISON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 743 F. 2d 1450.

No. 84–976. BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL–CIO, CLC, ET AL. *v.* CITY OF BELLEVUE. Sup. Ct. Wash. Certiorari denied. Reported below: 100 Wash. 2d 748, 675 P. 2d 592.

No. 84–1011. OLIPHANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84–1016. HARRINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–1017. UNIVERSITY OF PITTSBURGH ET AL. *v.* KRYNICKY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 94.

No. 84–1019. CARPENTER'S LOCAL UNION NO. 1478 ET AL. *v.* STEVENS. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1271.

No. 84–1020. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 426.

No. 84–1053. ECCLESIASTICAL ORDER OF THE ISM OF AM, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 967.

No. 84–1086. PERKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 29.

No. 84–1135. COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 163.

No. 84–1151. ESTATE OF KREMM *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 743 F. 2d 1578.

No. 84–1157. NKC Hospitals, Inc. *v.* Heckler, Secretary of Health and Human Services. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1100.

No. 84–1167. Pinar *v.* Dole, Secretary of Transportation, et al. C. A. 4th Cir. Certiorari denied. Reported below: 747 F. 2d 899.

No. 84–1185. Razatos *v.* Colorado Supreme Court et al. C. A. 10th Cir. Certiorari denied. Reported below: 746 F. 2d 1429.

No. 84–1231. Strickland, Warden, et al. *v.* King. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 1462.

No. 84–1238. Roop *v.* Alaska. Ct. App. Alaska. Certiorari denied.

No. 84–1263. Rodman et al. *v.* Hensley et al. C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 2d 665.

No. 84–1275. Stewart *v.* Disneyland, Division of Walt Disney Productions, et al. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84–1283. Luna *v.* House of Sofas et al. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 57.

No. 84–1284. United States *v.* Squillacote et al. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1208 and 747 F. 2d 432.

No. 84–1289. Port Terminal Railroad Assn. *v.* Sims. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 671 S. W. 2d 575.

No. 84–1290. Byrne *v.* Mass Transit Administration et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 501, 473 A. 2d 956.

No. 84–1296. Pennsylvania Dental Assn. et al. *v.* Medical Association of Pennsylvania, dba Pennsylvania Blue Shield, et al. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 248.

No. 84–1301. Amis *v.* Steele, Lee County Tax Collector, et al. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84–1305. Epperson *v.* Estate of Epperson. Sup. Ct. Ark. Certiorari denied. Reported below: 284 Ark. 35, 679 S. W. 2d 792.

No. 84–1308. Bosley, Clerk of the Circuit Court, City of St. Louis, et al. *v.* Barnes et al. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 501.

No. 84–1309. Starnes et al. *v.* Heckler, Secretary of Health and Human Services, et al. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 217.

No. 84–1314. International Longshoremen's Assn., AFL–CIO, et al. *v.* Hampton Roads Shipping Assn. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1015.

No. 84–1322. Nill *v.* Essex Group, Inc., et al. Ct. App. Ind. Certiorari denied. Reported below: 462 N. E. 2d 1334.

No. 84–1325. Ponterio *v.* Koch, Mayor of the City of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 374.

No. 84–1328. Ulane *v.* Eastern Air Lines, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1081.

No. 84–1330. Gould *v.* Mutual Life Insurance Company of New York. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1165.

No. 84–1336. Kern *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 382.

No. 84–1338. Ramos *v.* Ramos. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 126 Ill. App. 3d 391, 466 N. E. 2d 1016.

No. 84–1339. Raske *v.* Board of Commissioners of the Forest Preserve District of Cook County, Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–1349. Busto *v.* Martin Marietta. Ct. App. Colo. Certiorari denied. Reported below: 691 P. 2d 345.

No. 84–1356. Kohn Beverage Co. *v.* Teamsters' Local No. 348 et al. C. A. 6th Cir. Certiorari denied. Reported below: 749 F. 2d 315.

No. 84–1371. Farwest Steel Corp. *v.* DeSantis et al. Sup. Ct. Wash. Certiorari denied. Reported below: 102 Wash. 2d 487, 687 P. 2d 207.

No. 84–1391. Independent School District No. 3 of Broken Arrow, Tulsa County, Oklahoma *v.* Helms. C. A. 10th Cir. Certiorari denied. Reported below: 750 F. 2d 820.

No. 84–1392. George et al. *v.* Liberty National Bank & Trust of Louisville, formerly dba United Kentucky Bank, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 50.

No. 84–1405. Ghibaudy *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 108.

No. 84–1407. Scott *v.* Baldrige, Secretary of Commerce. C. A. D. C. Cir. Certiorari denied. Reported below: 241 U. S. App. D. C. 174, 746 F. 2d 907.

No. 84–1424. Ciro *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 753 F. 2d 248.

No. 84–1434. Mangrum *v.* Continental Casualty Co. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 57.

No. 84–1456. Erdlen *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1197.

No. 84–1474. Bartholomew *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 644.

No. 84–1489. Phelps *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5844. Primiano *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84–5933. Bowring *v.* Booker, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1470.

No. 84–5979. Barngrover *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–5997. McQueen *v.* Parole and Probation Commission. Sup. Ct. Fla. Certiorari denied. Reported below: 461 So. 2d 115.

No. 84–6034. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 84–6076. RABB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1320.

No. 84–6090. KANE *v.* FLORIDA STATE ATTORNEY GENERAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1477.

No. 84–6134. ALEXANDER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1007, 470 N. E. 2d 1071.

No. 84–6150. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1164, 481 N. E. 2d 363.

No. 84–6190. JUDD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 390.

No. 84–6231. DOE *v.* MICHIGAN DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. App. Mich. Certiorari denied.

No. 84–6240. SPEEDY *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 481.

No. 84–6241. LEE *v.* ALDERMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 379.

No. 84–6242. MIDWIFE *v.* EL PASO MATERNITY NURSING HOME ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84–6244. WARD *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 84–6245. KIMBALL *v.* LEWELLEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 66.

No. 84–6252. PHILLIPS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 447 So. 2d 1312.

No. 84–6257. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 128 Ill. App. 3d 706, 471 N. E. 2d 210.

No. 84–6258. LUCIEN *v.* MCGINNIS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 84–6262. BRAGG *v.* CAVE, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 84–6264. ASH *v.* SWANSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

No. 84–6265. BAKER ET AL. *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 461 So. 2d 26.

No. 84–6266. FINNEY *v.* ROTHGERBER, CHAIRMAN, KENTUCKY PAROLE BOARD, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 858.

No. 84–6267. LIBERTA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 152, 474 N. E. 2d 567.

No. 84–6269. HOWARD *v.* LANDRY. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 381.

No. 84–6274. O'CONNOR *v.* O'CONNOR. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 27.

No. 84–6276. SPOON ET AL. *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 691 P. 2d 253.

No. 84–6277. VOSSBRINCK *v.* VOSSBRINCK. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 229, 478 A. 2d 1011.

No. 84–6278. MCCALL *v.* TOVEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6279. NORMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 71 Ore. App. 389, 692 P. 2d 665.

No. 84–6280. ZARRILLI *v.* BRAUNSTEIN. C. A. 1st Cir. Certiorari denied.

No. 84–6288. SOCKWELL *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 979.

No. 84–6292. CHANCE *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6295. GIBBS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1462.

No. 84–6296. HOWARD *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 510.

No. 84–6304. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 99 N. J. 208, 491 A. 2d 704.

No. 84–6311. MITCHELL *v.* MEESE, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied.

No. 84–6313. YOCUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–6314. CALVENTE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 1019.

No. 84–6319. GRAY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–6324. INGRAHAM *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 156.

No. 84–6328. FLEMING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 918.

No. 84–6331. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 84–6347. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–6355. PRIDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–6362. MERRITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 1226.

No. 84–6363. TOOKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 975.

No. 84–6376. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 247.

No. 84–6380. Martin *v.* Pennsylvania Board of Law Examiners. Sup. Ct. Pa. Certiorari denied.

No. 84–6382. Yates *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 70.

No. 84–6383. Esquibel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6385. Wise *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 33.

No. 84–6386. Neely *v.* Central Intelligence Agency. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 254, 744 F. 2d 878.

No. 84–6388. DiNoia *v.* New York. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 2d 799, 481 N. Y. S. 2d 738.

No. 84–6389. Haywood *v.* Procunier, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied.

No. 84–6392. Lewis *v.* Procunier, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 1073.

No. 84–6402. Miriti *v.* Schade et al. C. A. D. C. Cir. Certiorari denied.

No. 84–6419. Harvey *v.* Smith. C. A. 5th Cir. Certiorari denied.

No. 84–6436. DeVyver, aka Wilson *v.* Smith, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–322. Reminick et al. *v.* Maltz et al. Ct. App. N. Y. Motion of Bankers Trust Co. for leave to intervene denied. Certiorari denied. Reported below: 62 N. Y. 2d 173, 464 N. E. 2d 974.

No. 84–600. Cooper *v.* United States Postal Service. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 714.

Justice White, dissenting.

In December 1980, petitioner filed an administrative complaint with respondent, her employer, alleging that she had been denied

a position because of her sex. The Regional Postmaster General denied the complaint, notifying petitioner that she could appeal to the Equal Employment Opportunity Commission within 20 days, or file suit in federal district court within 30. See 42 U. S. C. § 2000e–16(c). Choosing the latter route, petitioner filed this suit on October 29, 1982, the day before the 30-day limit expired. She did not serve copies of the complaint on the United States Attorney or the Attorney General until January 1983, and did not serve the Postmaster General until February. The record does not indicate when or if the Postal Service, which was the named defendant, was served, but it was not within the 30-day period.

The District Court dismissed the complaint because it did not name the proper defendant, who was the Postmaster General. § 2000e–16(c). Petitioner sought to correct this defect and have the amendment relate back to the date of the initial complaint. See Fed. Rule Civ. Proc. 15(c).[1] The District Court denied the motion on the ground that the Postmaster General had not had notice of the suit within the 30-day period.

On appeal, a panel of the Ninth Circuit agreed that the Postmaster General was the only proper defendant and that the 30-day period was a flat—parenthetically, a jurisdictional—requirement. 740 F. 2d 714, 716 (1984). Therefore, petitioner's action was necessarily time-barred unless the amendment could relate back to the date of the original complaint. Observing that "[t]here is no unanimity among the circuits concerning the proper interpretation of rule 15(c)'s notice provision," *ibid.*, the court adopted a strict, literal reading and affirmed.

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[1] That Rule provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

The case raises two important issues. The first is whether the 30-day limit of § 2000e–16(c) is jurisdictional or, like the equivalent limitation for suits against private employers, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), subject to waiver, estoppel, and equitable tolling. I have previously noted my dissent from the Court's refusal to address this issue, which has divided the Courts of Appeals. See *Stuckett* v. *United States Postal Service*, 469 U. S. 898 (1984) (WHITE, J., joined by REHNQUIST, J., dissenting from denial of certiorari). In light of the Court of Appeals' firm stance on the 30-day requirement and its view that petitioner's claim "must be barred" unless the amendment related back, I believe the issue is presented here. I continue to think it merits our attention.

The petition also challenges the Ninth Circuit's strict reading of Rule 15(c).[2] As that court observed, the Courts of Appeals have not taken a consistent approach to this provision. Some have rejected a literal construction of the requirement that the added party have had notice of institution of the action within "the period provided by law for commencing the action against him," allowing, for example, a reasonable time thereafter for service of process. See *Kirk* v. *Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); see also *Ringrose* v. *Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (Jones, J., concurring). The argument in favor of such a grace period for service of process is appealing when the statute of limitations is as short as 30 days. On the other hand, the Ninth Circuit is hardly alone in requiring that the added defendant have had notice strictly within the limitations period. See, *e. g.*, *Watson* v. *Uni-press, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984) (explicitly rejecting *Ingram*, *supra*); *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F. 2d 68, 71–72 (CA8 1983); *Hughes* v. *United States*, 701 F. 2d 56, 58–59 (CA7 1982).

Relying on the implications of the Rule's second paragraph, respondent argues that except as provided therein, actual notice is

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[2] The two questions presented are not unrelated. For example, were the 30-day period jurisdictional, the question would arise whether a district court would even have the power, notwithstanding the authorization of Rule 15(c), to add a new defendant after 30 days. See generally *Canavan* v. *Beneficial Finance Corp.*, 553 F. 2d 860, 864–865 (CA3 1977).

always required against a federal defendant. It points out that the cases with which the decision below conflicts did not involve federal defendants. This effort to separate federal from private defendants may or may not be legitimate, but neither the court below nor any other cited decision relied on the identity of the added defendant in denying relation back. Moreover, this argument goes more to the question of when the added defendant may be deemed to have had notice,[3] rather than the question, raised by petitioner, whether the period within which notice is required may be viewed flexibly.

In light of the conflicts in the lower courts on both issues raised by this petition, I would grant certiorari and set the case for oral argument.

No. 84-1013. BOUGH ET AL. *v.* RAMIREZ. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-1180. PETROV *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 747 F. 2d 824.

No. 84-1224. EVANS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 468, 323 S. E. 2d 114.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, and I would vacate the judgment of the Supreme Court of Virginia insofar as it left

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[3] In some cases, as where a complaint naming a corporation as the defendant is later amended to add the corporation's owner, *e. g., Itel Capital Corp.* v. *Cups Coal Co.*, 707 F. 2d 1253, 1258 (CA11 1983), or parent corporation, *e. g., Marks* v. *Prattco, Inc.*, 607 F. 2d 1153 (CA5 1979), the added party is deemed to have had notice in light of its identity of interests or close association with the original defendant. See generally *Hernandez Jimenez* v. *Calero Toledo*, 604 F. 2d 99, 102-103 (CA1 1979). Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period.

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 to decide the constitutional validity of the death sentence imposed here.

I

Petitioner Wilbert Lee Evans was convicted of capital murder in April 1981. At his sentencing hearing, the State urged the jury to recommend the death sentence based on Evans' "future dangerousness." To prove future dangerousness, the State relied principally upon the records of seven purported out-of-state convictions. The State's prosecutor later admitted that he knew, at the time he introduced the records into evidence, that two of them were false. App. to Pet. for Cert. 50a–52a. One of the seven "convictions," for assault on an officer with a deadly weapon, had been dismissed on appeal. Another, for engaging in an affray with a deadly weapon, had been vacated on appeal, and Evans had been reconvicted in a trial *de novo;* the conviction for one crime was, however, counted as two convictions.[1] After considering Evans' prior "history," the jury determined that there was a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, see Va. Code § 19.2–264.4C (1983), and it recommended the death penalty based solely upon its finding of future dangerousness. 228 Va. 468, 323 S. E. 2d 114 (1984). Evans was sentenced to death on June 1, 1981.

On October 16, 1981, while Evans' direct appeal was pending, the Supreme Court of Virginia ruled that, when a capital defendant's right to a fair and impartial jury is violated during the sentencing phase of trial, a death sentence must be commuted to life imprisonment. *Patterson* v. *Commonwealth*, 222 Va. 653, 283 S. E. 2d 212 (1981). The court premised its decision on a construction of the then-existing death-penalty statute under which only the jury that finds a capital defendant guilty can fix his punishment. Because the original jury, tainted by the constitutional error, could not be reconvened to resentence the defendant, the

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[1] In addition, several of the other convictions had been obtained when Evans was without the benefit of counsel. App. to Pet. for Cert. 3a–4a.

death sentence had to be reduced automatically to life imprisonment. *Id.*, at 660, 283 S. E. 2d, at 216.

This ruling was in effect when the Virginia Supreme Court considered Evans' direct appeal. Therefore, had that court known of the error in the sentencing hearing and vacated Evans' death sentence, he would very likely have received a life sentence.[2] But the State not only failed to confess its error, it listed all the purported convictions, including the erroneous ones, in its brief. App. to Pet. for Cert. 42a. In sustaining Evans' death sentence, the State Supreme Court relied, in part, on this inaccurate record. *Id.*, at 31a. When Evans petitioned this Court for a writ of certiorari, the State again relied on the misleading records of convictions in its brief in opposition. *Id.*, at 46a. Certiorari was denied. 455 U. S. 1038 (1982).

The State did not notify Evans that it would confess its error regarding the false evidence until March 28, 1983. App. to Pet. for Cert. 73a. *On that day*, the Virginia Governor signed into law a bill that amended the state death-penalty statute to allow for resentencing by a different jury after a death sentence was set aside, thus effectively overruling *Patterson*. See Va. Code § 19.2–264.3C (1983). The State subsequently confessed error to the trial judge on April 12, 1983. At a hearing to consider the propriety of resentencing Evans, the prosecutor at Evans' trial admitted that he knew the evidence that he introduced at the sentencing hearing was false. The judge then ordered a new sentencing hearing. A new jury recommended the death penalty, and petitioner was again sentenced to death.

II

In *Napue* v. *Illinois*, 360 U. S. 264 (1959), this Court reversed a conviction obtained through the use of false evidence that was known to be false by representatives of the State. Since *Napue*,

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[2] In its brief in opposition, the State urges that the opinion of the Virginia Supreme Court implied that the court would not have applied the *Patterson* rule to Evans' sentence. A fair reading of the opinion below, however, indicates that the court was not rejecting Evans' contention that *Patterson* would have controlled his case had it not been legislatively overruled; rather, the court was rejecting Evans' *ex post facto* argument, which was based on the subsequent overruling of *Patterson*. See 228 Va. 468, 476–477, 323 S. E. 2d 114, 118–119 (1984).

this Court has adhered to the principle that a conviction obtained by the knowing use of false evidence is fundamentally unfair. See, *e. g.*, *United States* v. *Agurs*, 427 U. S. 97, 103 (1976); *Miller* v. *Pate*, 386 U. S. 1, 7 (1967). The rule of *Napue* is undoubtedly applicable to the sentencing phase of a capital trial. In this case, the prosecutor admitted that he knowingly introduced false evidence at Evans' sentencing hearing to demonstrate "future dangerousness." Evans was therefore deprived of the fundamental fairness due him under the Fourteenth Amendment.

To remedy this injury, the state court ordered a new sentencing hearing free from the taint of false evidence. This remedy, however, was inadequate to undo the harm suffered by Evans. For the State compounded its original misconduct by concealing the deception during both Evans' direct appeal and his petition for certiorari to this Court. Had the State honestly confessed the error, petitioner's sentence would almost certainly have been commuted to life imprisonment under the then-existing statute. Instead, the State did not confess error until nearly two years after the original death sentence had been imposed, by which time the death-penalty statute had been amended.

The court below ruled that, even assuming that the prosecutor's handling of the sentencing hearing involved serious prosecutorial misconduct, the State was not barred from seeking the death penalty a second time. In doing so, it relied on the holding in *United States* v. *Morrison*, 449 U. S. 361 (1981), that drastic remedies should not be used to redress "deliberate" and "egregious" violations of constitutional rights "absent demonstrable prejudice, or substantial threat thereof," to the defendant. *Id.*, at 365. The court concluded that Evans' resentencing hearing removed any prejudice. But the court considered only the prejudice suffered by Evans at the initial sentencing. It failed to account for the harm done to Evans afterwards, during his direct appeal. Had the State not continued to rely on the false evidence, very likely the death sentence would have been commuted to life imprisonment.

The State argues, nevertheless, that this Court cannot consider the harm done to Evans by its conduct during the appeal. It directs our attention to the finding by the trial judge that the State did not delay its confession of error until after the death-penalty statute was amended just to have a second chance to sentence

Evans to death. App. to Pet. for Cert. 20a. This argument misses the point. Regardless of its purpose in regard to the amendment, the State's continued, knowing use of false evidence during the direct appeal and petition for certiorari, and its failure to disclose this misconduct, constituted egregious conduct that seriously harmed Evans.[3]

III

To my mind, the only way to remedy the federal constitutional violation Evans has suffered would be for the Virginia courts to consider, *nunc pro tunc*, how *Patterson* would have applied to this case. I would grant the petition for certiorari to consider whether the court below was constitutionally obligated to make this inquiry. Accordingly, I dissent from the denial of certiorari.

No. 84–1341. DUQUESNE LIGHT CO. ET AL. *v.* STATE TAX DEPARTMENT OF WEST VIRGINIA ET AL. Sup. Ct. App. W. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: —— W. Va. ——, 327 S. E. 2d 683.

No. 84–1353. KARTELL ET AL. *v.* BLUE SHIELD OF MASSACHUSETTS, INC.; and

No. 84–1354. RODKEY ET AL. *v.* BLUE SHIELD OF MASSACHUSETTS, INC. C. A. 1st Cir. Motion of American Medical Association for leave to file a brief as *amicus curiae* granted. Motion of Ball Memorial Hospital, Inc., et al. for leave to file a brief as

[3] Further, whether the delay of nearly two years in confessing error was intentional or merely negligent has no bearing on the degree of prejudice suffered by Evans. "Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin." *Dickey* v. *Florida*, 398 U. S. 30, 51 (1970) (BRENNAN, J., concurring).

Nor does it matter whether the state attorney who appeared at the sentencing hearing, and who admitted that he knew the evidence on which the State relied was false, took part in preparing the State's briefs in the Virginia Supreme Court or in this Court. The prosecutor's office is an entity, not just a group of isolated individuals, and the prosecutor is responsible for assuring that relevant information is communicated among the lawyers in the office. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972); *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (MARSHALL, J., concurring in part and dissenting in part).

*amici curiae* in No. 84–1353 granted. Certiorari denied. Reported below: 749 F. 2d 922.

No. 84–5339. WINGO *v.* LOUISIANA. Sup. Ct. La.;
No. 84–6073. NELSON *v.* LOUISIANA. Sup. Ct. La.;
No. 84–6224. WALDROP *v.* ALABAMA. Sup. Ct. Ala.;
No. 84–6250. MILTON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 84–6251. NUCKOLS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6285. AVERHART *v.* INDIANA. Sup. Ct. Ind.;
No. 84–6348. COPELAND *v.* FLORIDA. Sup. Ct. Fla.; and
No. 84–6442. WEEKS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 84–5339, 457 So. 2d 1159; No. 84–6073, 459 So. 2d 510; No. 84–6224, 459 So. 2d 959; No. 84–6250, 744 F. 2d 1091; No. 84–6251, 690 P. 2d 463; No. 84–6285, 470 N. E. 2d 666; No. 84–6348, 457 So. 2d 1012; No. 84–6442, 456 So. 2d 404.

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. 84–5819. BOYD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 311 N. C. 408, 319 S. E. 2d 189.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was sentenced to death after a hearing in which the judge prevented the jury from considering evidence that it might well have considered highly relevant to petitioner's motive at the time of his crime and to the relationship of his character and record to the offense he had committed. As a result, the jury was called on to decide whether death was the appropriate punishment but was deprived of the evidence petitioner offered in mitigation of his crime. The death sentence must thus be vacated, for it stands in glaring conflict with one of the most basic requirements of the Eighth Amendment—" 'that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of

a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)).[1]

I

Petitioner Boyd was convicted of murdering his former girlfriend after unsuccessfully attempting a reconciliation. They had lived together for three years but had separated several months prior to the murder. On the day of the murder, Boyd met the victim at a local shopping mall. They sat and talked quietly for some time, sitting in the midst of a church-sponsored event run by the victim's father, a local pastor. Eventually, the victim's mother approached her daughter and said it was time to leave, but Boyd asked the daughter to stay and talk to him a little longer. After talking some more, the victim said she would leave. She was also reported to have said that if Boyd was going to kill her "he should hurry up and get it over with." Boyd took out a knife but also assured her that he would not hurt her. He then began to stab her rapidly and repeatedly until bystanders dragged the two apart. The victim died from the multiple stab wounds.

At his capital sentencing hearing, Boyd offered in mitigation expert testimony by a sociologist, Dr. Humphrey, who had interviewed Boyd and previously had done academic research into the behavioral dynamics of suicide and homicide. Most relevantly, Dr. Humphrey had coauthored a study of people who had murdered their relatives or intimates. The trial judge excluded the entirety of his testimony.

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[1] I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in this case because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See *Eutzy* v. *Florida*, *post*, p. 1045 (MARSHALL, J., dissenting from denial of certiorari); *Patterson* v. *South Carolina*, *post*, p. 1036 (MARSHALL, J., dissenting from denial of certiorari).

Dr. Humphrey would have testified, based on his study and his personal interview with Boyd, that Boyd's crime and life history conformed to a common pattern that distinguishes those who kill intimates from those who kill others. According to the sociologist, those in the former group are more likely to have had lives characterized by repeated deep personal losses (such as deaths of loved ones or abandonment by parents) and strong feelings of self-destruction:

> "'The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are after all, killing something that is a part of them, very close to them, very important to their self. They are destroying them. So in the act of killing another person they are in fact destroying part of their self, a self-destructive act.'" 311 N. C. 408, 439, 319 S. E. 2d 189, 209 (1984) (Exum, J., dissenting) (quoting *voir dire* testimony of Dr. Humphrey).

In Dr. Humphrey's view, Boyd's life history conformed to the pattern he had found in his research; Boyd's life had involved repeated and intense personal losses that had generated strong self-destructive feelings in him.[2] Dr. Humphrey thus understood Boyd's crime "primarily [as] a depression caused self-destructive act, closely related to the impulse that leads to suicide, resulting from a life history of an inordinate number of losses beginning with the abandonment by the defendant's father and the death of his grandfather and culminating with the threatened loss of [the victim]." *Id.*, at 419, 319 S. E. 2d, at 197.

Boyd's counsel sought to introduce the expert's testimony to provide the jury with a perspective on Boyd's personal history, on his mental and emotional condition, and on how these factors may have led to the crime. In that sense, it was evidence of motive; but more broadly, the proposed testimony was an effort to "link

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[2] Boyd's lawyers had introduced evidence that Boyd's father had been an alcoholic who abandoned his family when Boyd was a child, that his grandfather—whom he had come to view as a father—had then died, that he had a history of losing jobs and repeated imprisonment, and that his life since adolescence had been characterized by drug and alcohol abuse. When Dr. Humphrey interviewed Boyd, Boyd said that he had so feared the loss of his girlfriend that he had contemplated suicide shortly before the murder.

together all of the defendant's mitigating evidence into a unified whole which explained the apparent contradiction of killing the person the defendant loved the most." *Ibid.*[3]

On the prosecutor's motion, the trial court excluded Dr. Humphrey's explanation of why Boyd killed his former girlfriend, but the prosecutor nevertheless argued vigorously for an alternative explanation of Boyd's motive. According to the prosecutor, Boyd was selfish and mean; he killed the victim because if he could not have her he wanted to make sure that no one else could. *Id.*, at 436, 319 S. E. 2d, at 207 (Exum, J. dissenting). In the words of the dissenting opinion below, the State's theory was "a motive theory that is easy to sell in this kind of case. . . . Defendant's motive theory was different, less apparent to the average observer, and probably more difficult to sell. It was a theory which does not excuse the crime but which might have mitigated it in the eyes of the jury." *Ibid.* The legal question, obviously, is not which of these theories is more worthy of belief, but whether petitioner had a right to offer evidence in support of his theory. *Lockett* and *Eddings* leave no doubt as to the correct answer to that question; he had such a right.

With two justices in dissent, the State Supreme Court affirmed the sentence of death. In the court's view the proffered testimony only "placed [the] various 'stressful events' [of Boyd's life] in a context suggesting that defendant's act [of murder] was predictable." 311 N. C., at 423, 319 S. E. 2d, at 199. It had "merely constructed a profile of a murderer into which the defendant fits." *Ibid.* The court doubted that this information could have much weight in mitigation, especially because, in the court's view, some of the traumas in Boyd's life (*e. g.*, imprisonment) could not "extenuate or reduce the moral culpability of the killing." *Ibid.*

## II

*Lockett* and *Eddings* have at their core an understanding that the factors that can rationally militate against the appropriateness of death are varied, subjective, and not subject to prior itemization. See also *McGautha* v. *California*, 402 U. S. 183, 204–208 (1971). Moreover, those cases clearly stand for the proposition that, within a broad range of relevance, the weight of any offered

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[3] The proffered evidence would of course also have been quite relevant to such issues as future dangerousness and prospects of rehabilitation.

factor of mitigation is for the sentencer to determine. Here the sentencers were the jurors. Although evidence of various events in Boyd's personal history was admitted, expert evidence that might have been highly useful to the sentencer's attempt to understand Boyd's crime and its relation to those events of personal history was excluded. Expert knowledge of human motivation might well have been considered highly relevant in the eyes of the jurors, for it might have offered an alternative explanation for why Boyd killed. Without that evidence, the scattered personal history evidence might have had little apparent significance, but the expert evidence might well have provided a link between the personal history evidence and that "extenuat[ion] or reduc[tion of] the moral culpability of the killing" that might call for a sentence of less than death. The exclusion of the expert evidence thus violated *Lockett* and *Eddings*.

Behind the State Supreme Court decision stand certain premises concerning punishment. Most apparently, the court took the view that it would be highly questionable to mitigate punishment based on a criminal's conformity to a social psychology profile that traces the crime's origins to the traumas of the criminal's life and to the self-destructive impulses that those traumas may produce. But under the Constitution, the weight of mitigating factors is a judgment for the capital sentencer, and neither court nor legislature may usurp the sentencer's role. In a jury's eyes, the fact that a killer is moved by self-destructive tendencies might make a crime seem more generally tragic and less demanding of retribution, and it might make the criminal seem less clearly evil and more capable of rehabilitation. Moreover, the jury might become less concerned with the prospect of future dangerousness where a defendant's violence stemmed from intimacy and the likely alternative to death is that he spend his life in prison far from loved ones.[4]

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[4] There is some ambiguity in the State Supreme Court's opinion as to whether the affirmance rested on a view that the proffered evidence was properly excludable as irrelevant or was simply of so little weight as to not be a basis for vacating the sentence in this case. Either basis would of course be improper. The former would clearly be contrary to the discussions of relevance in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and the latter would ignore those cases' determination that the sentencer be the judge of the proper weight to be given to mitigating

Although these possible uses of the proffered but excluded evidence show that it was of clear relevance within even the most traditional views of mitigation, its possible power with the jury is even clearer when we consider the inherent subjectivity of capital sentencing decisions. Put simply, viewing the defendant's behavior in terms of a pattern that has governed a far greater number of persons than the defendant alone might lead a jury to step beyond initial revulsion and attempt to understand the crime in more human terms. As one commentator has speculated, in many cases a jury's ability to take precisely that step might be what determines whether or not a defendant will be sentenced to die:

> "[It may be that] many jurors vote to execute when they are repelled by the defendant, because he presents the threatening image of gratuitous, disruptive violence that they cannot assimilate into any social or psychological categories they use in comprehending the world. Jurors can probably give mercy to even the most vicious killers if they can somehow understand what might cause this person to be a killer . . . . A juror votes to expel the defendant who presents an image of violence he or she cannot assimilate into any stabilizing categories, and who thereby threatens his or her sense of comfortable order in the world." Weisberg, Deregulating Death, 1983 S. Ct. Rev. 305, 391.

It was our recognition of the importance to a defendant of just this sort of subjective but intensely human analysis of mitigation that stood behind this Court in *Lockett* and *Eddings*. Relying on those cases, Boyd sought to place his crime within the jury's understanding. The state courts denied him the right to make that effort.

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factors. Whatever might be the circumstances, if any, that might allow a court to speculate as to the possible harmlessness of an improper exclusion of a properly proffered mitigating factor, cf. *Eddings*, *supra*, at 119 (O'CONNOR, J., concurring); see also *Songer* v. *Wainwright*, 469 U. S. 1133, 1140, and n. 13 (1985) (BRENNAN, J., dissenting from denial of certiorari), the standard can certainly be no less than the constitutional harmless-error standard we have otherwise endorsed. The court below did not engage in any determination that there was error that could be found harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U. S. 18 (1967). Moreover, there is no reason to believe that any such determination could reasonably have been made in a case such as this.

III

We have broadly declared that the law cannot preclude a capital sentencer's consideration of "'*any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings*, 455 U. S., at 110 (quoting *Lockett*, 438 U. S., at 604). Accordingly, a constitutional death sentence cannot result from a process wherein the State may portray a defendant's acts as so "inhuman," bizarre, and cruel as to be beyond the reach of human sympathy, but a defendant is legally precluded from offering in mitigation those "'diverse frailties of humankind'" an understanding of which might place the barbaric act within the realm of the tragic but nonetheless human. 455 U. S., at 112, n. 7 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)).

The *Lockett-Eddings* principle stems from the "'fundamental respect for humanity underlying the Eighth Amendment,'" *Eddings*, *supra*, at 112 (quoting *Woodson* v. *North Carolina*, *supra*, at 304), and rests on the requirement that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976). Without the *Lockett-Eddings* principle, the uniqueness of a person's life, including how that life may have led to the crime, may be casually ignored in determining whether that person should live or die. The Constitution cannot tolerate the execution of people "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, *supra*, at 304. This Court should not stand by and allow the *Lockett-Eddings* principle to erode. I would thus grant review, and I dissent from the denial of certiorari.

No. 84–5843. PATTERSON *v.* SOUTH CAROLINA; and
No. 84–5850. KOON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 84–5843, 285 S. C. 5, 327 S. E. 2d 650; No. 84–5850, 285 S. C. 1, 328 S. E. 2d 625.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In spite of this Court's repeated declarations that a capital "'sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character . . . that the

defendant proffers as a basis for a sentence less than death,'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)), the South Carolina Supreme Court has determined that evidence of a capital defendant's likely nondangerousness within a prison environment is legally irrelevant to the capital sentencer's choice between death or life in prison. In these cases, the petitioners were sentenced to death. They had offered such evidence in mitigation of death but were denied the opportunity of submitting the evidence to their sentencing juries.

The death sentences in these cases were imposed in glaring violation of two lines of this Court's capital sentencing jurisprudence. First, and most obviously, the sentences are contrary to the *Lockett-Eddings* line of authority, which makes unmistakably clear that it is for the sentencer to determine the weight to be given to proffered evidence of mitigation. Second, they are equally in conflict with those decisions of this Court that make equally clear that the question of a capital defendant's future dangerousness is a legitimate penological concern relevant to a capital sentencing hearing. See *California* v. *Ramos*, 463 U. S. 992, 1001–1003 (1983); *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983); *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976).

While this latter group of cases affirmed the penological relevance of future dangerousness in contexts in which the State urged it as a factor in aggravation, the hitherto relevant factor of future dangerousness cannot become suddenly and cruelly "irrelevant" as a matter of law when a defendant wishes to assert its absence as a factor in mitigation. As was declared in a precursor to *Lockett* and *Eddings*, "a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, *supra*, at 271. Rather than allow *Lockett* and *Eddings* to be eroded through such a cruelly inequitable view of relevance, I would grant these petitions.[1]

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[1] I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in these cases because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably

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At the time of the sentencing hearings in question the South Carolina Supreme Court's view of the relevance of predictive evidence as to a defendant's future nondangerousness in a prison environment was clear:

> "The penalty phase of a capital murder case is concerned with the existence or nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. . . . In *Lockett* v. *Ohio*, . . . cited as controlling in *Eddings* v. *Oklahoma*, . . . the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant." *State* v. *Koon*, 278 S. C. 528, 536, 537, 298 S. E. 2d 769, 773–774 (1982) (hereinafter *Koon I*).[2]

At Koon's hearing below, his counsel sought to develop a number of avenues of mitigating evidence. First, he sought to call two prison officials to testify as to petitioner's excellent record in prison and his demonstrated ability to adapt to prison life. Record in No. 84–5850, pp. 922–927. Second, he sought to call psychiatric experts to testify as to Koon's mental condition. Those psychiatrists had examined him and were prepared to testify that he suffered from a severe mental disorder, and that partly as a result of that disorder he was extremely capable of

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narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See *Boyd* v. *North Carolina*, *ante*, p. 1030 (MARSHALL, J., dissenting from denial of certiorari); *Eutzy* v. *Florida*, *post*, p. 1045 (MARSHALL, J., dissenting from denial of certiorari).

[2] This ruling by the South Carolina Supreme Court occurred in an appeal of an earlier sentencing of petitioner Koon. In both of these cases the capital defendants had previously been sentenced to death pursuant to proceedings that were later found by the South Carolina Supreme Court to violate state law. *State* v. *Patterson*, 278 S. C. 319, 295 S. E. 2d 264 (1982); *Koon I*. Both had thus been imprisoned for a substantial period at the time of their resentencing hearings.

adapting to prison life. They would have testified that, within the highly structured and regulated context of life in prison, Koon would be unlikely to present any problem of future dangerousness, and that, indeed, he might live a more productive life than he was capable of living outside of confinement. *Id.*, at 925–928. See also *id.*, at 1062–1066.[3]

The trial court, relying on *Koon I*, excluded all of the prison officers' testimony, and all psychiatric evidence of Koon's ability to adapt to prison life or of his likely future nondangerousness within the prison environment. Although Koon was allowed to

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[3] At the sentencing hearing at issue in the instant case, Koon made a proffer that his psychiatric expert would testify to substantially the same effect as the expert had done in the hearing that resulted in *Koon I*, *supra*. The following testimony by Dr. Pattison, an expert psychiatric witness, was proffered in mitigation at that earlier hearing:

"Q: You have observed Paul in his prison environment—his jail environment. Do you have an opinion as to his ability to adapt to a long term institutional environment?

"A: Yes. Both from the records and from observing him in the jail and talking with him it is, I think, quite clear in my professional opinion that he adapts very well to an institutional environment. As a matter of fact, in my professional judgment, in an institutional environment he has performed at probably his highest levels of function during his adult life, in as much as that environment is supportive, protective and has a relatively low level of stress compared to life in the outside world. Therefore, in this case I would be willing to risk a professional prediction in that I would predict that he would make an overall excellent institutional adjustment on a long term basis . . . .

"Q: Do you think Paul would be a violent person in an institutionalized environment?

"A: Again, in my professional opinion I feel confident in a reasonable frame to conclude that he would not be violent or dangerous within a custodial institution. The basis for my opinion is his past record within the custodial environment, his ability to conform within that environment, not only to maximum seclusion, but also conforming to the rules and regulations when he was under minimal supervision. Furthermore, his past history and his present state suggests that he performs interpersonally much better with men. That his major provocations of explosive and assaultive behavior is with women rather than with men. Therefore, I conclude that he would be a very good risk for good adjustment in an institution and a very low risk for assaultive or violent behavior in an institutional setting.

"Q: He could be, in your opinion, could he be a contributive [sic] member to a prison institution?

"A: Again, for the same reasons, I would say yes, in my professional opinion." Pet. for Cert. in No. 84–5850, pp. 6–7.

call a psychiatric witness to testify about his general psychiatric makeup, questions concerning adaptability or future nondangerousness were prohibited. The witness did briefly refer to petitioner's successful adaptation to prison life in responding to a question only tangentially related to that issue; petitioner's counsel was obviously unable to either develop this issue to any extent or to draw the jury's attention to it in his summation.

In *Patterson*, the facts are quite similar. Petitioner proffered evidence from prison authorities that he had an exemplary prison record during the period of almost three years since his earlier trial, and proffered evidence from a psychiatrist that individuals exhibiting a personality pattern similar to petitioner's "usually make a satisfactory adjustment to prison life" so that the likelihood of future violence by such persons "diminishes with the passing of time." Record in No. 84–5843, p. 1442. The trial court excluded all this evidence as irrelevant under the authority of *Koon I*. Thus, the sentencing jury was given no opportunity at all to consider either petitioner's behavior in prison or the issue of petitioner's likely future nondangerousness within a prison environment.

On appeal, both of these petitioners' death sentences were affirmed by the State Supreme Court on a slight variation of the *Koon I* rationale. 285 S. C. 5, 327 S. E. 2d 650 (1984); 285 S. C. 1, 328 S. E. 2d 625 (1984). Following *Koon I*, the court held that all predictive evidence of Patterson's future behavior in prison was simply irrelevant. It modified *Koon I* only to the extent that it held that the bare facts of Patterson's past prison record would now be considered admissible as general personal history. It read *Lockett* and *Eddings* as saying that a defendant's "character" was relevant mitigating evidence that can be shown through evidence of past behavior. It thus found that it had been error for the trial court to exclude the prison officers' testimony concerning Patterson's prior prison behavior. But since such behavior was relevant only to show a generally good character, the court held that it was merely cumulative of other general character evidence submitted by the petitioner.[4]

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[4] The character evidence that the court found was cumulative to Patterson's evidence of his prison record was the testimony of a former employer that Patterson was a good and responsible worker and general testimony by Pat-

Similarly, in Koon's appeal below, the State Supreme Court held that the evidence of future nondangerousness was properly excluded. Prison officials' testimony as to Koon's prison record was relevant, but again, was properly excluded as cumulative since the psychiatrist had briefly, in an unresponsive answer, stated that petitioner had been doing quite well in prison.

In both of these cases, the capital defendants were limited to argue the most vague and general theories of mitigation. Their chosen theories were completely excluded from the jury's consideration. The State Supreme Court declared that it was irrelevant, as a matter of law, to argue that a death sentence might be inappropriate where a defendant could be relied on to lead an unthreatening life, and even a somewhat productive life, if kept in prison.[5]

II

The constitutionality of these sentences rests on the premise that a State can make irrelevant to the capital sentencing process, as a matter of law, the theory of future nondangerousness that was proffered in mitigation by petitioners. The State's reasoning was that the proffered factor does not "aris[e] out of the murder" nor "bear logical relevance to the crime." *Koon I*, 278 S. C., at 536, 298 S. E. 2d, at 774. Put another way, the State viewed the factor as irrelevant because its proof would not reduce the moral culpability of the defendant. But this Court has never limited the circumstances relevant to a capital sentencing determination to those going to moral culpability. Quite the contrary, this Court has repeatedly treated predictive evidence relating to future dangerousness as highly relevant to sentencing concerns.

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terson's relatives to the effect that he had been a good child and was still a "wonderful person" who had been led by bad influences to commit a murder that was out of character for him.

[5] The fact that in both of these cases the state court held that the proffered evidence of prior prison behavior was "cumulative" cannot save either of these decisions from review. In both cases, the theory of future nondangerousness was deemed irrelevant and the evidence and argument which would have been necessary to its proof were excluded. The determinations of "cumulativeness" whatever their merits, cf. *Chapman* v. *California*, 386 U. S. 18 (1967), were determinations that rested on the predicate federal determination that the only basis for the relevance of the evidence was to show general good character.

The most glaring is *Jurek* v. *Texas*, 428 U. S. 262 (1976), where this Court upheld a state law requiring capital sentencing juries to consider the issue of future dangerousness. The opinion announcing the judgment there declared:

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . *And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.* . . . The task that a [capital sentencing] jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. *What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.*" *Id.*, at 274–276 (emphasis added).

The Court has treated evidence of future dangerousness as relevant even where the evidence at issue seemed of much less predictive value than the evidence at issue here. In both the instant cases, the witnesses who were excluded had all had extensive contact with the defendants and were testifying only to the likely behavior of the defendants within the same environment as that in which they had made their observations. In contrast, in *Barefoot* v. *Estelle*, 463 U. S. 880 (1983), this Court approved of the relevance of expert psychiatric predictions of future dangerousness even where the expert witness was testifying based on hypotheticals without ever having examined the defendant. *Id.*, at 903–906. If that evidence was relevant to capital sentencing, how can the evidence at issue in the instant cases be deemed irrelevant? See also *California* v. *Ramos*, 463 U. S. 992 (1983).

III

Of course there are two differences between these earlier cases and the instant cases. First, relevance in the earlier cases was urged on the sentencers by prosecutors, who called for death sentences on the theory that the defendants at issue might be violent in the future. Here, evidence of the absence of future dangerous-

ness is offered as a reason for urging that the defendants not be sent to die. But this difference can hardly be a relevant one. A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment.

The second difference is that discussions of future dangerousness in our prior cases have emphasized the defendant's dangerousness to the society outside of jail, while here the emphasis was on the likely nondangerousness of the defendants' future behavior within jail. But although this might be viewed as an important distinction by a sentencer, it cannot be rationally viewed as a distinction that makes nondangerousness in prison irrelevant as a matter of law. If a jury can base a sentencing determination on predictions of the possible dangerousness of a defendant at the point far in the future when, after a long confinement, he might be paroled or pardoned, a jury cannot be precluded from considering the more immediate issue of his future dangerousness during that quite lengthy period when he will remain in jail. Similarly, it would be the ultimate cynicism to adopt a conclusive presumption that a sentencing jury would simply be wholly uninterested in the possible dangers that a killer who continues to be violent might present to other inmates—or conversely—that the jury would be wholly unimpressed by the fact that a different criminal might present no dangers to those inmates.

Ultimately, the evidence offered in mitigation here was premised on the proper notion that a jury might confront in a serious and humane way the question of what is actually to be gained and lost by a verdict of death. While in some cases the cry for moral retribution may sound clear to the jury, in others it may not. In the latter cases, it may be quite effective, as it would always be legitimate, to remind the jury that an execution may generate little social benefit and, indeed, may generate substantial social loss. A jury may come to see that a prisoner's life in prison has some substantial social worth. He may adapt to his environment, find some degree of community in it, and contribute in some way to that community. He may even come to live a life of greater meaning than that which he knew before his confinement. Should a sentencer believe that there is a chance that these may be the consequences of a rejection of a death sentence, these factors may

become powerful factors of mitigation. South Carolina's determination that they are simply irrelevant cannot stand.

No. 84–6123. Estes *v.* United States. C. A. 10th Cir. Certiorari denied. Justice White took no part in the consideration or decision of this petition.

No. 84–6154. Albanese *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 104 Ill. 2d 504, 473 N. E. 2d 1246.

Justice Marshall, with whom Justice Brennan joins, dissenting.

Petitioner Charles Albanese was convicted of murder and sentenced to death. On appeal to the Illinois Supreme Court, Albanese argued that the Illinois death penalty statute violated the Eighth and Fourteenth Amendments because of the broad, post-trial discretion granted each of Illinois' 102 State's Attorneys on whether to seek the death penalty following a conviction for a capital offense.

Under the Illinois statute, the decision whether to convene a death hearing rests solely in the hands of the individual Illinois State's Attorney. Ill. Rev. Stat., ch. 38, ¶9–1(d) (1983). As a result, the statute vests in each State's Attorney freewheeling discretion to select, among potential capital defendants, those who may be subject to the death penalty. It allows each of the 102 State's Attorneys to establish his own policy, or no policy at all, by which to exercise this discretion. The scheme thereby introduces into the penalty phase an element of completely unbridled discretion and invites wholly arbitrary decisionmaking. It does so at the phase of the proceeding at which clear statutory guideposts and carefully channeled discretion are absolutely necessary to preserve the constitutionality of a capital sentencing scheme. See *Zant* v. *Stephens*, 462 U. S. 862, 876–877 (1983); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion).

Even if I did not continue to believe that the death penalty is under 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 would grant certiorari in this case. As I have said before, I believe that this aspect of the Illinois scheme poses a serious constitutional question that is worthy of this Court's consideration. See *Eddmonds* v. *Illinois*, 469 U. S. 894 (1984) (Marshall, J., dis-

senting from denial of certiorari). I therefore dissent from the Court's refusal to consider the merits of this case.

No. 84–6182. Eutzy *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 458 So. 2d 755.

Justice Marshall, with whom Justice Brennan joins, dissenting.

Although the State of Florida has adopted a system of capital sentencing that allows a trial judge to overturn a sentencing jury's finding as to the inappropriateness of death—and although this Court has upheld that system as constitutional, see *Spaziano* v. *Florida,* 468 U. S. 447 (1984)—that system nevertheless remains subject to the dictates of *Lockett* v. *Ohio,* 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982). In Florida, as in other States, a capital defendant has a right to a sentencer who is free to consider and weigh, within the broadest bounds of relevance, "'*any* aspect of a defendant's character or record and *any* of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id.,* at 110 (quoting *Lockett, supra,* at 604) (emphasis added).

This principle must govern judges responsible for sentencing, *Eddings, supra,* just as it must govern juries. In Florida, it must govern both, for the state scheme purports to split sentencing authority between the two. Although the judge has the power to override, that power is limited, for the judge may not exercise plenary discretion as to the issue of mitigation. To the contrary, the State has repeatedly purported to limit the judicial override to those cases where "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State,* 322 So. 2d 908, 910 (1975). Unfortunately, regardless of this supposed limit—a limit that the State cited to this Court when arguing for the constitutionality of its sentencing process, *Spaziano, supra,* at 465—the State has administered capital sentencing in a manner that allows the override to repeatedly denigrate the principle of *Lockett* and *Eddings.* See *e. g., Heiney* v. *Florida,* 469 U. S. 920 (1984) (Marshall, J., dissenting from denial of certiorari).

In this case, the Florida Supreme Court took another step in the erosion of *Lockett* and *Eddings,* affirming a judge's sentence of death over a jury's finding for life on the ground that certain miti-

gating factors that likely stood behind the jury's finding were simply invalid as a matter of law, and the jury's verdict was therefore reversible within the *Tedder* rule. Under *Lockett* and *Eddings* that legal determination is simply wrong as a matter of federal law. It embodies a view of mitigation that is violative of the Eighth Amendment. To prevent this denigration of one of the most important aspects of our Eighth Amendment law, I would grant review in this case.[1]

I

The facts of this case are not complicated. Petitioner was found guilty of murdering a taxi driver. There were no witnesses, nor was there evidence of robbery; and petitioner's sister-in-law, who testified against petitioner at trial, may have played some uncertain role in the crime. The jury returned a verdict of life in prison, and the trial judge, finding that there were three aggravating circumstances but no mitigating circumstances, overrode that verdict and imposed a death sentence. The trial judge did not attempt to analyze the jury's thought process when he reversed it, nor did he make any *Tedder* finding. He simply expressed disagreement with the jury determination. His sentence was affirmed by the State Supreme Court. 458 So. 2d 755 (1984).

II

The State Supreme Court's analysis of the case began with a determination that at least one of the aggravating circumstances found by the trial judge was inapplicable to this case as a matter of law, but it nevertheless affirmed the death sentence because it agreed that there were no valid mitigating circumstances. It held that this situation satisfied the *Tedder* standard. However,

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[1] I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in this case because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See, *Boyd* v. *North Carolina, ante,* p. 1030 (MARSHALL, J., dissenting from denial of certiorari); *Patterson* v. *South Carolina, ante,* p. 1036 (MARSHALL, J., dissenting from denial of certiorari).

petitioner's counsel had argued the presence of mitigating factors. Most prominently, counsel argued that petitioner's likely nondangerousness after incarceration should be considered a mitigating factor. Because petitioner was 43 years old at the time of his conviction, under Florida law he could not be paroled from a life sentence until he was at least 68. Petitioner's counsel argued that there was a very low probability that a 68-year-old, emerging from 25 years in prison, would constitute a substantial and continuing threat to the society.

The State Supreme Court simply ruled that such an argument of future nondangerousness was irrelevant as a matter of law.

> "[T]he crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of a defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young." 458 So. 2d, at 759 (citations omitted).

III

It may be that the argument proffered by petitioner would prove unpersuasive to a sentencing authority, but it is simply wrong to hold that it is legally irrelevant. In the State's view, legitimate mitigation is limited to the consideration of factors that would reduce the moral culpability of the defendant and thus the need for moral retribution. But this Court has never limited the circumstances relevant to a capital sentencing determination in such a way.

This Court has, in fact, repeatedly treated predictive evidence relating to future dangerousness as highly relevant to sentencing concerns. See, *e. g.*, *California* v. *Ramos*, 463 U. S. 992, 1001–1003 (1983); *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983); *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976). As the opinion announcing the judgment in *Jurek* declared:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . And any sentencing authority must pre-

dict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Id.*, at 275.

Of possibly even greater relevance to this case is *California* v. *Ramos, supra,* in which this Court held that the mere possibility that a capital defendant might be pardoned by the Governor at some undefined time after receiving a life sentence was a legitimate sentencing concern, because of the issue of future dangerousness. The existence of a provision for pardons is certainly no more relevant to a defendant's moral culpability than is his age, but that link never has been accepted by this Court as a test for relevance even as to aggravating circumstances. In contrast, the issue of future dangerousness repeatedly has been accepted as relevant to valid penological concerns. See *Patterson* v. *South Carolina, ante,* p. 1036 (MARSHALL, J., dissenting from denial of certiorari).

Given that future dangerousness after a distant parole or pardon has been considered relevant to aggravation, it must certainly be considered relevant to mitigation. As I said in *Patterson:* "A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment." *Ante,* at 1043.[2] Indeed, whether or not a State chooses to allow evidence of future dangerousness in aggravation, *Lockett* and *Eddings* make clear that evidence of future nondangerousness simply cannot be prohibited as a consideration in mitigation.

## IV

This Court, in *Lockett* and then more decisively in *Eddings,* held that *any* aspect of a case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is

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[2] Although it might also be argued that looking to a defendant's advanced age at the time when he might possibly be released from prison would be unreliable evidence of future nondangerousness, this Court has been quite willing to find relevance in evidence of future dangerousness of a much more speculative nature. See, *e. g., Barefoot* v. *Estelle,* 463 U. S. 880, 903–906 (1984). Given that speculative evidence of future dangerousness has been so willingly declared relevant for aggravation, it would simply be constitutionally intolerable to declare the evidence of nondangerousness here argued in mitigation to be irrelevant.

certainly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence on the basis that a life sentence, even with the possibility of parole, will sufficiently render a defendant nondangerous to the outside society until he is of an age where he likely will no longer present a significant threat of violence. Under federal law, a capital defendant has a right to a sentencer who may consider such a factor for mitigation. But under Florida law, a life sentence based on such a factor shall now be subject to override as irrational. The Florida courts cannot be allowed to use their override system to erode the rights protected by *Lockett* and *Eddings*. The fact that they are doing so is reason enough to grant review.

No. 84-6286 (A-667). GRAVES *v.* HESTER ET AL. C. A. 4th Cir. Application for injunction, addressed to JUSTICE STEVENS and referred to the Court, denied. Certiorari denied. Reported below: 751 F. 2d 379.

*Rehearing Denied*

No. 82-1913. GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL., 469 U. S. 528;

No. 82-1951. DONOVAN, SECRETARY OF LABOR *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL., 469 U. S. 528; and

No. 83-1416. NATIONAL LABOR RELATIONS BOARD *v.* ACTION AUTOMOTIVE, INC., 469 U. S. 490. Petitions for rehearing denied.

No. 84-355. NEW YORK *v.* SMITH, 469 U. S. 1227;

No. 84-890. BROWN *v.* UNITED STATES, 470 U. S. 1004;

No. 84-896. IN RE ANDERSON, 469 U. S. 1206;

No. 84-897. TESCH, SHERIFF OF CASS COUNTY, NEBRASKA, ET AL. *v.* MCCURRY ET AL., 469 U. S. 1211;

No. 84-911. KOKER ET UX. *v.* SAGE ET AL., 469 U. S. 1201;

No. 84-937. BELL, INDIVIDUALLY AND DBA WES OUTDOOR ADVERTISING CO. *v.* NEW JERSEY ET AL., 469 U. S. 1201;

No. 84-952. GERZOF *v.* GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, 469 U. S. 1200;

No. 84-1031. COMMUNICATIONS SATELLITE CORP. *v.* FRANCHISE TAX BOARD, 469 U. S. 1201; and

No. 84-1034. FINCH ET AL. *v.* HUGHES AIRCRAFT CO., 469 U. S. 1215. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 84–1057. HUTCHERSON ET AL. *v.* BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA, ET AL., 470 U. S. 1004;

No. 84–1074. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 469 U. S. 1216;

No. 84–1095. FITZPATRICK *v.* DIMARTINO, JUDGE, SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY, ET AL., 470 U. S. 1005;

No. 84–1153. OTTO *v.* UNITED STATES, 469 U. S. 1217;

No. 84–5821. HOLMAN *v.* ILLINOIS, 469 U. S. 1220;

No. 84–5845. NOLAND *v.* NORTH CAROLINA, 469 U. S. 1230;

No. 84–5925. NUEY *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, 470 U. S. 1007;

No. 84–6020. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY, 470 U. S. 1007;

No. 84–6037. FAISON *v.* DAVIS, JUDGE, ET AL., 470 U. S. 1030;

No. 84–6044. DAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL., 470 U. S. 1030;

No. 84–6107. HOWELL *v.* MARYLAND, 470 U. S. 1056; and

No. 84–6169. LEVINE *v.* UNITED STATES, 470 U. S. 1031. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

APRIL 22, 1985

*Dismissal Under Rule 53*

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Case dismissed under this Court's Rule 53. [For earlier order herein, see, *e. g.*, 459 U. S. 1096.]

*Appeals Dismissed*

No. 84–1281. WATSON MARINE SERVICES, INC. *v.* KLIEBERT EDUCATIONAL TRUST ET AL. Appeal from Ct. App. La., 5th Cir., dismissed for want of substantial federal question. Reported below: 454 So. 2d 855.

No. 84–1380. ALLNUTT *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 59 Md. App. 694, 478 A. 2d 321.

No. 84–1429. GILBERT *v.* UNIVERSITY OF TENNESSEE ET AL. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question.

*Certiorari Granted—Vacated and Remanded*

No. 82–1928. SWYKA ET AL. *v.* JOHNSON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wilson* v. *Garcia, ante,* p. 261. Reported below: 699 F. 2d 675.

No. 84–706. LARSON, SECRETARY, PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, ET AL. *v.* FITZGERALD. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilson* v. *Garcia, ante,* p. 261. Reported below: 741 F. 2d 32.

*Miscellaneous Orders*

No. A–753 (84–6506). BEWLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–470. IN RE DISBARMENT OF HAYES. Disbarment entered. [For earlier order herein, see 469 U. S. 1102.]

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Joint petition for an order with respect to fees and expenses of the Special Master granted, and it is ordered that the Honorable Wade H. McCree, Jr., be awarded the sum of $50,000 as compensation for his services as Special Master and that his disbursements of $2,246.74 be allowed. It is further ordered that the fees and disbursements be paid in equal parts by the State of California, the State of Texas, and William R. Lummis and First Interstate Bank of Nevada.

The order of this Court entered December 13, 1982 [459 U. S. 1083], is vacated.

This case having been dismissed on stipulation pursuant to Rule 53.1 of the Rules of this Court [*supra,* at 1050], it is further ordered that the Special Master is hereby discharged.

No. 84–262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. [Certiorari granted, 469 U. S. 879.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84–310. IN RE SNYDER. C. A. 8th Cir. [Certiorari granted, 469 U. S. 1156.] Motion of petitioner for leave to file a reply brief out of time granted.

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 Thomas H. Jackson for leave to file a brief as *amicus curiae* granted.

No. 84–1198. TEXAS *v.* MCCULLOUGH. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellants to expedite and schedule oral argument during 1984 Term denied.

No. 84–6344. IN RE ELY. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 84–1236. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. *v.* BULLOCK. C. A. 5th Cir. Certiorari granted. Reported below: 743 F. 2d 244.

No. 84–6263. BATSON *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted.

*Certiorari Denied*

No. 83–2131. CITY OF OVERLAND PARK, KANSAS, ET AL. *v.* HAMILTON. C. A. 10th Cir. Certiorari denied. Reported below: 730 F. 2d 613.

No. 83–2140. MURRAY CITY ET AL. *v.* MISMASH. C. A. 10th Cir. Certiorari denied. Reported below: 730 F. 2d 1366.

No. 83–6676. GARCIA *v.* INGRAM. C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 691.

No. 83–7047. MCCLURE *v.* ESPARZA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 162.

No. 84–663. Minnis *v.* United States Department of Agriculture et al. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 784.

No. 84–894. Illinois *v.* Fogel. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1160, 481 N. E. 2d 361.

No. 84–1028. News Publishing Co., dba Rome News Tribune *v.* DeBerry. Ct. App. Ga. Certiorari denied. Reported below: 171 Ga. App. 787, 321 S. E. 2d 112.

No. 84–1036. Materia *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 197.

No. 84–1039. Olson *v.* Leeke, Commissioner, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 1061.

No. 84–1063. Foster et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1491.

No. 84–1068. Stubbs, Administratrix of the Estate of Stubbs *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 58.

No. 84–1083. West, as Mother and Administratrix of the Estate of West, et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1317.

No. 84–1112. Fleet Finance, fka Southern Discount *v.* Moyer et al. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 814.

No. 84–1116. Louisiana *v.* Jackson. Sup. Ct. La. Certiorari denied. Reported below: 457 So. 2d 660.

No. 84–1216. Adkins et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 744.

No. 84–1317. Ackerman, Sheriff of Bonneville County, et al. *v.* Giles. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 614.

No. 84–1358. GREENFIELD ET AL. *v.* WOOD, TRUSTEE FOR TOWER 2450, INC. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–1359. LERMAN *v.* FLYNT DISTRIBUTING CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 745 F. 2d 123.

No. 84–1364. WILLIAMSON *v.* GILLMOR. Int. Ct. App. Haw. Certiorari denied.

No. 84–1370. AUSTIN, A MINOR, ET AL. *v.* BROWN LOCAL SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1161.

No. 84–1375. JETT *v.* JETT. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 449 So. 2d 557.

No. 84–1389. CITY OF BURBANK ET AL. *v.* CINEVISION CORP. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 560.

No. 84–1390. WILSON ET AL. *v.* POGO PRODUCING CO. C. A. 10th Cir. Certiorari denied.

No. 84–1394. MATCHETT *v.* CHICAGO BAR ASSN. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1004, 467 N. E. 2d 271.

No. 84–1395. LOTZ REALTY CO., INC., ET AL. *v.* ANTI-DEFAMATION LEAGUE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 31.

No. 84–1401. CARPENTER *v.* CITY OF PASCO, WASHINGTON. Super. Ct. Wash., Franklin County. Certiorari denied.

No. 84–1411. ARKANSAS-BEST FREIGHT SYSTEM, INC. *v.* BARRENTINE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 750 F. 2d 47.

No. 84–1431. SMITH ET AL. *v.* SORENSEN, COMMISSIONER OF LABOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 427.

No. 84–1443. THOMPSON BUILDING MATERIALS INC. *v.* BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1396.

No. 84–1451. BAKER *v.* SEABOARD SYSTEM RAILROAD, INC. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84–1460. ALL ALEXANDER L. KIELLAND LITIGANTS *v.* PHILLIPS PETROLEUM COMPANY NORWAY, INC. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 55.

No. 84–1477. MOON *v.* SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 599.

No. 84–1511. SERVOTECH INTERNATIONAL ESTABLISHMENT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1280.

No. 84–1512. SOTERAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 585.

No. 84–1516. MARTINEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 60.

No. 84–5714. ELLISON *v.* LANDON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 961.

No. 84–5827. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 122.

No. 84–5905. FITZPATRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84–6018. HARRISON *v.* MEACHUM, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6069. HINKLE *v.* MOSS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84–6086. COBB *v.* OWENS, SUPERINTENDENT, INDIANA STATE REFORMATORY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–6298. LOCKETT *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84–6305. QUIROZ *v.* WAWRZASZEK, ADMINISTRATOR, ARIZONA STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1375.

No. 84-6307. PERKINS *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6309. ALI *v.* FORD MOTOR CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 367.

No. 84-6312. MELDRUM *v.* CAMPBELL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-6318. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1167, 483 N. E. 2d 732.

No. 84-6320. DAY *v.* CARTWRIGHT ET AL. Sup. Ct. Tex. Certiorari denied.

No. 84-6321. PATTERSON *v.* CHARTER FINANCIAL GROUP, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1396.

No. 84-6322. PATTERSON, DBA SCREEN ADVERTISING FILM FUND *v.* BUENA VISTA DISTRIBUTION CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 602.

No. 84-6327. HYDE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 682 S. W. 2d 103.

No. 84-6335. BERGHAHN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 683 S. W. 2d 697.

No. 84-6337. FITZGERALD *v.* JORDAN, SUPERINTENDENT, COOK COUNTY JUVENILE DETENTION CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1120.

No. 84-6339. ALBERTON *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1484.

No. 84-6340. DAY *v.* AMOCO CHEMICALS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 880.

No. 84-6342. GUSTAFSON *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 121 Wis. 2d 459, 359 N. W. 2d 920.

No. 84–6345. Doe *v.* Board of Bar Overseers of Massachusetts et al. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 1001, 465 N. E. 2d 250.

No. 84–6365. Gochnour *v.* Marsh, Secretary of the Army. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1137.

No. 84–6374. Frazier *v.* Lopes, Connecticut Commissioner of Correction. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 913.

No. 84–6378. Maxwell *v.* Borden, Inc. C. A. 2d Cir. Certiorari denied.

No. 84–6438. Valles *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1085.

No. 84–6441. Sloan *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 753 F. 2d 248.

No. 84–6443. Pride *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6446. Smith *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 750 F. 2d 1233.

No. 84–6456. Burns *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6457. Lopez *v.* O'Brien, Warden. C. A. 10th Cir. Certiorari denied.

No. 84–6463. Winterhalder *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 83–6361. Manzanares *v.* New Mexico. Sup. Ct. N. M. Certiorari denied. Justice White would grant certiorari. Reported below: 100 N. M. 621, 674 P. 2d 511.

No. 84–1009. Bailey et al. *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Justice Brennan and Justice Marshall would grant the petition for writ of certiorari and reverse the judgment of the Appellate Court of Illinois, Second District. Reported below: 125 Ill. App. 3d 346, 465 N. E. 2d 979.

No. 84-1062. GEE *v.* BOYD, DISTRICT ENGINEER, NORFOLK DISTRICT OF THE CORPS OF ENGINEERS OF THE UNITED STATES DEPARTMENT OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

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

In 1982, the city of Norfolk sought permission from the Army Corps of Engineers to construct a 298-slip marina at the site of an abandoned ferry and near two existing marinas. The Corps issued an "environmental assessment"[1] concerning the project, which concluded that the socioeconomic benefits of the project outweighed its likely adverse impact on the aquatic ecosystem. The Corps further concluded that the project would not "significantly affect . . . the quality of the human environment," see 42 U. S. C. § 4332(2)(C), thereby making unnecessary the preparation of an environmental impact statement (EIS). On the same day, the Corps issued a permit to the city clearing the project.

Petitioner, a partner in a venture that owns property near the site of the proposed marina, subsequently filed suit, challenging, *inter alia*, the Corps' failure to prepare an EIS.[2] The District Court granted summary judgment to respondents and denied petitioner's cross-motion for summary judgment. On appeal, the Court of Appeals for the Fourth Circuit, like the District Court, employed an "arbitrary and capricious" standard in reviewing the agency's determination that the proposed marina would have no significant effect on the environment. *Gee* v. *Hudson*, 746 F. 2d 1471 (1984). See also *Webb* v. *Gorsuch*, 699 F. 2d 157, 160 (CA4 1983); *Providence Road Community Assn.* v. *EPA*, 683 F. 2d 80, 82 (CA4 1982). The court held that neither this finding, nor the agency's failure to consider the effect of possible future marinas on the environment, was arbitrary or capricious.

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[1] An "environmental assessment" is a brief document that the Army Corps of Engineers prepares in order to determine whether a proposed action will have a significant effect on the human environment. If such an effect is anticipated, a more detailed "environmental impact statement" is required under 42 U. S. C. § 4332(2)(C). See App. to Pet. for Cert. 15a-16a, n. 1.

[2] Petitioner also contended that respondents failed to consider all reasonable alternatives and mitigation measures as required by 42 U. S. C. § 4332(2)(E), and that they had failed to verify certain financial data submitted by the applicant. These claims were rejected by the lower courts.

The decision below is the most recent in a long line of cases that have used divergent standards of review to assess an agency's failure to prepare an EIS. The First, Second, and Seventh Circuits, like the Fourth, will reverse such agency action only if it is arbitrary or capricious. See *Grazing Fields Farm* v. *Goldschmidt*, 626 F. 2d 1068, 1072 (CA1 1980); *Hanly* v. *Kleindienst*, 471 F. 2d 823, 828–829 (CA2 1972), cert. denied, 412 U. S. 908 (1973); *Nucleus of Chicago Homeowners Assn.* v. *Lynn*, 524 F. 2d 225, 229 (CA7 1975), cert. denied *sub nom. Nucleus of Chicago Homeowners Assn.* v. *Hill*, 424 U. S. 967 (1976). Four other Circuits have employed a "reasonableness" standard of review. See *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (CA5 1973); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F. 2d 269, 271 (CA8), cert. denied, 449 U. S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Dept. of Agriculture*, 681 F. 2d 1172, 1177–1178 (CA9 1982); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244, 1248–1249 (CA10 1973).[3] The Third Circuit has assumed, without deciding, that a "reasonableness" standard is appropriate, *Township of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F. 2d 732, 741–742 (1982), and the Sixth Circuit has similarly declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.*, 659 F. 2d 74, 75 (1981). The Court of Appeals for the District of Columbia Circuit has developed a four-part test to determine whether the agency action is arbitrary and capricious. *Sierra Club* v. *Peterson*, 230 U. S. App. D. C. 352, 717 F. 2d 1409 (1983).[4]

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[3] The Eleventh Circuit has adopted as binding decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner* v. *City of Prichard*, 661 F. 2d 1206 (CA11 1981) (en banc). Therefore, the Eleventh Circuit would presumably employ a "reasonableness" standard in reviewing the failure to prepare an EIS statement.

Courts that have applied a "reasonableness" standard have generally placed an initial burden on the plaintiff of raising a "substantial environmental issue concerning the proposed project," after which the burden shifts to the agency to demonstrate the reasonableness of its negative determination. See *Winnebago Tribe of Nebraska* v. *Ray*, 621 F. 2d, at 271. See also *Foundation for North American Wild Sheep* v. *United States Dept. of Agriculture*, 681 F. 2d, at 1178; *Pokorny* v. *Costle*, 464 F. Supp. 1273, 1276 (Neb. 1979).

[4] The test used by the District of Columbia Circuit in scrutinizing an agency's finding of "no significant impact" is:

"(1) whether the agency took a 'hard look' at the problem;

This conflict is not merely semantic or academic. Certainly, there are individual cases in which application of one standard rather than the other makes no difference. But the lower courts that have wrestled with the question of what rule to adopt clearly have not viewed the issue as one that might be settled by the flip of a coin. Courts that have chosen the "reasonableness" standard have relied on the importance of "the basic jurisdiction-type conclusion involved,"[5] or on the "mandatory nature" of the statute's language.[6] In settling on this more stringent rule, the Court of Appeals for the Fifth Circuit expressed the concern that "[t]he spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect environment were too well shielded from impartial review." *Save Our Ten Acres, supra*, at 466. In contrast, courts adopting the "arbitrary and capricious" test have emphasized that the decision not to prepare an EIS is one committed to the agency's discretion,[7] and that application of a more deferential standard "permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise."[8] The Court of Appeals did not state in this case that it would have reached the same result under a "reasonableness" standard,[9] and it is not for us to say what conclusions it might have drawn had it applied different considerations to these facts.

The lower courts have long been in disarray on what standard of review to apply to an agency's decision not to undertake an EIS. I would grant certiorari to end this confusion.

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"(2) whether the agency identified the relevant areas of environmental concern;

"(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and

"(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." 230 U. S. App. D. C., at 356, 717 F. 2d, at 1413.

[5] *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (CA5 1973).

[6] *Foundation for North American Wild Sheep* v. *United States Dept. of Agriculture, supra*, at 1177, n. 24; see also *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244, 1249 (CA10 1973).

[7] *Providence Road Community Assn.* v. *EPA*, 683 F. 2d 80, 82 (CA4 1982).

[8] *Hanly* v. *Kleindienst*, 471 F. 2d 823, 829–830 (CA2 1972), cert. denied, 412 U. S. 908 (1973). See also *First National Bank of Chicago* v. *Richardson*, 484 F. 2d 1369, 1381 (CA7 1973).

[9] Cf. *Providence Road Community Assn., supra*, at 82, n. 3.

No. 84–1239. Young *v.* Lehman, Secretary of the Navy. C. A. 4th Cir. Certiorari denied. Justice White, Justice Blackmun, and Justice O'Connor dissent and would grant the petition for writ of certiorari, vacate the judgment, and remand the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Anderson* v. *Bessemer City,* 470 U. S. 564 (1985). Reported below: 748 F. 2d 194.

No. 84–1350. Cohen, Secretary, Department of Public Welfare of Pennsylvania, et al. *v.* Betson et al. C. A. 3d Cir. Motion of respondents Betson and Woodward for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 749 F. 2d 1009.

No. 84–1357. United States *v.* Morgan. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Justice White and Justice Blackmun would grant certiorari. Reported below: 743 F. 2d 1158.

No. 84–1386. Morrissey *v.* William Morrow & Co., Inc., et al. C. A. 2d Cir. Certiorari denied. Justice Rehnquist took no part in the consideration or decision of this petition.

No. 84–1470. Francois *v.* Raybestos-Manhattan, Inc., et al. C. A. 9th Cir. Certiorari denied. Justice Powell would grant certiorari. Reported below: 749 F. 2d 37.

No. 84–5972. Smith *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 676 S. W. 2d 379.

Justice Brennan and Justice Marshall, dissenting.

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

No. 84–6145. Reyes *v.* Immigration and Naturalization Service. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1045.

Justice White, dissenting.

Because the decision in this case conflicts with *Bolanos-Hernandez* v. *INS,* 749 F. 2d 1316 (CA9 1984), I would grant certiorari in this case.

*Rehearing Denied*

No. 83–1065. COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL., 470 U. S. 226. Petition for rehearing denied.

No. 83–1452. MARRESE ET AL. *v.* AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, 470 U. S. 373. Motion of petitioners for clarification denied. Petition for rehearing denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition.

No. 84–532. ROWLAND *v.* MAD RIVER LOCAL SCHOOL DISTRICT, MONTGOMERY COUNTY, OHIO, 470 U. S. 1009;
No. 84–5548. SMITH *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, 470 U. S. 1060;
No. 84–5811. GACY *v.* ILLINOIS, 470 U. S. 1037;
No. 84–6082. ATTWELL ET AL. *v.* UNITED STATES POSTAL SERVICE ET AL., 470 U. S. 1008;
No. 84–6173. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE, 470 U. S. 1086;
No. 84–6273. MULLINS *v.* OHIO, 470 U. S. 1059; and
No. 84–6315. IN RE MCDONALD, 470 U. S. 1082. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

APRIL 27, 1985

*Dismissal Under Rule 53*

No. 84–1409. DELTA AIR LINES, INC. *v.* JACOBSON. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 742 F. 2d 1202.

APRIL 29, 1985

*Appeals Dismissed*

No. 84–5795. CORNES *v.* KELLUM ET AL. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question. Reported below: 125 Ill. App. 3d 512, 466 N. E. 2d 273.

No. 84–6381. SINGER *v.* BODLEY, JUDGE, ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

*Certiorari Granted—Vacated and Remanded*

No. 84–1015. GOODSON *v.* UNITED STATES. Ct. Mil. App. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smith* v. *Illinois*, 469 U. S. 91 (1984). Reported below: 18 M. J. 243.

No. 84–1208. MURR *v.* TENNESSEE BOARD OF LAW EXAMINERS. Sup. Ct. Tenn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274 (1985).

*Miscellaneous Orders**

No. — –——. AFFLERBACH ET AL. *v.* UNITED STATES. Motion to direct the Clerk to file a petition for writ of certiorari in typewritten form not in compliance with the Rules of this Court denied.

No. — –——. DAVIS ET AL. *v.* AMOCO OIL CO. ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–791. HOLDERMAN *v.* UNITED STATES (No. 84–1637); and HOLDERMAN *v.* UNITED STATES (No. 84–1638). C. A. 2d Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–473. IN RE DISBARMENT OF HUTCHINS. Disbarment entered. [For earlier order herein, see 469 U. S. 1202.]

No. D–474. IN RE DISBARMENT OF KOZEL. William Thomas Kozel, of Santa Maria, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 19, 1985 [469 U. S. 1202], is hereby discharged.

No. D–490. IN RE DISBARMENT OF HOLTZMAN. It is ordered that Frank E. Holtzman, of Southfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable

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*For the Court's orders prescribing amendments to the Bankruptcy Rules, see *post*, p. 1149; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1155; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1169.

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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 supplement the record granted.

No. 84–1103. HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. [Certiorari granted, 470 U. S. 1049.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Jack T. Lassiter, Esquire, of Little Rock, Ark., be appointed to serve as counsel for petitioner in this case.

No. 84–6158. FERRARA *v.* BECTON, DICKINSON & CO. ET AL., 470 U. S. 1049. Motion of petitioner for reconsideration of the order denying leave to proceed *in forma pauperis* denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–6370. IN RE BEACHUM; and
No. 84–6375. IN RE ELY. Petitions for writs of mandamus denied.

*Probable Jurisdiction Noted*

No. 83–1968. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. Appeal from D. C. E. D. N. C. Probable jurisdiction noted limited to Questions I and III presented by the statement as to jurisdiction. Reported below: 590 F. Supp. 345.

*Certiorari Granted*

No. 84–1144. UNITED STATES *v.* VON NEUMANN. C. A. 9th Cir. Certiorari granted. Reported below: 729 F. 2d 657.

No. 84–1274. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* DIMENSION FINANCIAL CORP. ET AL. C. A. 10th Cir. Certiorari granted. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 744 F. 2d 1402.

*Certiorari Denied.* (See also No. 84–6381, *supra.*)

No. 84–1105. New Mexico *v.* Baker, Secretary of the Treasury. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 1318.

No. 84–1108. Wenturine *v.* Parfett et al. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84–1109. Bothke *v.* Racca. C. A. 9th Cir. Certiorari denied.

No. 84–1147. Simmons Fastener Corp. *v.* Illinois Tool Works, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 739 F. 2d 1573.

No. 84–1235. Waterman *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 1527.

No. 84–1249. Norris et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 1116.

No. 84–1280. Bolden *v.* Tarrant County Department of Human Resources. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied.

No. 84–1367. Guerra et al. *v.* Garcia et al. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 1159.

No. 84–1384. Pyramid Lake Paiute Tribe of Indians *v.* Carson-Truckee Water Conservancy District et al. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 2d 523.

No. 84–1412. McDonald *v.* United Air Lines, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 1081.

No. 84–1414. Haberman et al. *v.* Chemical Bank et al. Sup. Ct. Wash. Certiorari denied. Reported below: 102 Wash. 2d 874, 691 P. 2d 524.

No. 84–1417. San Jose Unified School District et al. *v.* Diaz et al. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 660.

No. 84–1421. PUDLO *v.* CITY OF CHICAGO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 337, 462 N. E. 2d 494.

No. 84–1422. B. R. MACKAY & SONS, INC. *v.* ATTORNEY GENERAL OF ILLINOIS. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 644.

No. 84–1428. TRECKER *v.* SCAG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1176.

No. 84–1433. BROWN *v.* PAULUS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1484.

No. 84–1439. JOHNSON *v.* BRANFORD ZONING BOARD OF APPEALS ET AL. App. Ct. Conn. Certiorari denied. Reported below: 2 Conn. App. 24, 475 A. 2d 339.

No. 84–1445. MOORE ET AL. *v.* KENYATTA. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 1179.

No. 84–1450. STEPPING STONES ASSOCIATES *v.* CITY OF WHITE PLAINS. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 690, 474 N. E. 2d 1196.

No. 84–1458. CHESLER ET AL. *v.* STADLER ASSOCIATES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–1492. BEERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 752 F. 2d 499.

No. 84–1510. SMITH *v.* ALYESKA PIPELINE SERVICE CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 668.

No. 84–1527. STONEHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–1533. JARAMILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1245.

No. 84–1536. CLARK *v.* WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–1590. JENSEN ET AL. *v.* GATES LEARJET CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1325.

No. 84-1595. RIGGINS *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 282.

No. 84-5854. OTALORA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1382.

No. 84-5944. PEOPLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 934.

No. 84-5959. LAMBINUS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 747 F. 2d 592.

No. 84-6054. DIXON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 458 So. 2d 272.

No. 84-6064. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 859.

No. 84-6122. WILKS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 121 Wis. 2d 93, 358 N. W. 2d 273.

No. 84-6135. PERKINS *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 963.

No. 84-6161. STALLINGS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 667.

No. 84-6176. FIELDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 484 A. 2d 570.

No. 84-6349. BIRDEN *v.* GOUSHA. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 916.

No. 84-6354. TOOMEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 38 Wash. App. 831, 690 P. 2d 1175.

No. 84-6356. PALLETT *v.* HARP ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-6357. MOORE *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 386.

No. 84-6358. STUMES *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 317.

No. 84-6359. RADFORD *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1076.

No. 84-6361. ROBINSON *v.* IKARI ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 457 So. 2d 180.

No. 84-6366. HEATH *v.* NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES LOCAL R5-189 ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 374.

No. 84-6369. ELY *v.* GLEN ELLYN POLICE DEPARTMENT. Sup. Ct. Ill. Certiorari denied.

No. 84-6371. CRIST *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 476.

No. 84-6373. HERNANDEZ *v.* DUNCAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6400. GLOVER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 284 S. C. 152, 326 S. E. 2d 150.

No. 84-6411. HEMBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 30.

No. 84-6428. JONES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1082.

No. 84-6431. PRIMBS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 159.

No. 84-6433. ANDREWS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 462 So. 2d 1249.

No. 84-6440. HARTER *v.* SHULTZ, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 17, 750 F. 2d 1093.

No. 84-6445. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84-6450. GAZA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 750 F. 2d 1197.

No. 84-6451. GEOGHEGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1076.

No. 84–6454. DIZZLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 380.

No. 84–6460. GUSTUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–6466. PETRINO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 332 Pa. Super. 13, 480 A. 2d 1160.

No. 84–6468. DENISON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 241.

No. 84–6493. WILLIAMS *v.* GALDI. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84–550. INTERSTATE COMMERCE COMMISSION *v.* BRAE CORP. ET AL.; and

No. 84–867. CONSOLIDATED RAIL CORPORATION *v.* AHNAPEE & WESTERN RAILWAY CO. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 238 U. S. App. D. C. 352, 740 F. 2d 1023.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In the Staggers Rail Act of 1980, 49 U. S. C. § 10101 *et seq.*, Congress took a significant step away from the traditionally pervasive federal regulation of railroads. Displaying evident distrust of the regulatory model, the Act includes a 15-point National Rail Transportation Policy. § 10101a. Among the policies identified are "(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; [and] (2) to minimize the need for Federal regulatory control over the rail transportation system." *Ibid.* The Act also provides that the Interstate Commerce Commission (ICC) "shall exempt" persons or transactions from an otherwise applicable regulation if the regulation "is not necessary to carry out the transportation policy of section 10101a" and "either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." § 10505(a).

These cases arise out of an ICC rulemaking regarding the deregulation of boxcar traffic. *Exemption from Regulation—Boxcar Traffic*, 367 I. C. C. 423 (1983); *Alaska Railroad Certification*, 367 I. C. C. 745 (1983). The Commission granted far-reaching exemptions pursuant to § 10505(a). First, it eliminated ceilings on boxcar rates. Particularly in light of economic pressures caused by competition from the trucking industry, the Commission found that rail carriers lacked market power and that regulation of boxcar rates was not necessary to further the National Rail Transportation Policy. Second, it extended this exemption to "joint rates." A joint rate is the charge to a shipper for transportation over connected lines by more than one carrier. The revenues are divided among the carriers pursuant to joint rate agreements, which are regulated by 49 U. S. C. § 10705. The Commission concluded that elimination of joint rate regulation would not lead to the demise of joint rates, long haul routes, or cooperation between large and small carriers. Third, the Commission exempted negotiated agreements from its "car hire rules." Under the otherwise applicable rules, the owner of a boxcar could charge a per diem rental fee to the railroad with control over the boxcar for the entire time the car was on that railroad's tracks, even if it was empty and still. The Commission found that in practice these rules resulted in extreme inefficiency, higher operating costs, an incentive for excessive purchases of boxcars, and a lack of responsiveness to market conditions.

Respondents sought judicial review in the Court of Appeals for the District of Columbia Circuit. The court sustained the exemption of boxcar traffic from maximum rate regulation, but set aside the other two rulings. 238 U. S. App. D. C. 352, 740 F. 2d 1023 (1984). With regard to the joint rate exemption, it found that the Commission's consideration of the need for regulation and the possible adverse consequences of its elimination had been inadequate. Noting congressional concern about the possibility of large carriers squeezing profits from captive small carriers, it held the Commission's failure to consider the effect of joint rate exemption on the fair division of joint rate revenue among carriers had been arbitrary and capricious. Turning to the car hire issue, the Court of Appeals, echoing the position of dissenting ICC Chairman Taylor, held that the Commission's decision was, in reality, not an exemption but a new regulation. As such, it exceeded the Com-

mission's authority under § 10505. That section was part and parcel of the Act's emphasis on the reduction of regulatory burdens and Government oversight. The joint rate "exemption," rather than leaving the contours of the car hire relationships to the market, skewed the initial economic relationship in favor of the destination carrier. This reregulation could only be accomplished pursuant to normal rulemaking procedures.

Consolidated Rail Corp., which had initially sought the rulemaking, and the Commission itself now seek review in this Court. They are supported by a brief from the United States. Several aspects of the decision below are questionable. The court's concern with the fair division of revenues between carriers is not squarely based on the statutory language, which requires only that the regulation from which an exemption is granted be "not needed to protect *shippers* from the abuse of market power." § 10505(a)(2)(B) (emphasis added). There is also an arguable inconsistency between upholding the Commission with regard to maximum rate regulation generally and affirming its view of the surrounding circumstances supporting such a ruling, while refusing to do so as to joint rates. Finally, the court's distinction between reregulation and deregulation is hard to pin down—on its face, the Commission's ruling is certainly the latter.

More generally, the fact that the battle between the court and the agency has taken place on what may be considered the latter's turf casts doubt on the decision below. It is the Commission that should be evaluating the nature of the rail transportation market and the effect and necessity of regulation.

Finally, these cases present a significant clash between an independent federal agency and a Federal Court of Appeals. The subject matter is important not only to the numerous parties but also to the Nation as a whole. These cases seem to be one episode of a larger struggle. See *ICC* v. *Coal Exporters Assn. of United States, Inc.*, *post*, p. 1072. The court and the agency have rather divergent views of the mandate of the Staggers Act and the nature of the Commission's task thereunder. The proper implementation of that important legislation requires that these larger issues be settled.

I would grant these petitions and consolidate them for oral argument.

No. 84–884. INTERSTATE COMMERCE COMMISSION *v.* COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.; and

No. 84–885. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 240 U. S. App. D. C. 256, 745 F. 2d 76.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Like *ICC* v. *Brae Corp.* and *Consolidated Rail Corp.* v. *Ahnapee & W. R. Co.*, *ante*, p. 1069, these cases involve implementation of the Staggers Rail Act of 1980, 49 U. S. C. § 10101 *et seq.* That Act begins with a 15-point National Rail Transportation Policy with a decidedly antiregulatory bent. § 10101a. It goes on to provide that the Interstate Commerce Commission (ICC) "shall exempt a person, class of persons, or a transaction or service" from any regulation that is not necessary to carry out the policies detailed in § 10101a or to "protect shippers from the abuse of market power." § 10505(a).

Pursuant to this provision, the ICC exempted the rail transportation of coal bound for export from all regulation under the Interstate Commerce Act. *Railroad Exemption—Export Coal*, 367 I. C. C. 570 (1983). In the view of the Commission, relief from regulation would lead to improved efficiency, stronger railroads, and greater pricing flexibility. The resulting benefits would promote a variety of goals set out in § 10101a. In addition, continued regulation was not needed to protect against abuse of market power by the railroads. They had an interest in the shippers' success, and the competitive international coal market would prevent them from raising prices so high that producers would not be competitive abroad. In addition, as experience had shown, the shippers formed a concentrated industry with bargaining power essentially equal to that of the railroads. The Commission also noted that antitrust remedies were available should the railroads abuse what market power they had, and that the railroads were unlikely to do so even if they could because the Commission would respond by revoking the exemption.

The Court of Appeals for the District of Columbia Circuit vacated and remanded. *Coal Exporters Assn. of United States*

v. *United States*, 240 U. S. App. D. C. 256, 745 F. 2d 76 (1984). It found that the Commission had overlooked a key element of National Transportation Policy: "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." 49 U. S. C. § 10101a(6). Reading this provision in tandem with § 10505's requirement that an exemption not subject shippers to "the abuse of market power," the court held that the Commission had too narrow an understanding of the latter phrase. As it read the Commission's opinion, there would be no abuse of market power as long as the shippers had some bargaining power, however minimal, and received some share of the economic rents, however slight. The court condemned this view as "wholly unreasonable," 240 U. S. App. D. C., at 275, 745 F. 2d, at 95, and indifferent to the Act's concern for protecting the revenues of shippers, *id.*, at 278, 745 F. 2d, at 98.

The railroads and the ICC, supported by the United States, petition for certiorari. They argue that the decision below effectively forecloses any use of the exemption provision. While this seems an overstatement, the opinion below does criticize the ICC for failing to quantify its conclusions with a precision that would appear unattainable. Moreover, the Court of Appeals involved itself in details of regulatory decisionmaking that might more properly be left to the agency. Precisely where hard bargaining leaves off and "abuse of market power" begins is the sort of issue best left to the agency's expertise, and the Court of Appeals' identification of abuse with any inequality is open to question.

More important, the decision below is set against the background of a fundamental clash between the Court of Appeals and the ICC concerning the deregulatory mandate of the Staggers Act. See *ICC* v. *Brae Corp.*, *ante*, p. 1069. The exemption provision is the key mechanism by which that mandate is to be effected, and the Commission has had some difficulty in getting its exemptions past the Court of Appeals. As I noted in dissenting from the Court's refusal to consider the *Brae* case, the effective implementation of the Staggers Act requires that the scope of the exemption requirement be settled.

I respectfully dissent.

No. 84–1067. District of Columbia *v.* Brown. C. A. D. C. Cir. Motion of respondent Brown, aka Yusaf Lateef Salahuddin,

for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 239 U. S. App. D. C. 345, 742 F. 2d 1498.

No. 84–1098. GENERAL MOTORS CORP. *v.* THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 239 U. S. App. D. C. 408, 742 F. 2d 1561.

No. 84–1209. CATLETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1102.

JUSTICE WHITE, dissenting.

Petitioners were convicted and fined for hunting doves in a "baited" field contrary to the Federal Migratory Bird Act, 16 U. S. C. § 703, and the regulations issued thereunder, despite their claim that they were unaware of the baiting and that they could not reasonably have been aware of it, since the remaining bait on the property was hidden from view at the time of the hunt. The Court of Appeals affirmed, observing that petitioners "were apparently unaware of, and had not participated in, the baiting of the field." 747 F. 2d 1102, 1103 (CA6 1984). Nonetheless, the panel applied prior law of the Circuit to hold that scienter is not an element of the crime charged, and thus that petitioners could be convicted even if they could not have reasonably known that the field was baited.

The rule applied is that adopted by several Circuits, reading the regulation in question to impose strict liability on those who hunt over baited fields. See, *e. g.*, *United States* v. *Chandler*, 753 F. 2d 360, 363 (CA4 1985); *United States* v. *Brandt*, 717 F. 2d 955, 958–959 (CA6 1983); *United States* v. *Jarman*, 491 F. 2d 764, 766–767 (CA4 1974); *Rogers* v. *United States*, 367 F. 2d 998, 1001 (CA8 1966), cert. denied, 386 U. S. 943 (1967). Nevertheless, as the Court of Appeals below recognized, the rule applied here is contrary to the holding of a case from another Federal Circuit which requires proof of at least the minimum scienter, that hunters should have known of the baited condition. *United States* v. *Delahoussaye*, 573 F. 2d 910, 912 (CA5 1978).

There is a clear and recognized division between Circuits on the elements of a federal criminal offense. As the court explained in *Delahoussaye*, the regulation at issue here "is a national one, founded on a treaty, and [it] should not mean one thing in one state and another elsewhere." *Id.*, at 913. I would grant certiorari to resolve the split among the Courts of Appeals.

No. 84–1258. CHEMICAL BANK ET AL. *v.* PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, ET AL. Sup. Ct. Wash. Motions of Salomon Brothers, Inc., et al., American Bankers Association et al., Public Securities Association, American Association of Retired Persons, and National WPPSS 4 and 5 Bondholders' Committee for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 102 Wash. 2d 874, 691 P. 2d 524.

No. 84–1393. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, N. A. A. C. P., INC., ET AL.; and

No. 84–1430. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 749 F. 2d 102.

No. 84–1400. DONOVAN *v.* MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 84–1402. A. L. ADAMS CONSTRUCTION CO. *v.* GEORGIA POWER CO. C. A. 11th Cir. Motion of Georgia Branch, Associated General Contractors of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 733 F. 2d 853.

No. 84–1427. SIMON *v.* KROGER CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 1544.

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

Section 10(b) of the National Labor Relations Act limits the time for filing an unfair labor practice charge with the National

Labor Relations Board. It provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." 29 U. S. C. § 160(b). The plain words require that a charge be both filed *and* served within six months of the challenged conduct, and such has long been the Board's interpretation. See, *e. g.*, *Old Colony Box Co.*, 81 N. L. R. B. 1025, 1027 (1949). Service may be accomplished merely by mailing a copy of the charge. See 29 CFR § 102.113(a) (1984).

In *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), we held that § 10(b) governs an employee's suit against his employer for breach of contract and his union for breach of its duty of fair representation. We did not discuss whether that section's requirement of service, as well as filing, within the 6-month period also applies in such a suit. That is the question raised in this petition.

The Kroger Co. (Kroger) discharged petitioner on February 18, 1982. Grievance procedures were unsuccessful, and on July 6, 1982, the union notified petitioner that it would not proceed to arbitration. The following January 3, just within the 6-month period, petitioner filed this § 301 action in Federal District Court. See 29 U. S. C. § 185. On January 12, after the 6-month period had run, he served a copy of the complaint on Kroger; and on January 25 he served the union. Applying *DelCostello*, and relying on the plain words of § 10(b), the District Court granted both defendants' motions for summary judgment on the ground that the action was time-barred. It also found that petitioner had not filed a timely response to Kroger's motion for summary judgment and that under a local rule he would be deemed not to oppose it.

The Court of Appeals for the Eleventh Circuit affirmed. 743 F. 2d 1544 (1984). Referring to the "intent, spirit, and plain language of section 10(b)," it held that a § 301 complaint must be both filed and served within the 6-month period. *Id.*, at 1546. It also found that the District Court had properly applied its local rule in treating Kroger's motion for summary judgment as unopposed.

The lower courts agree that a suit in federal court on a federal cause of action is commenced, and the statute of limitations tolled, upon the filing of the complaint. See, *e. g.*, *Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 262, 737 F. 2d 1, 44 (1984); Fed. Rule Civ. Proc. 3; 2 J. Moore & J. Lucas, Moore's Federal Practice

¶3.07[4.–3–2] (1984). While the time for service of process is not open-ended, see Fed. Rules Civ. Proc. 4(a), 4(j), it need not occur within the limitations period. Ordinary federal practice thus conflicts with the specific terms of this borrowed statute of limitations. In light of this inconsistency, the brevity of the limitations period, and the fact that § 10(b) was not intended to apply to judicial proceedings, the result below is not obviously correct. In practical effect, the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary to effect service under the Federal Rules. Section 10(b) does not have a similar impact in administrative proceedings, in which service is accomplished merely by placing a copy of the charge in the mail. Compare Fed. Rule Civ. Proc. 4 with 29 CFR § 102.113(a) (1984).

This issue has come before the Eleventh Circuit more than once, see *Howard* v. *Lockheed-Georgia Co.*, 742 F. 2d 612 (1984), and it may be expected to recur. At least one District Court in another Circuit has reached the contrary conclusion. See *Williams* v. *E. I. du Pont de Nemours Co.*, 581 F. Supp. 791 (MD Tenn. 1983). A panel of the Sixth Circuit held that a complaint filed at the 5-month, 27-day mark was timely, without pausing to consider whether the defendants had been served within the subsequent 4 days. *Smith* v. *General Motors Corp.*, 747 F. 2d 372 (1984).

This problem is a necessary corollary to the decision in *DelCostello*. It is worth settling quickly and dispositively. I would therefore grant the petition and set the case for oral argument.*

No. 84–1432. MARTIN *v.* CRAIN ET AL. Sup. Jud. Ct. Mass. Motion of Francis X. Bellotti, Attorney General of Massachusetts, for leave to intervene granted. Certiorari denied. Reported below: 393 Mass. 430, 472 N. E. 2d 231.

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*The decision below also rests on petitioner's failure to respond to Kroger's motion for summary judgment. However, this ruling applies only to Kroger; the judgment in favor of the union rests solely on the statute of limitations holding. In any event, the presence of an alternative holding does not reduce the precedential effect of the § 10(b) holding or make it any less the authoritative judgment of the Court of Appeals. See *Richmond Co.* v. *United States*, 275 U. S. 331, 340 (1928); *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 160, 166 (1905).

No. 84–5814. DIGGS *v.* LYONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 741 F. 2d 577.

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

Petitioner sued respondent prison officials in Federal District Court under 42 U. S. C. § 1983, alleging the use of excessive force in preventing his escape from Holmesburg County Prison in Philadelphia and the denial of access to legal assistance. Respondents prevailed on both claims. At trial, the District Court permitted respondents' counsel to prove that petitioner had been convicted of murder, bank robbery, attempted prison escape, and criminal conspiracy within the 10 years preceding the date of trial. In so doing the trial judge relied on Rule 609(a) of the Federal Rules of Evidence, which provides that evidence of such felony convictions "shall be admitted" to attack the credibility "of a witness," if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[1] The trial judge interpreted the Rule to require the evidence to be admitted since the Rule's provision for assessing the prejudicial import of the evidence applied only in regard to the *defendant*, not to a plaintiff witness against whom such evidence was sought to be introduced. Moreover, under the trial judge's view, Rule 609(a) precluded any resort to the balancing test of Rule 403 of the Federal Rules of Evidence, which permits the exclusion of relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice."[2]

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[1] Rule 609(a) provides:

"(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Rule 609(b) limits application of the Rule to convictions that are less than 10 years old.

[2] Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A divided panel of the Court of Appeals for the Third Circuit affirmed on appeal. 741 F. 2d 577 (1984). The Court of Appeals found the District Court's interpretation of Rule 609(a) to be strongly supported by the Rule's legislative history. Although acknowledging that congressional attention in enacting the Rule had been focused largely on criminal cases and on the defendants in those cases, the Court of Appeals concluded that its broad language was nevertheless applicable to a civil case such as the one before it. And, like the District Court, the Court of Appeals held that Rule 403 had no application where, as here, a more specific rule of admissibility applied. Admission of prior convictions to impeach a plaintiff witness in a civil case was therefore mandatory. The Court of Appeals recognized that this reading of the Rule "may in some cases produce unjust and even bizarre results," but suggested that the remedy lay with "those who have the authority to amend the rules, the Supreme Court and the Congress." *Id.*, at 582.[3]

As the Court of Appeals recognized, its reading of Rule 609(a) directly conflicts with the interpretation of two other Circuits. Both the Eighth Circuit and the Fifth Circuit have ruled that, assuming the applicability of Rule 609(a) to civil cases, it does not relieve courts of the duty to assess the prejudicial effect of evidence of prior convictions against a plaintiff witness under Rule 403. See *Czajka* v. *Hickman*, 703 F. 2d 317 (CA8 1983); *Shows* v. *M/V Red Eagle*, 695 F. 2d 114 (CA5 1983). This disagreement concerning the Rule's meaning now affects litigants in three large Circuits, and the issue will undoubtedly arise elsewhere before long. See *Furtado* v. *Bishop*, 604 F. 2d 80 (CA1 1979), cert. denied, 444 U. S. 1035 (1980) (finding it unnecessary to resolve the

[3] The District Court stated that it would have admitted the evidence of the prior convictions even if it had been given the discretion to exclude it under a balancing test. The Court of Appeals evidently viewed this statement as dictum. After squarely affirming the District Court's holding that "Rule 609(a) compelled the admission of evidence of [petitioner's] prior convictions and that Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness," the Court of Appeals noted that it therefore had "no need to consider the trial judge's suggestion that he would have admitted them in any event in the exercise of his discretion if he had been given such discretion." 741 F. 2d, at 581–582. In any event, that the District Judge would have reached the same result under a different test is no reason for this Court to decline to review this case. The Court of Appeals' interpretation of Rule 609(a) as precluding application of the Rule 403 balancing test is now the law in the Third Circuit, and future cases in that Circuit will be governed by it.

question). Given this square conflict regarding a fundamental evidentiary rule, and in light of the concededly "bizarre" results that may follow from the ruling below, I would grant certiorari to decide whether Rule 609(a) mandates the admission of evidence of prior convictions against a plaintiff witness in a civil case.

No. 84-6030. GLASS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 455 So. 2d 659.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

The petitioner Jimmy L. Glass has been condemned to death by electrocution—"that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead." La. Rev. Stat. Ann. § 15:569 (West 1981). Glass contends that "electrocution causes the gratuitous infliction of unnecessary pain and suffering and does not comport with evolving standards of human dignity," and that this method of officially sponsored execution therefore violates the Eighth and Fourteenth Amendments. Pet. for Cert. 27. The Supreme Court of Louisiana held that this claim must summarily be rejected pursuant to "clearly established principles of law" and observed that, in any event, the claim is wholly lacking in medical or scientific merit. 455 So. 2d 659, 660, 671 (1984).

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), and would therefore grant certiorari and vacate Glass' death sentence in any event. One of the reasons I adhere to this view is my belief that the "physical and mental suffering" inherent in *any* method of execution is so "uniquely degrading to human dignity" that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional. *Furman* v. *Georgia*, 408 U. S. 238, 287–291 (1972).

Even if I thought otherwise, however, I would vote to grant certiorari. Glass' petition presents an important and unsettling

question that cuts to the very heart of the Eighth Amendment's Cruel and Unusual Punishments Clause[1]—a question that demands measured judicial consideration. Of the 42 officially sponsored executions carried out since the Court's decision in *Gregg* v. *Georgia, supra*, 31 have been by means of electrocution.[2] And since *Gregg*, an ever-increasing number of condemned prisoners have contended that electrocution is a cruel and barbaric method of extinguishing human life, both *per se* and as compared with other available means of execution. As in this case, such claims have uniformly and summarily been rejected,[3] typically on the strength of this Court's opinion in *In re Kemmler*, 136 U. S. 436 (1890), which authorized the State of New York to proceed with the first electrocution 95 years ago. *Kemmler*, however, was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience. I believe the time has come to measure electrocution against well-established contemporary Eighth Amendment principles.

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[1] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Emphasis added.)

[2] See American Civil Liberties Union, Death-Row Census (Mar. 1, 1985). On the prevalence of electrocution, see also The Death Penalty in America 16 (H. Bedau ed., 3d ed., 1982) (hereinafter Bedau); Gardner, Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 119, and n. 164 (1978).

[3] See, *e. g.*, *Sullivan* v. *Dugger*, 721 F. 2d 719, 720 (CA11 1983) (order); *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 616 (CA5 1978), cert. denied, 440 U. S. 976 (1979); *Dix* v. *Newsome*, 584 F. Supp. 1052, 1068 (ND Ga. 1984); *Mitchell* v. *Hopper*, 538 F. Supp. 77, 94 (SD Ga.), supp. op. *sub nom. Ross* v. *Hopper*, 538 F. Supp. 105 (1982), aff'd in part and vacated in part on other grounds *sub nom. Spencer* v. *Zant*, 715 F. 2d 1562 (CA11), and aff'd in part and rev'd in part on other grounds, 716 F. 2d 1528 (1983); *McCorquodale* v. *Balkcom*, 525 F. Supp. 408, 430–431 (ND Ga. 1981), aff'd in part and rev'd in part, 705 F. 2d 1553 (CA11), on rehearing, 721 F. 2d 1493 (1983), cert. denied, 466 U. S. 954 (1984); *Ruiz* v. *State*, 265 Ark. 875, 900–901, 582 S. W. 2d 915, 927–928 (1979), cert. denied, 454 U. S. 1093 (1981); *Booker* v. *State*, 397 So. 2d 910, 918 (Fla.), cert. denied, 454 U. S. 957 (1981); *Godfrey* v. *Francis*, 251 Ga. 652, 670, 308 S. E. 2d 806, 820, cert. denied, 466 U. S. 945 (1984); *State* v. *Shaw*, 273 S. C. 194, 206, 255 S. E. 2d 799, 804–805, cert. denied, 444 U. S. 957 (1979); *Martin* v. *Commonwealth*, 221 Va. 436, 439, 271 S. E. 2d 123, 125 (1980).

I

Electrocution as a means of killing criminals was first authorized by the New York Legislature in 1888, and resulted from a lengthy investigation to identify "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."[4] In *In re Kemmler, supra*, this Court rejected a constitutional attack on New York's statute by William Kemmler, who was scheduled to be the first person put to death by electrocution. The Court emphasized that, because the Eighth Amendment was not applicable to the States, "[t]he decision of the state courts sustaining the validity of the act under the state constitution is not reexaminable here." *Id.*, at 447.[5] In dicta, the Court also followed a "historical" interpretation of the Cruel and Unusual Punishments Clause as it governed executions carried out by the Federal Government, suggesting that the constitutionality of a particular means of execution should be determined by reference to contemporary norms at the time the Bill of Rights was adopted. See *id.*, at 446–447. In addition, the Court approvingly observed that the state court had concluded that "'it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as *certainly* to produce *instantaneous*, and, therefore, *painless*, death.'" *Id.*, at 443 (emphasis added).

State and federal courts recurrently cite to *Kemmler* as having conclusively resolved that electrocution is a constitutional method of extinguishing life, and accordingly that further factual and legal

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[4] See Report of the Commission to Investigate and Report the Most Humane and Practical Method of Carrying Into Effect the Sentence of Death in Capital Cases 3 (transmitted to the Legislature of the State of New York, Jan. 17, 1888). See generally Bedau 15; L. Lawes, Life and Death in Sing Sing 183–186 (1928) (hereinafter Lawes); N. Teeters, Hang By The Neck 446 (1967) (hereinafter Teeters); Beichman, The First Electrocution, 35 Commentary 410, 411 (1963). Some contemporary observers described the so-called Electrical Execution Law as a means to ensure "euthanasia by electricity." *Id.*, at 411.

[5] The Court concluded that the challenged statute was reviewable only to determine whether its enactment "was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence." 136 U. S., at 449. See also *McElvaine* v. *Brush*, 142 U. S. 155, 158–159 (1891).

consideration of the issue is unnecessary. See n. 3, *supra*. But *Kemmler* clearly is antiquated authority. It is now well established that the Eighth Amendment applies to the States through the Fourteenth Amendment. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S., at 168 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Robinson* v. *California*, 370 U. S. 660 (1962). Moreover, the Court long ago rejected *Kemmler*'s "historical" interpretation of the Cruel and Unusual Punishments Clause, emphasizing instead that the prohibitions of the Clause are not "confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts." *Weems* v. *United States*, 217 U. S. 349, 372 (1910). This is because "[t]ime works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.*, at 373. The Clause thus has an "expansive and vital character," *id.*, at 377, that "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion).[6] Accordingly, Eighth Amendment claims must be evaluated "in the light of contemporary human knowledge," *Robinson* v. *California*, *supra*, at 666, rather than in reliance on century-old factual premises that may no longer be accurate.

To be sure, legislative decisions concerning appropriate forms of punishment are entitled to considerable deference. But in common with all constitutional guarantees, "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Gregg* v. *Georgia*, *supra*, at 174, n. 19 (opinion of Stewart, POWELL, and STEVENS, JJ.); see also *Weems* v. *United States*, *supra*, at 371–373.[7] "[T]he Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a challenged punishment, guided by "objective

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[6] See also *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (methods of punishment cannot trangress contemporary "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'").

[7] Were it otherwise, the Cruel and Unusual Punishments Clause would be rendered "little more than good advice," *Trop* v. *Dulles*, 356 U. S. 86, 104 (1958) (plurality opinion), and "[i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas," *Weems* v. *United States*, 217 U. S., at 373.

factors to the maximum possible extent." *Coker* v. *Georgia*, 433 U. S. 584, 592, 597 (1977) (plurality opinion). Thus it is firmly within the "historic process of constitutional adjudication" for courts to consider, through a "discriminating evaluation" of all available evidence, whether a particular means of carrying out the death penalty is "barbaric" and unnecessary in light of currently available alternatives. *Furman* v. *Georgia*, 408 U. S., at 420, 430 (POWELL, J., dissenting).

What are the objective factors by which courts should evaluate the constitutionality of a challenged method of punishment? First and foremost, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." *Gregg* v. *Georgia*, *supra*, at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.). See also *Coker* v. *Georgia*, *supra*, at 592 (plurality opinion) (a punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence"). The Court has *never* accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life.[8] Thus in explaining the obvious unconstitutionality of such ancient practices as disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel, the Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death." *In re Kemmler*, 136 U. S., at 447. It is beyond debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace." *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879).[9]

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[8] See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238, 392 (1972) (BURGER, C. J., dissenting) ("The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them").

[9] See also *id.*, at 279 (BRENNAN, J., concurring); *id.*, at 430 (POWELL, J., dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives"); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 473–474 (1947) (Burton, J., dissenting) ("Taking human life by unnecessarily

The Eighth Amendment's protection of "the dignity of man," *Trop* v. *Dulles, supra,* at 100 (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, *e. g.*, Royal Commission on Capital Punishment, 1949–1953 Report ¶ 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. *Ibid.* These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. See, *e. g.*, *Wilkerson* v. *Utah, supra,* at 135.

In evaluating the constitutionality of a challenged method of capital punishment, courts must determine whether the factors discussed above—unnecessary pain, violence, and mutilation—are "*inherent* in the method of punishment." *Louisiana ex rel. Francis* v. *Resweber, supra,* at 464 (emphasis added). A single, unforeseeable accident in carrying out an execution does not establish that the method of execution itself is unconstitutional. Cf. *Estelle* v. *Gamble,* 429 U. S. 97, 105 (1976). Thus in *Louisiana ex rel. Francis* v. *Resweber, supra,* the Court allowed a State to proceed with a second effort to electrocute a prisoner after a mechanical failure had interrupted the first attempt.[10] The Court emphasized that the initial failure had been an "unforeseeable accident," 329 U. S., at 464, and Justice Frankfurter's concurrence stressed that the failure had been an "innocent misadventure," *id.*, at 470.

A different case would be presented, however, if the Court were confronted with "a series of abortive attempts." *Id.*, at 471.

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cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. . . . The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself").

[10] The issue in *Resweber* was whether repeated attempts to electrocute a person were unconstitutional, not whether electrocution was *per se* cruel and unusual punishment. The plurality obviously believed that electrocution in the abstract was not constitutionally forbidden, and even the dissent assumed that electrocution generally was so "instantaneous" and "painless" that it would not present constitutional difficulties. *Id.*, at 474 (Burton, J., dissenting).

This is because the Eighth Amendment requires that, as much as humanly possible, a chosen method of execution minimize the risk of unnecessary pain, violence, and mutilation.[11] If a method of execution does not satisfy these criteria—if it causes "torture or a lingering death" in a significant number of cases, *In re Kemmler*, 136 U. S., at 447—then unnecessary cruelty inheres in that method of execution and the method violates the Cruel and Unusual Punishments Clause.

## II

Because contemporary courts have summarily rejected constitutional challenges to electrocution, the evidence respecting this method of killing people has not been tested through the adversarial truthfinding process. There is considerable empirical evidence and eyewitness testimony, however, which if correct would appear to demonstrate that electrocution violates every one of the principles set forth above.[12] This evidence suggests that death by electrical current is extremely violent and inflicts pain and indignities far beyond the "mere extinguishment of life." *Ibid.*[13] Witnesses routinely report that, when the switch is

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[11] We have emphasized in procedural contexts that the Eighth Amendment requires that all feasible measures be taken to minimize the risk of mistakes in administering capital punishment. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S. 862, 884–885 (1983); *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (O'CONNOR, J., concurring). See also Royal Commission Report ¶ 729, at 255 (importance of determining "which method [of execution] is most likely to avoid mishaps").

[12] Details concerning the actual process of electrocution are not widely known, primarily because "executions are carried out in private; there are few witnesses; pictures are not allowed; and newspaper accounts are, because of 'family newspaper' requirements of taste, sparing in detail." Hearings on H. R. 8414 et al. before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., 308 (1972) (hereinafter 1972 Hearings). See also *Furman* v. *Georgia*, *supra*, at 297 (BRENNAN, J., concurring); Camus, Reflections on the Guillotine, in Resistance, Rebellion, and Death 187 (1961) ("The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail").

[13] The technical aspects of electrocution, briefly stated, are that the authorities bind the condemned to a wooden chair with leather straps, affix electrodes to his shaven head and right leg, and partially cover his face with a mask. When the switch is thrown, an "initial voltage of 2,000 to 2,200 and amperage of 7 to 12" are sent "hurtling through the prisoner's body," and the voltage and amperage subsequently "are lowered and reapplied at various intervals" until the prisoner is dead. Lawes 170.

thrown, the condemned prisoner "cringes," "leaps," and "'fights the straps with amazing strength.'"[14] "The hands turn red, then white, and the cords of the neck stand out like steel bands."[15] The prisoner's limbs, fingers, toes, and face are severely contorted.[16] The force of the electrical current is so powerful[17] that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks."[18] The prisoner often defecates, urinates, and vomits blood and drool.[19]

"The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking."[20] Sometimes the prisoner catches on fire, particularly "if [he] perspires excessively."[21] Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber.[22] This "smell of frying

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[14] Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 20 (1968) (hereinafter 1968 Hearings) (statement of Clinton Duffy, former Warden of San Quentin); Lawes 170; 1972 Hearings, at 305. See also Teeters 448 ("'The figure in the chair gives one terrific lurch against the straps, every muscle contracting and straining. The face—all that can be seen from mouth to throat—turns crimson'") (quoting Dr. Amos Squire, Sing Sing prison).

[15] Lawes 170.

[16] C. Duff, A Handbook on Hanging 119–120 (1974) (hereinafter Duff).

[17] "The force of the death-dealing blow the condemned prisoner receives is more easily understood when it is realized that this amount of electricity, transferred into mechanical power, would be equivalent to 884,400 foot-pounds per minute, or enough electrical energy to light 800 lights in the average home." Lawes 189.

[18] 1968 Hearings, at 20 (statement of Clinton Duffy); see also Rubin, The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty, 15 Crime and Delinquency 121, 129 (1969). In addition, the force of the current is so strong that it sometimes literally ruptures the prisoner's heart. Duff 120.

[19] Tyler, Electrocution As a Spectator Sport, 2 Fact 47, 50–51 (Mar.-Apr. 1965); see also 1968 Hearings, at 20 (statement of Clinton Duffy).

[20] Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126; 1968 Hearings, at 20 (statement of Clinton Duffy). See also G. Bishop, Executions: The Legal Ways of Death 27 (1965).

[21] Rubin, 15 Crime and Delinquency, *supra* n. 18, at 128; see also 1972 Hearings, at 305; Teeters 448.

[22] Tyler, 2 Fact, *supra* n. 19, at 50. One veteran observer once commented: "Only the greenhorns sit in the first row. We sit behind. The smell is too bad." *Id.*, at 49. See generally 1968 Hearings, at 20 (statement of Clinton Duffy); Bedau 16; Teeters 449; Rubin, 15 Crime and Delinquency, *supra* n. 18, at 128.

human flesh in the immediate neighbourhood of the chair is sometimes bad enough to nauseate even the Press representatives who are present."[23] In the meantime, the prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the postelectrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand."[24] The body frequently is badly burned and disfigured.[25]

The violence of killing prisoners through electrical current is frequently explained away by the assumption that death in these circumstances is instantaneous and painless.[26] This assumption, however, in fact "is open to serious question" and is "a matter of sharp conflict of expert opinion."[27] Throughout the 20th century a number of distinguished electrical scientists and medical doctors have argued that the available evidence strongly suggests that electrocution causes unspeakable pain and suffering. Because "'[t]he current flows along a restricted path into the body, and destroys all the tissue confronted in this path . . . [i]n the meantime the vital organs may be preserved; and pain, too great for us to imagine, is induced. . . . For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.'"[28] L. G. V. Rota, a renowned French electrical scientist, concluded after extensive research that

> "[i]n every case of electrocution, . . . death inevitably supervenes but it may be very long, and above all, excruciatingly painful . . . . [T]he space of time before death supervenes varies according to the subject. Some have a greater physiological resistance than others. I do not believe that anyone killed by electrocution dies instantly, no matter how weak the

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[23] Duff 119.

[24] Lawes 189; 1968 Hearings, at 20 (statement of Clinton Duffy). "[T]he electrodes making contact may reach a temperature high enough to melt copper (1,940 degrees Fahrenheit) and . . . the average body temperature will be in the neighbourhood of 140 degrees Fahrenheit . . . ." Lawes 188.

[25] Bedau 16; 1968 Hearings, at 20 (statement of Clinton Duffy).

[26] Lawes 188–189; Teeters 447–448.

[27] 1972 Hearings, at 305; Note, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1339 (1968). "No one knows whether electrocuted individuals retain consciousness until dead . . . ." 1972 Hearings, at 306. See also Bedau, General Introduction, in Capital Punishment 7, 17–18, 22–23 (J. McCafferty ed. 1972); G. Scott, The History of Capital Punishment 219 (1950).

[28] Teeters 447 (quoting Nicola Tesla).

subject may be. In certain cases death will not have come about even though the point of contact of the electrode with the body shows distinct burns. Thus, in particular cases, the condemned person may be alive and even conscious for several minutes without it being possible for a doctor to say whether the victim is dead or not. . . . This method of execution is a form of torture." [29]

Although it is an open question whether and to what extent an individual feels pain upon electrocution, there can be no serious dispute that in numerous cases death is far from instantaneous. Whether because of shoddy technology and poorly trained personnel, or because of the inherent differences in the "physiological resistance" of condemned prisoners to electrical current, see n. 29, *supra*, it is an inescapable fact that the 95-year history of electrocution in this country has been characterized by repeated failures swiftly to execute and the resulting need to send recurrent charges into condemned prisoners to ensure their deaths.[30] The very first electrocution required multiple attempts before death resulted,[31] and our cultural lore is filled with examples of at-

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[29] Quoted in Duff 118–119. See also Lawes 187 ("[T]he resisting power of the human body is very high and it requires a voltage comparatively large or small, depending entirely upon the resistance and contacts, to force this amount of current through a circuit in which the body, with its contacts, constitutes the resistance").

[30] See Duff 122 ("Experience proves that human beings vary enormously in their powers of resistance to electrocution, which depends upon the strength of current and not upon voltage pressure: hence, *several shocks* may be required to produce what medical experts can reasonably define as death, which means that doctors have to stand by with stethoscopes at the ready to apply to the victim's chest when he or she has been given one or more doses of current") (emphasis in original).

[31] See generally Teeters 446–447; Beichman, 35 Commentary, *supra* n. 4, at 417–419. George Westinghouse, founder of Westinghouse Electric Company, "thought that the job could have been 'done better with an axe.'" Voices Against Death xxxii (P. Mackey ed. 1976) (hereinafter Voices Against Death). The New York Press asserted that "the age of burning at the stake is past; the age of burning at the wire will pass also." Beichman, *supra*, at 417. Another newspaper editorialized: "[I]t is not improbable that the first will prove the last . . . . Dr. E. A. Spitzka, the celebrated expert, who was present, unhesitatingly pronounced the experiment a failure and declared it his belief that the law should be repealed and no more experiments made with electricity as a means of execution." Teeters 446–447. A note in the Harvard Law Review from the time suggested that the judicial approval of electrocution

tempted electrocutions that had to be restaged when it was discovered that the condemned "tenaciously clung to life."[32] Attending physicians routinely acknowledge that electrocutions must often be repeated in order to ensure death.[33] It is difficult to

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"might well be changed in the light of subsequent experiment." 4 Harv. L. Rev. 287 (1891).

[32] R. Elliott, Agent of Death 66 (1940) (hereinafter Elliott). See generally Bedau 15; Duff 121; J. Pritchard, A History of Capital Punishment 65 (1932); Teeters 448–449; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126; 1972 Hearings, at 305–306. Robert Elliott, Sing Sing's long-time electrocutioner, described in his memoirs a number of failed attempts to electrocute prisoners. See especially Elliott 57 ("Fred's heart, larger than that of any other person electrocuted up to that time, was still beating, and he was alive. There was only one thing to do: put him in the chair again, and pass current through his body until he was dead"); *id.*, at 66 (describing the execution of another condemned prisoner in which "six shocks [were] necessary before he was pronounced dead"); *id.*, at 147–148.

A noted instance of this phenomenon occurred when Ethel Rosenberg was electrocuted for treason: five consecutive attempts were required before she finally died. "After the *fourth* (shock) guards removed one of the two straps and the two doctors applied their stethoscopes. But they were not satisfied that she was dead. The executioner came to them from his switchboard in a small room 10 feet from the chair. 'Want another?' he asked. The doctors nodded. Guards replaced the straps and for the *fifth* time electricity was applied." Duff 122 (emphasis in original).

See also Howells, State Manslaughter, in Voices Against Death 152: "It was not imagined that electricity could fail to kill instantly, much less that the criminal, who had become the State's peculiar care, could be so ineffectually tortured as to froth at the mouth, and strain at his bonds with writhings of agony which almost burst them, or give out the smell of his burning flesh so that the invited guest was often made sick at his stomach by the loathsome and atrocious fact. Yet all this has happened again and again in the execution of the death sentences since the consecration of the electric chair to the hallowed office of the axe, the noose, the screw. It has happened so often that I, at least, had become used to reading of it, and had tranquilly accepted it . . . . I generally managed to reconcile myself to the record of the frothing, and burning, and writhing, by learning further that the scientific gentleman, or the educated electrician, on the other side of the wall, had made it all right by discharging another thousand or two thousand volts into the body of his erring brother, and so putting him finally out of his misery."

[33] Dr. Amos Squires, for years the officiating doctor at electrocutions conducted at Sing Sing, observed that after "the current is cut off . . . the doctor with his stethoscope listens for heartbeats—*he listens to them grow fainter and fainter*. A brief interval passes. The switch is thrown again—and after contact is broken, again the doctor listens. *There is seldom any pulse this time.*" Teeters 448 (emphasis added). See also *id.*, at 449 ("[I]t often takes

imagine how such procedures constitute anything less than "death by installments"—"a form of torture [that] would rival that of burning at the stake." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 474, 476 (Burton, J., dissenting).[34]

This pattern of "death by installments" is by no means confined to bygone decades. Here is one eyewitness account of Alabama's electrocution of John Louis Evans on April 22, 1983:

> "At 8:30 p. m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted thirty seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently. The electrode apparently burst from the strap holding it in place. A large puff of greyish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.
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> "The electrode on the left leg was refastened. At 8:30 p. m. *[sic]* Mr. Evans was administered a second thirty sec-

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several shocks of high voltage to finally convince the attending physician—who often must rely on the executioner himself to give the nod—that the victim is actually dead").

[34] Louisiana's execution of Willie Francis remains the most notorious example of the botched manner in which so many electrocutions have been conducted. See generally L. Berkson, The Concept of Cruel and Unusual Punishment 26–29 (1975); B. Prettyman, Death and the Supreme Court 90–128 (1961). Sheriff Harold Resweber described the first attempted electrocution as follows:

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath *[sic]*.'" 329 U. S., at 480, n. 2 (Burton, J., dissenting).

Another witness gave this account of the aborted attempt:

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath *[sic]*.' Then they took the hood from his eyes and unstrapped him. . . . This boy really got a shock when they turned that machine on." *Ibid.*

ond jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. The doctors reported that his heart was still beating, and that he was still alive.

"At that time, I asked the prison commissioner, who was communicating on an open telephone line to Governor George Wallace to grant clemency on the grounds that Mr. Evans was being subjected to cruel and unusual punishment. The request for clemency was denied.

"At 8:40 p. m., a third charge of electricity, thirty seconds in duration, was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took fourteen minutes." [35]

Similarly, this was the scene at Georgia's electrocution of Alpha Otis Stephens just last December 12th:

"The first charge of electricity administered today to Alpha Otis Stephens in Georgia's electric chair failed to kill him, and he struggled to breathe for eight minutes before a second charge carried out his death sentence for murdering a man who interrupted a burglary.

. . . . .

". . . A few seconds after a mask was placed over his head, the first charge was applied, causing his body to snap forward and his fists to clench.

"His body slumped when the current stopped two minutes later, but shortly afterward witnesses saw him struggle to breathe. In the six minutes allowed for the body to cool before doctors could examine it, Mr. Stephens took about 23 breaths.

"At 12:26 A. M., two doctors examined him and said he was alive. A second two-minute charge was administered at 12:28 A. M." [36]

Stephens "'was just not a conductor' of electricity, a Georgia prison official said." [37]

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[35] Affidavit of Russell F. Canan (June 22, 1983), attached to Pet. for Cert.

[36] N. Y. Times, Dec. 13, 1984, p. A18, cols. 1–4.

[37] N. Y. Times, Dec. 17, 1984, p. A22, col. 1.

Thus there is considerable evidence suggesting—at the very least—that death by electrocution causes far more than the "mere extinguishment of life." *In re Kemmler*, 136 U. S., at 447. This evidence, if correct, would raise a substantial question whether electrocution violates the Eighth Amendment in several respects. First, electrocution appears to inflict "unnecessary and wanton . . . pain" and cruelty, and to cause "torture or a lingering death" in at least a significant number of cases. *Gregg* v. *Georgia*, 428 U. S., at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.); *In re Kemmler*, *supra*, at 447. Second, the physical violence and mutilation that accompany this method of execution would seem to violate the basic "dignity of man." *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion). Finally, even if electrocution does not invariably produce pain and indignities, the apparent century-long pattern of "abortive attempts" and lingering deaths suggests that this method of execution carries an unconstitutionally high risk of causing such atrocities. *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 471 (Frankfurter, J., concurring); see also n. 11, *supra*. These features of electrocution seem so "inherent in [this] method of punishment" as to render it *per se* cruel and unusual and therefore forbidden by the Eighth Amendment. *Louisiana ex rel. Francis* v. *Resweber*, *supra*, at 464.

Moreover, commentators and medical experts have urged that other currently available means of execution—particularly some forms of lethal gas and fast-acting barbituates—accomplish the purpose of extinguishing life in a surer, swifter, less violent, and more humane manner.[38] Several state legislatures have abandoned electrocution in favor of lethal injection for these very reasons; one of the architects of this change has emphasized that it resulted precisely from the recognition that the electric chair is "a barbaric torture device" and electrocution a "gruesome ritual."[39] Other States have rejected electrocution in favor of the use of lethal gas.[40]

For me, arguments about the "humanity" and "dignity" of *any* method of officially sponsored executions are a constitutional

[38] See Bedau 18; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 110–113; see also Royal Commission Report ¶¶ 735–749, at 256–261.

[39] Gardner, 39 Ohio St. L. J., *supra* n. 2, at 126–127, n. 228 (quoting Texas Rep. Ben Grant).

[40] *Id.*, at 127.

contradiction in terms. See *supra*, at 1080. Moreover, there is significant evidence that executions by lethal gas—at least as administered in the gas chamber[41]—and barbituates—at least as administered through lethal injections[42]—carry their own risks of pain, indignity, and prolonged suffering. But having concluded that the death penalty in the abstract is consistent with the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion), courts cannot now avoid the Eighth Amendment's proscription of "the unnecessary and wanton infliction of pain" in carrying out that penalty simply by relying on 19th-century precedents that appear to have rested on inaccurate factual assumptions and that no longer embody the meaning of the Amendment. *Gregg* v. *Georgia*, *supra*, at 173 (opinion of Stewart, POWELL, and STEVENS, JJ.). For the reasons set forth above, there is an evermore urgent question whether electrocution in fact is a "humane" method for extinguishing human life or is, instead, nothing less than the contemporary technological equivalent of burning people at the stake.

No. 84-6302. ROSCOE *v.* ARIZONA. Sup. Ct. Ariz.;

No. 84-6306. CAMPBELL *v.* WASHINGTON. Sup. Ct. Wash.; and

No. 84-6364. VEREEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 84-6302, 145 Ariz. 212, 700 P. 2d 1312; No. 84-6306, 103 Wash. 2d 1, 691 P. 2d 929; No. 84-6364, 312 N. C. 499, 324 S. E. 2d 250.

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.

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[41] See, *e. g.*, 1968 Hearings, at 21; 1972 Hearings, at 306-307; Teeters 451-455; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 127-128.

[42] See, *e. g.*, *Chaney* v. *Heckler*, 231 U. S. App. D. C. 136, 139-140, 718 F. 2d 1174, 1177-1178 (1983), rev'd, 470 U. S. 821 (1985); Royal Commission Report ¶¶ 737-749, at 257-261; Gardner, 39 Ohio St. L. J., *supra* n. 2, at 128-129.

*Rehearing Denied*

No. 83-6493. IRVING *v.* MISSISSIPPI, 470 U. S. 1059;

No. 84-1251. OHIO *v.* LUCK, 470 U. S. 1084;

No. 84-6092. BERKSON *v.* DEL MONTE CORP. ET AL., 470 U. S. 1056; and

No. 84-6144. DAY *v.* AMOCO CHEMICALS CORP., 470 U. S. 1086. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

MAY 1, 1985

*Dismissal Under Rule 53*

No. 84-999. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 745 F. 2d 68.

MAY 13, 1985

*Appeals Dismissed*

No. 84-1145. LANTON *v.* ALABAMA. Appeal from Ct. Crim. App. 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 873.

No. 84-1478. BLAIR *v.* BOULGER. Appeal from Sup. Ct. N. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 358 N. W. 2d 522.

No. 84-1583. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-1637. HOLDERMAN *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-1638. HOLDERMAN *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 755 F. 2d 915.

No. 84–6401. VALWAY ET UX. *v.* KEARNS ET AL. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1476. DEPERTE ET AL. *v.* TRIBUNE CO. ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 458 So. 2d 1075.

*Certiorari Granted—Vacated and Remanded*

No. 84–6410. TUGGLE *v.* VIRGINIA. Sup. Ct. Va. 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*, 470 U. S. 68 (1985). Reported below: 228 Va. 493, 323 S. E. 2d 539.

*Certiorari Granted—Vacated in Part and Remanded.* (See No. 84–1440, *ante*, p. 459.)

*Certiorari Granted—Reversed.* (See No. 84–1165, *ante*, p. 453.)

*Vacated and Remanded After Certiorari Granted*

No. 84–5636. ALCORN *v.* SMITH, WARDEN. C. A. 6th Cir. [Certiorari granted, 470 U. S. 1003.] Judgment vacated and case remanded for further proceedings in light of the assertions set forth in petitioner's motion to vacate filed April 26, 1985, and the response filed thereto.

*Miscellaneous Orders*

No. — — ——. KELLER, ADMINISTRATRIX OF THE ESTATE OF KELLER *v.* AMERICAN OPTICAL CO. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. D–294. IN RE DISBARMENT OF WOLFF. Disbarment entered. [For earlier order herein, see 459 U. S. 939.]

No. D–462. IN RE DISBARMENT OF COLLIER. Disbarment entered. [For earlier order herein, see 469 U. S. 1030.]

No. D–480. IN RE DISBARMENT OF BLACK. Disbarment entered. [For earlier order herein, see 470 U. S. 1025.]

No. D–489. IN RE DISBARMENT OF MCGARRY. It is ordered that James P. McGarry, of Flushing, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-491. In re Disbarment of Pecoraro. It is ordered that Maria Catherine Pecoraro, of West Chester, Pa., 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-492. In re Disbarment of Surgent. It is ordered that John W. Surgent, of Lake Ariel, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83-1944. Jensen, Director, Department of Motor Vehicles of Nebraska, et al. *v.* Quaring. C. A. 8th Cir. [Certiorari granted, 469 U. S. 815.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84-262. Mountain States Telephone & Telegraph Co. *v.* Pueblo of Santa Ana. C. A. 10th Cir. [Certiorari granted, 469 U. S. 879.] Motion of petitioner for leave to file a supplemental brief after argument granted.

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 respondents for divided argument granted.

No. 84-1321. Nix, Warden *v.* Whiteside. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1014.] Motion for appointment of counsel granted, and it is ordered that Patrick Reilly Grady, Esquire, of Cedar Rapids, Iowa, be appointed to serve as counsel for respondent in this case.

No. 84-1426. Abrams, Attorney General of New York *v.* McCray. C. A. 2d Cir. Motion of respondent to expedite further consideration of the petition for writ of certiorari and to consolidate with No. 84-6263, *Batson* v. *Kentucky* [certiorari

granted, *ante*, p. 1052], denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would grant this motion.

No. 84–1447. SALCER ET AL. *v.* ENVICON EQUITIES CORP. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84–6051. ALLEN *v.* GEORGIA, 470 U. S. 1059. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 84–6423. IN RE BERNSTEIN; and
No. 84–6496. IN RE HUNTER. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 84–1493. NATIONAL LABOR RELATIONS BOARD *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL.; and
No. 84–1509. SEATTLE-FIRST NATIONAL BANK *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 752 F. 2d 356.

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 743 F. 2d 648.

No. 84–1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 741 F. 2d 329.

No. 84–1485. MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 753 F. 2d 178.

No. 84–6646. TURNER *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari

granted limited to Question 1 presented by the petition. Reported below: 753 F. 2d 342.

*Certiorari Denied.* (See also Nos. 84–1145, 84–1478, 84–1583, 84–1637, 84–1638, and 84–6401, *supra.*)

No. 83–2132. LUCKY STORES, INC. *v.* GARIBALDI. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 1367.

No. 84–756. MOORE *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 311.

No. 84–821. WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY *v.* LASSO. C. A. 10th Cir. Certiorari denied. Reported below: 741 F. 2d 1241.

No. 84–996. JACOBS, EXECUTRIX OF THE ESTATE OF JACOBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 51.

No. 84–1101. BRAINARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 320.

No. 84–1104. PRZYBYLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 828.

No. 84–1136. BURROUGHS ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 1525.

No. 84–1142. EXXON CORP. *v.* DEPARTMENT OF ENERGY ET AL.; and

No. 84–1316. TEXACO INC. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 752 F. 2d 650.

No. 84–1143. O'BROCTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 263.

No. 84–1171. JENRETTE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 193, 744 F. 2d 817.

No. 84–1173. UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN *v.* SEARS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 749 F. 2d 1451.

No. 84–1177. STERLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 521.

No. 84–1210. SPRADLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1466.

No. 84–1260. YAMANIS *v.* UNITED STATES;
No. 84–1261. YAMANIS *v.* UNITED STATES; and
No. 84–6104. CALISE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1508.

No. 84–1306. BAKER *v.* BAKER. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 483 A. 2d 733.

No. 84–1345. TOWN PUMP, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 65.

No. 84–1348. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 1303.

No. 84–1369. MANHATTAN COFFEE CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 688. C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 2d 621.

No. 84–1416. SUMCO MANUFACTURING CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1189.

No. 84–1420. CHICAGO INVESTMENT CORP. *v.* AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 750 F. 2d 577.

No. 84–1446. TACA INTERNATIONAL AIRLINES, S.A. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 965.

No. 84–1448. LENNON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 737.

No. 84–1452. WISCONSIN'S ENVIRONMENTAL DECADE, INC., ET AL. *v.* STATE BAR OF WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 407.

No. 84–1453. KMA, INC. *v.* CITY OF NEWPORT NEWS. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 365, 323 S. E. 2d 78.

No. 84–1455. Bedat et al. *v.* McLean Trucking Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–1457. Capital Telephone Co., Inc., et al. *v.* New York Telephone Co. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 1154.

No. 84–1461. Providence Builders, Inc., et al. *v.* Zoning Hearing Board of Lower Providence Township et al. Pa. Commw. Ct. Certiorari denied.

No. 84–1462. James *v.* Hunter et al. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84–1464. Ronwin et al. *v.* Supreme Court of Iowa. Sup. Ct. Iowa. Certiorari denied.

No. 84–1467. Palmer et ux. *v.* Tucker et al. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 38.

No. 84–1468. DeSeyn *v.* Muskingum Watershed Conservancy District. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 56.

No. 84–1469. Berry *v.* Bailey. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 670.

No. 84–1472. Lyons *v.* Ohio. Ct. App. Ohio, Lake County. Certiorari denied.

No. 84–1473. Hoffman *v.* Henderson. Ct. App. Minn. Certiorari denied. Reported below: 355 N. W. 2d 322.

No. 84–1483. Yugoexport, Inc., et al. *v.* Thai Airways International, Ltd. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1373.

No. 84–1486. Kerrigan et ux. *v.* Luce, Forward, Hamilton & Scripps et al. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1082.

No. 84–1487. Washington *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 462 So. 2d 763.

No. 84–1494. Brister et al. *v.* Parish of Jefferson et al. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1019.

No. 84–1496. HAMPTON ROADS SHIPPING ASSN. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1015.

No. 84–1497. RICELAND FOODS, INC. *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO–CLC, LOCAL 2381, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 749 F. 2d 1260.

No. 84–1498. GOOD HOPE CHEMICAL CORPORATION CREDITORS' COMMITTEE *v.* KOERVER & LERSCH. C. A. 1st Cir. Certiorari denied. Reported below: 747 F. 2d 806.

No. 84–1501. JOHN E. GREEN PLUMBING & HEATING CO., INC. *v.* TURNER CONSTRUCTION CO. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 965.

No. 84–1505. CHAMBERS *v.* HENDERSON, JUDGE OF THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA. Dist. Ct. Oklahoma County, Okla. Certiorari denied.

No. 84–1507. CARDER *v.* VAN DE KAMP, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 84–1514. GEORGIA *v.* FELKER. Ct. App. Ga. Certiorari denied. Reported below: 172 Ga. App. 492, 323 S. E. 2d 817.

No. 84–1523. DUFFY *v.* CITY OF LONG BEACH. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

No. 84–1547. ALPHA PORTLAND INDUSTRIES, INC., ET AL. *v.* ANDERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 1293.

No. 84–1562. SEGRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84–1570. JOHNSON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 664.

No. 84–1574. ADCOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 346.

No. 84–1575. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 995.

No. 84–1585. COSMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84–1588. Dugger *v.* Delta Airlines. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 16, 325 S. E. 2d 394.

No. 84–1594. Genser *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–1596. Bibbero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 581.

No. 84–1610. Smith *v.* FCX, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 1378.

No. 84–1628. Williams *v.* General Motors Corp. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 67.

No. 84–1632. Suter *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 755 F. 2d 523.

No. 84–5343. Hux *v.* Murphy, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 737.

No. 84–5484. Jarrell *v.* Balkcom, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1242.

No. 84–5547. Saldana *v.* Wyoming. Sup. Ct. Wyo. Certiorari denied. Reported below: 685 P. 2d 20.

No. 84–5797. Herrera *v.* New Mexico. Sup. Ct. N. M. Certiorari denied. Reported below: 102 N. M. 254, 694 P. 2d 510.

No. 84–5950. Rhea *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 41.

No. 84–5954. Sams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–5963. Williams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–5993. Atnip *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84–6059. Thompson *v.* Reivitz, Secretary, Department of Health and Social Services, et al. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 397.

No. 84–6074. Gregory *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 59 Md. App. 732.

No. 84–6079. Owens *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 84–6080. Ventura *v.* Cupp, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1488.

No. 84–6099. Schmitt *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 249.

No. 84–6127. Thompson et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 731.

No. 84–6132. Grandison *v.* Moore et al. C. A. 3d Cir. Certiorari denied.

No. 84–6146. Preston *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 99.

No. 84–6205. Pierrot *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1156.

No. 84–6246. Thomas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 33.

No. 84–6259. Latil *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1464.

No. 84–6271. Young *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1458.

No. 84–6290. Van Orden *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 469 N. E. 2d 1153.

No. 84–6310. Love *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 468 N. E. 2d 519.

No. 84–6352. Segura *v.* United States; and
No. 84–6360. Reynosa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6353. Smith *v.* Lane, Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 386.

No. 84–6367. Sellars *v.* Social Security Administration et al. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 769.

No. 84–6372. Haas *v.* Nichols et al. Ct. App. Ariz. Certiorari denied.

No. 84–6379. Orange *v.* Lane, Director, Illinois Department of Corrections, et al. C. A. 7th Cir. Certiorari denied.

No. 84–6390. Coquillian *v.* Jones, Warden. C. A. 11th Cir. Certiorari denied.

No. 84–6391. Fosso et al. *v.* Cabinet for Human Resources of Kentucky et al. Sup. Ct. Ky. Certiorari denied.

No. 84–6393. Frankenberry *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied.

No. 84–6394. Brown *v.* Schweitzer et al. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84–6397. Drumheller *v.* Booker, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1070.

No. 84–6403. Smith et ux. *v.* Citizens Home Savings Co. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 84–6404. Speigel *v.* Zimmerman, Superintendent, State Correctional Institution at Huntingdon. C. A. 3d Cir. Certiorari denied.

No. 84–6405. Smith et ux. *v.* Citizens Home Savings Co. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 84–6415. Stewart *v.* Cabana, Warden. C. A. 5th Cir. Certiorari denied.

No. 84–6418. McKinnis *v.* Alabama. Sup. Ct. Ala. Certiorari denied. Reported below: 469 So. 2d 727.

No. 84–6420. Connor *v.* Haugh et al. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84–6421. Abbott *v.* Melson et al. C. A. 10th Cir. Certiorari denied.

No. 84–6424. Kimball *v.* Mahler et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-6426. ELY *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 345, 753 F. 2d 163.

No. 84-6435. MAGEE *v.* CAMPOY, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 84-6439. FORRESTER *v.* BRANDT. C. A. 2d Cir. Certiorari denied.

No. 84-6448. WOODS *v.* LUMBER CENTER, INC. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 66.

No. 84-6455. FREEZE *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 2d Cir. Certiorari denied.

No. 84-6459. HUBER *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 361 N. W. 2d 236.

No. 84-6461. SWANN *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 84-6462. PERKINS *v.* RICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6467. DAVIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 84-6472. BUHAJLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 307.

No. 84-6476. WEBSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 307.

No. 84-6479. SLOAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 84-6481. LIBERTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84-6483. DEVELASCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 913.

No. 84-6488. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84-6494. MURPHY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 307.

No. 84–6499. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 933.

No. 84–6511. MOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 751 F. 2d 1259.

No. 84–6518. PARSONS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 472 N. E. 2d 915.

No. 84–6519. PEPPER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 84–6523. LORICK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1295.

No. 84–6539. WALKER *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6549. MCELVEEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–6565. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 84–6570. BLYTHER *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 24, 748 F. 2d 714.

No. 84–1190. WELLS *v.* ROCKEFELLER ET AL. C. A. 3d Cir. Motion of respondents for award of damages denied. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion and this petition. Reported below: 728 F. 2d 209.

No. 84–1207. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. *v.* DOBY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 741 F. 2d 76.

No. 84–1223. DAVIS, WARDEN *v.* STOKES. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 746 F. 2d 1479.

No. 84–1234. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HALL. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 733 F. 2d 766.

No. 84–1410. Irving, Director, Juvenile Division, Illinois Department of Corrections *v.* Clay. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 749 F. 2d 427.

No. 84–1540. Duckworth, Superintendent, Indiana State Prison *v.* Dillon. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 751 F. 2d 895.

No. 84–1278. Yamasaki, Director, Hawaii Department of Transportation *v.* Stop H–3 Assn. et al. C. A. 9th Cir. Motion of Committee for H–3 et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 740 F. 2d 1442.

No. 84–1291. Park Avenue Investment & Development, Inc., et al. *v.* Barkheimer et al. Dist. Ct. App. Fla., 4th Dist. Motion of respondents for attorneys' fees and costs denied. Certiorari denied. Reported below: 462 So. 2d 1125.

Chief Justice Burger, with whom Justice Rehnquist and Justice O'Connor join.

I agree that we should deny the petition for a writ of certiorari, but I would also grant respondents' motion for costs and fees. This petition is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim, and on this record I believe that the purpose of the petition is to delay collection of a debt. This use of the Court's processes should subject the attorney who filed the petition to the sanction of Rule 49.2 of this Court.[1]

Park Avenue Investment & Development, Inc., was formed to develop and convert oceanfront buildings into time-share resorts. Petitioners solicited the respondents to invest in Park Avenue under a profit-sharing plan. Park Avenue later defaulted on its obligations under the profit-sharing plan. It then executed a series of promissory notes to the respondents for the deficiencies due under the plan, but defaulted on the notes as well. Respondents initiated five separate lawsuits to collect on the promissory notes. On September 17, 1981, the parties entered into a stipulation for the settlement of the lawsuits. The stipulation set out

[1] 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."

the amounts petitioners owed to respondents and established a timetable for repayment. When Park Avenue failed to make any of the payments under the stipulation, respondents attempted to foreclose on their debts, but petitioners prevented them from doing so.

Respondents then filed suit in state court. In response to a motion for summary judgment filed by respondents, petitioners moved to set aside the stipulation on the ground that it was usurious and unenforceable under Florida's criminal usury statute, Fla. Stat. § 687.071(7) (1983). The trial court denied petitioners' motion to set aside the stipulation, granted respondents' motion for summary judgment, and, a few weeks later, entered judgment for respondents. The court based its decisions on *Gunn Plumbing, Inc.* v. *Dania Bank*, 252 So. 2d 1 (Fla. 1971), in which the Florida Supreme Court held that "usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute." *Id.*, at 4. The trial court held that the parties' stipulation constituted a waiver of whatever usury defense petitioners may have had to the promissory notes.

Petitioners appealed to the District Court of Appeal. That court affirmed in a *per curiam* order, simply citing *Gunn Plumbing*, *supra*, and *Sherman* v. *Field Clinic*, 74 Ill. App. 3d 21, 392 N. E. 2d 154 (1979). Petitioners then filed a petition for a writ of certiorari in the Florida Supreme Court and at the same time attempted to take a direct appeal to that court, invoking its appellate jurisdiction on the obviously meritless ground that the District Court of Appeal had held § 687.071(7) invalid as applied. See generally Fla. Const., Art. V, § 3(b)(1). The State Supreme Court denied certiorari and dismissed the appeal. Petitioners then filed a motion for reinstatement of the appeal. The Florida Supreme Court denied this motion.

Petitioners next filed their petition for a writ of certiorari in this Court, asserting that the state courts' failure to apply § 687.071(7) infringed their rights under the Equal Protection Clause of the Fourteenth Amendment. Petitioners' equal protection "argument" is raised here for the first time. In reviewing judgments of state courts, of course, we do not consider constitutional arguments that were not properly presented in the state courts.

Moreover, the claim is patently frivolous. Besides the wholly conclusory assertion that the decisions of the state courts have violated petitioners' right to equal protection, the arguments

contained in the petition concern only matters of state law, principally that the trial and appellate courts erred in applying *Gunn Plumbing, supra.* Although there are colorable arguments that *Gunn Plumbing* is distinguishable from petitioners' case, there is nothing in *Gunn Plumbing* or in the facts of this case to indicate that the application of *Gunn Plumbing* here was arbitrary or even surprising. There is no allegation that *Gunn Plumbing* has not been applied in similar cases.[2] Hence there is no basis whatsoever for petitioners' assertion that they have been denied equal protection. Indeed, it seems clear to me that this petition is but the latest step in a series of actions designed solely to delay respondents' foreclosure on their loans. Such an abuse of the judicial process should not be tolerated. See *Talamini* v. *Allstate Insurance Co.*, 470 U. S. 1067, 1071 (1985) (STEVENS, J., concurring) ("[I]f 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.").

Respondents have moved for an award of costs and fees for their expenses in responding to this frivolous petition. I would grant the motion to the extent of awarding respondents $5,000 against Hal P. Dekle, Esq., petitioners' counsel, pursuant to this Court's Rule 49.2.

No. 84–1313. BURLINGTON NORTHERN RAILROAD CO. *v.* COSBY ET AL. C. A. 8th Cir. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 741 F. 2d 1077.

No. 84–1438. NATIONAL BUSINESS SYSTEMS, INC., ET AL. *v.* AM INTERNATIONAL, INC., ET AL. C. A. 7th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 743 F. 2d 1227.

No. 84–1471. BEECH AIRCRAFT CORP. *v.* ELSWORTH ET AL. Sup. Ct. Cal. Motion of Boeing Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 37 Cal. 3d 540, 691 P. 2d 630.

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[2] Nor could any such allegation be made; *Gunn Plumbing* has been followed consistently. See, *e. g.*, *Munilla* v. *Perez-Cobo*, 335 So. 2d 584 (Fla. App. 1976), cert. denied, 344 So. 2d 325 (Fla. 1977). See also *Morgan Walton Properties, Inc.* v. *International City Bank & Trust Co.*, 404 So. 2d 1059, 1062 (Fla. 1981).

No. 84–1488. Baldwin-United Corp. et al. *v.* Eubanks, Insurance Commissioner for Arkansas. Sup. Ct. Ark. Motion of the parties to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 283 Ark. 385, 678 S. W. 2d 754.

No. 84–6033. Brogdon *v.* Louisiana. Sup. Ct. La.;

No. 84–6284. Fairchild *v.* Arkansas. Sup. Ct. Ark.;

No. 84–6326. Hall *v.* Wainwright, Secretary, Florida Department of Corrections. C. A. 11th Cir.;

No. 84–6408. Singleton *v.* South Carolina. Sup. Ct. S. C.;

No. 84–6413. Stano *v.* Florida. Sup. Ct. Fla.;

No. 84–6486. Washington *v.* Virginia. Sup. Ct. Va.;

No. 84–6490. Dutton *v.* Oklahoma. Ct. Crim. App. Okla.; and

No. 84–6526. Carriger *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 84–6033, 457 So. 2d 616; No. 84–6284, 284 Ark. 289, 681 S. W. 2d 380; No. 84–6326, 733 F. 2d 766; No. 84–6408, 284 S. C. 388, 326 S. E. 2d 153; No. 84–6413, 460 So. 2d 890; No. 84–6486, 228 Va. 535, 323 S. E. 2d 577; No. 84–6526, 143 Ariz. 142, 692 P. 2d 991.

Justice Brennan and Justice Marshall, dissenting.

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

*Rehearing Denied*

No. 83–2022. Gribble *v.* Buckner, Judge, General Sessions Court of Rutherford County, Tennessee, et al., 469 U. S. 930;

No. 84–667. Lyons *v.* Warden, Nevada State Prison, *ante*, p. 1004;

No. 84–5968. Brewer *v.* City of Clayhatchee, *ante*, p. 1005;

No. 84–6190. Judd *v.* United States et al., *ante*, p. 1019; and

No. 84–6212. Hopgood *v.* Hopgood, *ante*, p. 1006. Petitions for rehearing denied.

No. 83-6663. Fugate *v.* New Mexico, 470 U. S. 904;

No. 84-16. Cory et al. *v.* Western Oil & Gas Assn. et al., *ante*, p. 81;

No. 84-249. Spencer et ux. *v.* South Carolina Tax Commission et al., *ante*, p. 82;

No. 84-559. Peralta Shipping Corp. *v.* Smith & Johnson (Shipping) Corp., 470 U. S. 1031;

No. 84-690. United States *v.* Gagnon et al., 470 U. S. 522;

No. 84-833. Bean Dredging Corp. *v.* Alabama, 469 U. S. 1200;

No. 84-841. Kashetta *v.* Kashetta, 469 U. S. 1191;

No. 84-939. Japan Air Lines Co., Ltd. *v.* Abramson, 470 U. S. 1059;

No. 84-5059. Ramirez *v.* Indiana, *ante*, p. 147;

No. 84-5507. Lavonte *v.* Walter et al., 469 U. S. 1219;

No. 84-5736. White *v.* Maryland, 470 U. S. 1062;

No. 84-5770. Stull *v.* United States, 470 U. S. 1062;

No. 84-5870. Finney *v.* Georgia, 470 U. S. 1088;

No. 84-6055. Hanson *v.* Rutherford et al., 470 U. S. 1055;

No. 84-6147. McNeair *v.* Suburban Hospital Assn., Inc., 470 U. S. 1086;

No. 84-6192. Bertulfo *v.* Office of Personnel Management, 470 U. S. 1057;

No. 84-6227. Manko *v.* United States, 470 U. S. 1046;

No. 84-6243. Betka *v.* Heckler, Secretary of Health and Human Services, 470 U. S. 1087; and

No. 84-6323. Fabian *v.* Ryan, 470 U. S. 1087. Petitions for rehearing denied. Justice Powell took no part in the consideration or decision of these petitions.

May 14, 1985

*Miscellaneous Order*

No. A-859. De La Rosa *v.* Procunier, Director, Texas Department of Corrections. Application for stay of execution of sentence of death scheduled for Wednesday, May 15, 1985, presented to Justice White, and by him referred to the Court, denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

MAY 17, 1985

*Dismissal Under Rule 53*

No. 84–1266. G. HEILEMAN BREWING CO., INC., ET AL. *v.* FOLDING CARTON ADMINISTRATION COMMITTEE ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 744 F. 2d 1252.

MAY 20, 1985

*Appeals Dismissed*

No. 84–1454. MISSISSIPPI POWER & LIGHT CO. *v.* CONERLY ET AL. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. JUSTICE BLACKMUN would dismiss for want of jurisdiction. Reported below: 460 So. 2d 107.

No. 84–1605. JACK H. BROWN & CO. INC. *v.* NORTHWEST SIGN CO. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 680 S. W. 2d 808.

*Certiorari Granted—Vacated and Remanded*

No. 84–1398. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* RAMIREZ DE ARELLANO ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub. L. 98–473, 98 Stat. 1884, 1893–1894, and other events occurring since October 5, 1984. Reported below: 240 U. S. App. D. C. 363, 745 F. 2d 1500.

No. 84–1418. PASTRANA DE CARABALLO *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to remand the case to the United States District Court for the District of Puerto Rico with instructions to remand the case to the Secretary of Health and

Human Services for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984.

*Miscellaneous Orders*

No. D–471. IN RE DISBARMENT OF BRAULT. Disbarment entered. [For earlier order herein, see 469 U. S. 1154.]

No. D–479. IN RE DISBARMENT OF GOFFEN. Disbarment entered. [For earlier order herein, see 470 U. S. 1025.]

No. D–481. IN RE DISBARMENT OF GOLD. Disbarment entered. [For earlier order herein, see 470 U. S. 1025.]

No. D–493. IN RE DISBARMENT OF SURDUT. It is ordered that Raymond J. Surdut, of Providence, R. I., 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. 83–1944. JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF NEBRASKA, ET AL. *v.* QUARING. C. A. 8th Cir. [Certiorari granted, 469 U. S. 815.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of Mexican American Legal Defense and Educational Fund for leave to file a brief as *amicus curiae* granted.

No. 84–1287. LIPHETE ET AL. *v.* STIERHEIM ET AL. Dist. Ct. App. Fla., 3d Dist.; and

No. 84–1545. MILLER-WOHL CO., INC. *v.* COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA ET AL. Appeal from Sup. Ct. Mont. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84–1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Appeal from Sup. Ct. Cal. Motions of California Chamber of Commerce and Western Mobilehome Association for leave to file briefs as *amici curiae* granted.

No. 84–6598. KNOBLAUCH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 10, 1985, within which to pay the docketing fee required by Rule

45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

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

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

No. 84–6471. IN RE CARTER. Petition for writ of mandamus denied.

No. 84–1558. IN RE PAN AMERICAN WORLD AIRWAYS, INC., ET AL. Petition for writ of mandamus and prohibition denied.

*Probable Jurisdiction Noted*

No. 84–1484. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 750 F. 2d 608.

No. 84–1379. DIAMOND ET AL. *v.* CHARLES ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted and case set for oral argument in tandem with No. 84–495, *Thornburgh* v. *American College of Obstetricians and Gynecologists* [probable jurisdiction postponed, *ante*, p. 1014]. Reported below: 749 F. 2d 452.

*Certiorari Granted.* (See No. 83–2097, *ante*, at 471.)

*Certiorari Denied.* (See also No. 84–1605, *supra.*)

No. 83–6887. QUIGLEY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 461, 462 N. E. 2d 92.

No. 84–995. MASSA *v.* UNITED STATES; and

No. 84–1265. SKINNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 2d 629.

No. 84–1200. MEESE, ATTORNEY GENERAL, ET AL. *v.* SEGAR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 103, 738 F. 2d 1249.

No. 84–1257. GLOVER *v.* UNITED GROCERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1380.

No. 84–1344. SAGINAW MINING CO. *v.* GIBAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 748 F. 2d 1112.

No. 84–1351. AKOOTCHOOK ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 1316.

No. 84–1365. PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 466.

No. 84–1366. BOARD OF EDUCATION OF THE CITY OF CHICAGO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 744 F. 2d 1300.

No. 84–1378. RENARD *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 126 Ill. App. 3d 563, 467 N. E. 2d 1090.

No. 84–1490. NELSON *v.* PIEDMONT AVIATION, INC. C. A. 4th Cir. Certiorari denied. Reported below: 750 F. 2d 1234.

No. 84–1520. CAMEO CONVALESCENT CENTER, INC. *v.* WILLKOM. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1077.

No. 84–1532. NEVADA ET AL. *v.* OLIVER. C. A. 9th Cir. Certiorari denied.

No. 84–1535. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* GERLING GLOBAL GENERAL INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 919.

No. 84–1541. DEWBERRY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–1544. MILLER *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 359 N. W. 2d 620.

No. 84–1546. MCGINNIS, WARDEN, ET AL. *v.* ROBINSON. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1078.

No. 84–1548. Amis *v.* Steele, Lee County Tax Collector, et al. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 459 So. 2d 1045.

No. 84–1551. Katherine D., a Minor, by and Through her Natural Parents and Legal Guardians, Kevin D. et ux. *v.* Department of Education of Hawaii. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 809.

No. 84–1552. Soderbeck *v.* Burnett County, Wisconsin, et al. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 285.

No. 84–1556. Durham Hosiery Mills, Inc., et al. *v.* White. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1072.

No. 84–1557. Howkins *v.* Caldwell et al. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 731.

No. 84–1561. S/S Lake Anja et al. *v.* M. Golodetz Export Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 1103.

No. 84–1565. Van Weelde Brothers Shipping Ltd. et al. *v.* I. N. C. A. S. et al. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 958.

No. 84–1576. Michigan *v.* Early. Ct. App. Mich. Certiorari denied.

No. 84–1579. Presbytery of Elijah Parish Lovejoy et al. *v.* Jaeggi et al. Sup. Ct. Mo. Certiorari denied. Reported below: 682 S. W. 2d 465.

No. 84–1603. Keltee *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 84–5934. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1338.

No. 84–5941. Satterfield *v.* United States;
No. 84–6300. Allison *v.* United States; and
No. 84–6434. Welden *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 827.

No. 84–6128. Palacios v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 66.

No. 84–6221. Cleveland v. Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 84–6222. BoCook v. Tate. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 55.

No. 84–6272. Glasshofer v. Cuyler, Superintendent, State Correctional Institution, et al. C. A. 3d Cir. Certiorari denied.

No. 84–6283. Britt v. United States. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 1149.

No. 84–6437. Savage v. City of Columbus. Sup. Ct. Ohio. Certiorari denied.

No. 84–6464. Small v. Rice, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 52.

No. 84–6480. Cooper et al. v. Society National Bank. Sup. Ct. Ohio. Certiorari denied.

No. 84–6482. Roybal v. New Mexico. Ct. App. N. M. Certiorari denied.

No. 84–6484. Owens v. Cupp, Superintendent, Oregon State Penitentiary, et al. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84–6489. Anderson v. Vose, Superintendent, Massachusetts Correctional Institution at Norfolk, et al. C. A. 1st Cir. Certiorari denied.

No. 84–6491. Wilson v. Seiter et al. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1014.

No. 84–6492. Papandrea v. Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 961.

No. 84–6497. Weser v. Maschner et al. C. A. 10th Cir. Certiorari denied.

No. 84–6524. Herrington v. Heflin-Horton Insurance Agency et al. Cir. Ct. W. Va., Monongalia County. Certiorari denied.

No. 84–6540. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84–6553. HILL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1160, 483 N. E. 2d 728.

No. 84–6566. GALA *v.* UNITED STATES DEPARTMENT OF DEFENSE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–6573. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 520.

No. 84–6574. PIQUETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 84–6577. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 175.

No. 84–6588. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84–6593. TIMLICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 937.

No. 84–6597. GODINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6600. BROWN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 659.

No. 84–6663. ANDINO *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–953. FLORIDA *v.* ZAFRA. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 444 So. 2d 1064.

No. 84–1227. CALIFORNIA *v.* RAMOS. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 37 Cal. 3d 136, 689 P. 2d 430.

No. 84–1537. EDUCATIONAL BOOKS, INC. *v.* VIRGINIA. Cir. Ct. Fairfax County, Va. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the convictions.

No. 84–6453. GASKINS *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 84–6498. LAWSON *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 84–6508. STEWART *v.* ILLINOIS. Sup. Ct. Ill.; and
No. 84–6522. HARDWICK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84–6453, 284 S. C. 105, 326 S. E. 2d 132; No. 84–6498, 310 N. C. 632, 314 S. E. 2d 493; No. 84–6508, 104 Ill. 2d 463, 473 N. E. 2d 1227; No. 84–6522, 461 So. 2d 79.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

*Rehearing Denied*

No. 83–1896. MOBIL OIL CORP. *v.* BLANTON ET AL., *ante*, p. 1007;
No. 84–724. TEXAS A & M UNIVERSITY ET AL. *v.* GAY STUDENT SERVICES ET AL., *ante*, p. 1001;
No. 84–6186. FERRELL *v.* SOUTH CAROLINA, *ante*, p. 1009;
No. 84–6189. CHAFFEE *v.* SOUTH CAROLINA, *ante*, p. 1009;
No. 84–6230. TRUESDALE *v.* SOUTH CAROLINA, *ante*, p. 1009; and
No. 84–6380. MARTIN *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS, *ante*, p. 1022. Petitions for rehearing denied.

No. 83–1274. METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* WARD ET AL., 470 U. S. 869. Petitions of W. G. Ward, Jr., and American Educators Life Insurance Co. for rehearing denied.

No. 84–685. RUSH ET AL. *v.* UNITED STATES, 470 U. S. 1004. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

MAY 23, 1985

*Dismissal Under Rule 53*

No. 84–1127. IN RE ROBSON ET AL. Petition for writ of mandamus dismissed under this Court's Rule 53.

MAY 28, 1985

*Appeal Dismissed.* (See also No. 84-1538, *infra.*)

No. 84-1571. O'KEEFE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF O'KEEFE *v.* COUNTY OF HENNEPIN. Appeal from Ct. App. Minn. dismissed for want of substantial federal question. Reported below: 354 N. W. 2d 531.

*Miscellaneous Orders*

No. A-856 (84-6743). DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A-903. FRANCOIS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, May 29, 1985, presented to JUSTICE POWELL, and by him referred to the Court, denied.

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 Francois' application for a stay of execution.

Even if I believed otherwise, however, I would grant the application. The Court's decision to send Francois to his death tomorrow morning is particularly disturbing because we have granted a writ of certiorari in a case raising the identical legal claim. *Cabana* v. *Bullock*, No. 84-1236, cert. granted, *ante*, p. 1052, poses the question whether a capital sentence may be carried out despite the fact that the sentencing jury was instructed on an imputed intent felony-murder theory of the type condemned in *Enmund* v. *Florida*, 458 U. S. 782 (1982).[1] Francois was sen-

[1] In *Enmund* we concluded that "the Eighth Amendment [does not] permi[t] imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U. S., at 797.

tenced to death based on his role in six murders committed in the course of a robbery. Four persons were arrested for the crime; two were triggermen, one accompanied the triggermen into the house, and the fourth stayed in a car outside. Francois claims that he argued at his trial, and has argued consistently since trial, that he was *not* the triggerman and did not realize that lethal force was likely to be used by his companions. In the rush to execution, we have not yet received the record in this case, and must assume that Francois accurately describes his defense.

It is undisputed that Francois' jury was instructed that "[a]ny person who knowingly aids [or] abets . . . the commission of [a felony] . . . is equally guilty of the crime of first degree murder with the one who actually performs the act," and that a killing in the course of a felony "is murder in the first degree *even though there is no premeditated design or intent to kill.*" Application for Stay 27 (emphasis added). Thus, even if the jury had believed Francois' defense that he did not specifically intend to kill, they could have returned their death sentence against him under these instructions, which concededly were faulty under *Enmund.*

The jury instructions used in *Cabana* v. *Bullock, supra,* are indistinguishable. The jury there was told that capital murder included any killing "when done with *or without any design to effect death,* by any person engaged in the commission of the crime of . . . robbery." *Bullock* v. *Lucas,* 743 F. 2d 244, 247 (CA5 1984) (emphasis added). Applying *Enmund, supra,* the Fifth Circuit concluded that although there had been some evidence introduced at trial that Bullock had intended the killing at issue, "the penalty of death may not stand in light of the jury instruction which would permit the imposition of the death penalty merely because Bullock participated in the robbery" without any intent to kill. 743 F. 2d, at 248. See *Stromberg* v. *California,* 283 U. S. 359 (1931); cf. *Francis* v. *Franklin, ante,* at 322–325; *Sandstrom* v. *Montana,* 442 U. S. 510, 526 (1979).

Until we have decided *Cabana* v. *Bullock, supra,* there can be no doubt that a death sentence imposed for a conviction based on such instructions is of doubtful validity, unless facts that would justify a finding of intent to kill under *Enmund* are undisputed. The Eleventh Circuit denied Francois' claim on this issue only today. We have no record before us on which to evaluate Francois' claim, nor has he ever had an opportunity fully to present his

claims to this Court.[2] The Eleventh Circuit has squarely and consistently rejected the Fifth Circuit's approach, see, *e. g.*, *Ross* v. *Kemp*, 756 F. 2d 1483, 1487–1488 (CA5 1985) (en banc), thereby creating a clear split of authority on the question presented. Accordingly, I would vote to stay Francois' execution until *Cabana* v. *Bullock* is decided, or, at the very least, until we can consider Francois' claim with the record of his trial before us.

I dissent.

No. D–478. In re Disbarment of Hailey. Disbarment entered. [For earlier order herein, see 470 U. S. 1047.]

No. D–487. In re Disbarment of Tabman. Disbarment entered. [For earlier order herein, see 470 U. S. 1081.]

No. 102, Orig. Indiana *v.* United States et al. Motion to amend the proposed complaint granted. Motion for leave to file bill of complaint denied. [For earlier order herein, see *ante*, p. 1002.]

No. 84–773. Bender et al. *v.* Williamsport Area School District et al. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of respondents for divided argument to permit American Jewish Congress to present oral argument as *amicus curiae* denied.

No. 84–1044. Pacific Gas & Electric Co. *v.* Public Utilities Commission of California et al. Appeal from Sup. Ct. Cal. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of the parties to dispense with printing the joint appendix granted.

No. 84–1361. United States *v.* Loud Hawk et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1014.] Motions for appointment of counsel granted, and it is ordered that Kenneth Saul

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[2] Francois' first state and federal habeas corpus petitions were filed in November 1982. After the Eleventh Circuit denied Francois relief on his first habeas petition, *Francois* v. *Wainwright*, 741 F. 2d 1275 (1984), his appellate counsel abandoned him and no petition for certiorari was filed. Because Florida did not recognize *Enmund* claims as cognizable on collateral review until 1984, the District Court rejected the State's claim that Francois' presentation of his intent claim in a second petition for habeas corpus constituted an abuse of the writ. *Francois* v. *Wainwright*, No. 85–1918, pp. 4–5 (SD Fla. May 23, 1985).

Stern, Esquire, of Milwaukie, Ore., be appointed to serve as counsel for respondents in this case.

No. 84–6649. In re Magee. Petition for writ of habeas corpus denied.

*Probable Jurisdiction Noted*

No. 84–1538. Fisher et al. *v.* City of Berkeley, California, et al. Appeal from Sup. Ct. Cal. Motions of California Association of Realtors and California Building Industry Association for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted limited to Question 1 presented by the statement as to jurisdiction. Appeal as to Question 2 presented by the statement as to jurisdiction is dismissed for want of a substantial federal question. Reported below: 37 Cal. 3d 644, 693 P. 2d 261.

*Certiorari Granted*

No. 84–1580. United States *v.* Inadi. C. A. 3d Cir. Certiorari granted. Reported below: 748 F. 2d 812.

No. 84–1586. Malley et al. *v.* Briggs et al. C. A. 1st Cir. Certiorari granted. Reported below: 748 F. 2d 715.

No. 84–1531. Michigan *v.* Jackson; and
No. 84–1539. Michigan *v.* Bladel. Sup. Ct. Mich. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 421 Mich. 39, 365 N. W. 2d 56.

*Certiorari Denied*

No. 84–1141. Holland et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 878.

No. 84–1319. Densmore *v.* City of Boca Raton, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84–1376. Grim Hotel Co. et al. *v.* Brock, Secretary of Labor, et al. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 966.

No. 84–1385. Wright *v.* Parke, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1481.

No. 84–1423. FEYERS ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 749 F. 2d 1222.

No. 84–1435. ADKINSON *v.* ADKINSON. Cir. Ct. W. Va., Jefferson County. Certiorari denied.

No. 84–1475. HOLOCARD *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 84–1563. BLINDER, ROBINSON & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 748 F. 2d 1415.

No. 84–1569. AGUILAR ET UX. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 1089.

No. 84–1572. MARX *v.* CENTRAN CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 1536.

No. 84–1573. DESAI *v.* TOMPKINS COUNTY TRUST CO. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–1578. MOREL DE LETELIER ET AL. *v.* REPUBLIC OF CHILE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 748 F. 2d 790.

No. 84–1581. SEALY, INC., ET AL. *v.* OHIO-SEALY MATTRESS MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 441.

No. 84–1582. MARTIN ET AL. *v.* KILGORE FIRST BANCORP, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1024.

No. 84–1592. SMELSER *v.* KELLEY, JUDGE, DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 84–1598. HOLLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 253.

No. 84–1607. NORTH EAST INDEPENDENT SCHOOL DISTRICT ET AL. *v.* FINDEISEN. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 234.

No. 84–1627. DAVIDSON *v.* CALEDONIAN HOSPITAL. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84–1670. Fg Fleuzeugleasing GmbH et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1280.

No. 84–1688. Ospina *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 448.

No. 84–1690. Enriquez *v.* Procunier, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 111.

No. 84–1696. Heaney *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6102. Jensen *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied.

No. 84–6196. Joost *v.* United States Parole Commission. C. A. 10th Cir. Certiorari denied.

No. 84–6303. Baldonado *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 84–6329. Johnson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 291.

No. 84–6495. Williams *v.* Blackburn, Warden. C. A. 5th Cir. Certiorari denied.

No. 84–6502. Ming Shen Wong *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–6503. Peterson *v.* Melton et al. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 653.

No. 84–6512. Harvey *v.* Andrist et al. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 569.

No. 84–6514. Lepiscopo *v.* Shuman et al. C. A. 10th Cir. Certiorari denied.

No. 84–6525. Herrington *v.* Tomasky et al. Cir. Ct. W. Va., Monongalia County. Certiorari denied.

No. 84–6533. Ryder *v.* Morris, Superintendent, Moberly Training Center for Men. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 327.

No. 84–6535. Magee *v.* Dabdoub et al. C. A. 5th Cir. Certiorari denied.

No. 84–6563. Tinghitella *v.* Procunier, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied.

No. 84–6568. Hayes *v.* LeFevre, Superintendent, Clinton Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 913.

No. 84–6595. Robinson *v.* Oldham, Judge, et al. C. A. 6th Cir. Certiorari denied.

No. 84–6608. Accibal *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 664.

No. 84–6611. Ruggiero *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 754 F. 2d 927.

No. 84–6616. Bejjani *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 84–6618. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 883.

No. 84–6630. Williams *v.* United States. Ct. App. D. C. Certiorari denied.

No. 84–6637. Tribble *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 884.

No. 84–6674. Fabian *v.* City of Miami et al. C. A. 11th Cir. Certiorari denied.

No. 84–1506. Airwork Service Division *v.* Director, Division of Taxation of New Jersey. Sup. Ct. N. J. Motions of Consumer Bureau, Chamber of Commerce of the United States, and American Civil Liberties Union of New Jersey for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 97 N. J. 290, 478 A. 2d 729.

No. 84–1524. Ollman *v.* Evans et al. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 301, 750 F. 2d 970.

Justice Rehnquist, with whom The Chief Justice joins, dissenting.

In March 1978, petitioner, then a professor of political science at New York University, was nominated by a departmental search

committee to head the Department of Government and Politics at the University of Maryland in College Park. The committee's recommendation proved to be highly controversial, largely because petitioner was an avowed Marxist. Petitioner's appointment was approved by the Provost of the University and the Chancellor of the College Park Campus, but was eventually overruled by the President of the University.

While this controversy was going on, respondents, nationally syndicated columnists, devoted one of their columns to it. In the course of the article, they made a number of statements about petitioner, including a description of his principal scholarly work as "a ponderous tome in adoration of the master," and then went on to say:

> "Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. 'Ollman has no status within the profession, but is a pure and simple activist,' he said."

Petitioner sued respondents for libel in the United States District Court for the District of Columbia, and that court granted summary judgment for respondents. 479 F. Supp. 292 (1979). On appeal, the Court of Appeals for the District of Columbia Circuit sitting en banc affirmed the judgment by a vote of six to five, producing three separate opinions concurring in the affirmance, and four dissenting opinions. 242 U. S. App. D. C. 301, 750 F. 2d 970 (1984).

The Court of Appeals rested its decision entirely on the First Amendment to the United States Constitution, and held that this statement about petitioner—that he had no status within his profession—could simply not form the basis of an action for defamation in the light of that Amendment. There was no question as to whether petitioner could meet the requirement of "malice" under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), since the case had never been tried to a jury. The Court of Appeals majority relied upon a brief passage from our opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–340 (1974). I think that the result reached by the Court of Appeals in this case is nothing less than extraordinary. At the heart of the common law of defamation were a few areas of expression which even when spoken rather than written were regarded as so damaging as to be classified as "slander *per se*" and therefore not to require the proof of any special damages in order to allow recovery. One of these catego-

ries consists of statements which defame the plaintiff in connection with his business or occupation. See, *e. g.*, *November* v. *Time, Inc.*, 13 N. Y. 2d 175, 194 N. E. 2d 126 (1963); *Stevens* v. *Morse*, 185 Wis. 500, 201 N. W. 815 (1924).

Much of the extended treatment of this question in the Court of Appeals was devoted to the question of whether or not this statement was one of "fact" or of "opinion," the implication being that if the statement were one of "opinion" it could not be actionable under any circumstances. But for nationally syndicated columnists to quote an unnamed political scientist as saying that petitioner has "no status within the profession" is far more than the mere statements of opinion traditionally protected by qualified privilege under the common law of libel. Doctors who are disapproved of by other doctors may find solace in the fees paid by their patients; lawyers disapproved of by other lawyers may comfort themselves by the retainers paid by their clients. But the academic who is disapproved of by his peers has no such healthy recourse outside of the profession. There, if ever, the opinion of one's peers is virtually the sole component of one's professional reputation.

The statement from our opinion in *Gertz*, *supra*, relied upon by the majority in the Court of Appeals was this:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U. S., at 339–340.

At the time I joined the opinion in *Gertz*, *supra*, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem." Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1239 (1976).

The scholarly treatment of this subject by the various opinions in the Court of Appeals comprises 148 pages in the appendix to the petition for certiorari in this case. Obviously the passage from *Gertz* quoted above has led the majority of that court to the conclusion that respondents' article is not actionable as a matter of law. But if one draws back for a moment, and considers the passage in context and in the light both of the First Amendment and the history of common-law libel, see R. Sack, Libel, Slander and Related Problems 158 (1980), I find it impossible to disagree with Judge Wald's characterization:

> "[T]he columnists' statement that 'Ollman has no status within the profession, but is a pure and simple activist' is an assertion of fact for which its authors can be made to answer, consistent with the requirements of the [F]irst [A]mendment, in a suit for libel." 242 U. S. App. D. C., at 363, 750 F. 2d, at 1032.

I would grant the petition for certiorari in this case.

No. 84–1577. Forro Precision, Inc. *v.* International Business Machines Corp. C. A. 9th Cir. Certiorari denied. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 745 F. 2d 1283.

No. 84–6156. Cooper *v.* United States; and
No. 84–6249. Wesley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 962.

Justice White, with whom Justice Brennan and Justice Marshall join, dissenting.

Before 1982, 18 U. S. C. § 1503 (1976 ed.) prohibited influencing or intimidating "any witness, in any court of the United States," or any juror or court officer in the discharge of his or her duty. The section also contained a residual clause forbidding anyone to obstruct or attempt to obstruct the "due administration of justice." In 1982, Congress amended § 1503 to remove all references to witnesses. At the same time, it enacted the Victim and Witness Protection Act, 18 U. S. C. § 1512, addressed specifically to protecting witnesses, informants, and crime victims from harassment and intimidation. Congress did not, however, remove from § 1503 the residual "obstruction of justice" clause.

Petitioners in these cases were charged with violating both § 1503 and § 1512 by attempting to influence a witness to testify falsely. They argued that such conduct could no longer support a conviction under § 1503, because § 1512 was now the only statute covering witness tampering. The Court of Appeals for the Fifth Circuit rejected this contention and affirmed petitioners' convictions under § 1503, reasoning that certain kinds of witness tampering could still be reached under the provision's "obstruction of justice" clause. 748 F. 2d 962 (1984). The court observed that § 1512 did not proscribe "urging and advising" a witness to testify falsely, which was the conduct that was charged to have violated § 1503 in these cases. If urging a witness to commit perjury was not prohibited by § 1512, and if witnesses had been removed entirely from the scope of § 1503, the conduct with which petitioners were charged would violate neither section. The Court of Appeals saw no indication that in enacting § 1512 to broaden witness protection, Congress had intended to create such a gap.

In reaching this result, the Court of Appeals explicitly rejected the reasoning of *United States* v. *Hernandez*, 730 F. 2d 895 (CA2 1984). In that case, the Second Circuit vacated a conviction under § 1503 that was based on witness intimidation. Reviewing the language and legislative history of §§ 1503 and 1512, the court held that Congress "affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.*, at 898. The argument that the residual clause of that statute still covered witness harassment, the court stated, "def[ied] common sense." *Id.*, at 899.

The Courts of Appeals of two large Circuits have thus arrived at contrary interpretations of an important criminal statute. I would grant certiorari in these cases to resolve the conflict.

No. 84–6181. Cospito et al. *v.* Heckler, Secretary of Health and Human Services. C. A. 3d Cir. Motion of Arkansas Legal Services Support Center et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 742 F. 2d 72.

No. 84–6395. Herrera *v.* Texas. Ct. Crim. App. Tex.;
No. 84–6399. Cervi *v.* Kemp, Warden. Sup. Ct. Ga.;
No. 84–6505. Gaines *v.* Illinois. Sup. Ct. Ill.; and
No. 84–6534. Stewart *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: No. 84–6395, 682 S. W. 2d 313; No. 84–

6505, 105 Ill. 2d 79, 473 N. E. 2d 868; No. 84–6534, 105 Ill. 2d 22, 473 N. E. 2d 840.

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. 84–6507. CALVERT *v.* SHARP. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 748 F. 2d 861.

*Rehearing Denied*

No. 84–6250. MILTON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 1030;

No. 84–6311. MITCHELL *v.* MEESE, ATTORNEY GENERAL, *ante*, p. 1021; and

No. 84–6340. DAY *v.* AMOCO CHEMICALS CORP., *ante*, p. 1056. Petitions for rehearing denied.

No. 84–5564. DANO *v.* SZOMBATHY, 469 U. S. 1219. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

JUNE 3, 1985

*Appeals Dismissed*

No. 84–1609. MURPHY ET AL. *v.* PENNSYLVANIA HUMAN RELATIONS COMMISSION ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 506 Pa. 549, 486 A. 2d 388.

No. 84–1763. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–1764. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES. Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal

was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 F. 2d 454.

No. 84–6529. Gaunce *v.* Idaho. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

*Miscellaneous Orders*

No. D–484. In re Disbarment of Wollrab. Disbarment entered. [For earlier order herein, see 470 U. S. 1081.]

No. D–485. In re Disbarment of Logan. Disbarment entered. [For earlier order herein, see 470 U. S. 1081.]

No. D–486. In re Disbarment of Delk. Leonard Adolph Delk, of Long Beach, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 25, 1985 [470 U. S. 1081], is hereby discharged.

No. D–494. In re Disbarment of Edwards. It is ordered that Robert Douglas Edwards, of Destin, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–495. In re Disbarment of Dicker. It is ordered that Leon Dicker, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–496. In re Disbarment of Hyter. It is ordered that Charles Kilburn Hyter, of Hutchinson, Kan., 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–497. In re Disbarment of Moore. It is ordered that Michael Maulsby Moore, of Everett, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-498. IN RE DISBARMENT OF SLONE. It is ordered that Harold G. Slone, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84-6646. TURNER *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1098.] Motion for appointment of counsel granted, and it is ordered that J. Lloyd Snook III, Esquire, of Charlottesville, Va., be appointed to serve as counsel for petitioner in this case.

*Probable Jurisdiction Postponed*

No. 84-1601. AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL. Appeal from Sup. Ct. Ala. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 470 So. 2d 1060.

*Certiorari Granted*

No. 84-782. SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE, INC. C. A. 4th Cir. Certiorari granted. Reported below: 740 F. 2d 305.

No. 84-1513. CALIFORNIA *v.* CIRAOLO. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93.

No. 84-1602. ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL. C. A. D. C. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 241 U. S. App. D. C. 246, 746 F. 2d 1563.

No. 84-1636. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* MATHEWS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 754 F. 2d 158.

No. 84-6470. DAVIDSON *v.* CANNON ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Case set for oral argument in tandem with No. 84-5872, *Daniels* v. *Williams* [certiorari granted, 469 U. S. 1207]. Reported below: 752 F. 2d 817.

*Certiorari Denied.* (See also Nos. 84–1763, 84–1764, and 84–6529, *supra.*)

No. 84–627. City Council of the City of Chicago *v.* Ketchum et al. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 1398.

No. 84–708. American Horse Shows Assn., Inc. *v.* Eighth Judicial District Court of Nevada et al. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 408, 683 P. 2d 26.

No. 84–866. Reed et al., Co-Executors of the Estate of Hancher *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 481.

No. 84–1134. Goldmar, Ltd., Inc., et al. *v.* Greeley et al. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 71.

No. 84–1140. Melia *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 741 F. 2d 70.

No. 84–1250. Messer *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 236 Kan. ix, 688 P. 2d 744.

No. 84–1285. Palmer *v.* Palmer et al. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 674, 463 N. E. 2d 129.

No. 84–1320. Radford *v.* Jago, Superintendent, London Correctional Institution, et al. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 386.

No. 84–1374. Cain *v.* Virginia. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1470.

No. 84–1397. Northwest Commercial Fishermen's Federal Recovery Assn. *v.* United States. C. A. Fed. Cir. Certiorari denied.

No. 84–1415. Martelon *v.* Temple, Director of the National Guard Bureau, et al. C. A. 10th Cir. Certiorari denied. Reported below: 747 F. 2d 1348.

No. 84–1436. Dugan & Meyers Construction Co., Inc., et al. *v.* Worthington Pump Corp. (USA). C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1166.

No. 84–1442. Carstens et al. *v.* Nuclear Regulatory Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 393, 742 F. 2d 1546.

No. 84–1502. Sheriff of the County of Newaygo, Michigan, et al. *v.* Deur. Sup. Ct. Mich. Certiorari denied. Reported below: 420 Mich. 440, 362 N. W. 2d 698.

No. 84–1504. S. G. Frantz Co., Inc. *v.* Director, Division of Taxation of New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84–1568. Quaker City Gear Works, Inc., et al. *v.* Skil Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 747 F. 2d 1446.

No. 84–1589. Barney *v.* Disciplinary Board of the Washington State Bar Assn. Sup. Ct. Wash. Certiorari denied.

No. 84–1597. Mann *v.* Spiegel. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84–1599. Bass Aviation, Inc. *v.* Hernandez, as Personal Representative of the Estate of Hernandez, et al. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 453 So. 2d 447.

No. 84–1600. Hameed et al. *v.* Jones, Superintendent, Great Meadow Correctional Facility, et al. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 154.

No. 84–1612. Kizer, Director, Department of Health Services, et al. *v.* Jeneski et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 163 Cal. App. 3d 18, 209 Cal. Rptr. 178.

No. 84–1614. Campbell *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 126 Ill. App. 3d 1028, 467 N. E. 2d 1112.

No. 84–1615. Borough of Demarest et al. *v.* Township of Mahwah et al. Sup. Ct. N. J. Certiorari denied. Reported below: 98 N. J. 268, 486 A. 2d 818.

No. 84–1618. Kopczynski *v.* The Jacqueline et al. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 555.

No. 84–1620. Bolar Pharmaceutical Co., Inc. *v.* Ciba-Geigy Corp. C. A. 3d Cir. Certiorari denied. Reported below: 747 F. 2d 844.

No. 84–1629. International Association of Machinists & Aerospace Workers Pension Plan et al. *v.* Shaw. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 1458.

No. 84–1631. Lucas *v.* Daniel International Corp. Sup. Ct. Mo. Certiorari denied. Reported below: 682 S. W. 2d 820.

No. 84–1651. Florida *v.* Manee. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 457 So. 2d 530.

No. 84–1694. Sharyland Water Supply Corp. *v.* Block, Secretary of Agriculture, et al. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 397.

No. 84–1721. Rafter *v.* Anglo-Iranian Oil Co., Ltd., et al. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84–1735. Waters *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 334 Pa. Super. 513, 483 A. 2d 855.

No. 84–1742. Carbone *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 477.

No. 84–1753. Feuling *v.* Wood, dba Aluminum Accessories, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 666.

No. 84–1762. Cerasani *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 754 F. 2d 927.

No. 84–6171. Benitez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1312.

No. 84–6387. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 1568.

No. 84–6530. Dusakto *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 464 So. 2d 534.

No. 84–6532. Pichon *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 683 S. W. 2d 422.

No. 84-6538. SIMPSON-WOOD *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 218 Neb. 889, 360 N. W. 2d 478.

No. 84-5642. PRINCE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 377.

No. 84-6543. WILSON *v.* WILEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 263.

No. 84-6545. DEMARCO *v.* A. ILLUM HANSEN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 146.

No. 84-6546. WILLIAMS *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 956.

No. 84-6547. SAYAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1086.

No. 84-6548. CLARK *v.* BRUCE, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1447.

No. 84-6550. BAYLIES ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 84-6552. AUSTIN *v.* BROWN, WARDEN. Ct. Crim. App. Okla. Certiorari denied.

No. 84-6554. GAMBRELL ET AL. *v.* MARTIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 257.

No. 84-6555. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84-6556. GRAVES *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 927.

No. 84-6557. HOWELL *v.* COLE, JUDGE, CIRCUIT COURT FOR CECIL COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 928.

No. 84-6559. STRAHAN *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 438.

No. 84–6564. SARRON *v.* FRUMKES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1076.

No. 84–6569. JOHNSON *v.* UNITED AUTOMOBILE WORKERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 375.

No. 84–6581. KEEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–6586. COLINO ESCOBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84–6599. COHODAS *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 917.

No. 84–6645. MCDANIEL *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 84–6648. CHEN *v.* UNITED STATES; and
No. 84–6650. CHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 817.

No. 84–6652. LEAMOUS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 795.

No. 84–6654. HUMPHREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1073.

No. 84–6656. LINDSLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84–6657. FAHNBULLEH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 473.

No. 84–6664. FLOWERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84–6670. NORMAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 71 Ore. App. 389, 692 P. 2d 665.

No. 84–6680. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 376.

No. 84–6684. SALMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84–6690. PIZARRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 756 F. 2d 579.

No. 84–6692. SEALS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 32.

No. 84–634. CHEVRON U. S. A., INC., ET AL. *v.* SHEFFIELD, GOVERNOR OF ALASKA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 483.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Reasonable Justices can certainly differ on whether certiorari should be granted in this case. JUSTICE WHITE, in dissent, has explained why he favors a grant of the petition for writ of certiorari. There is, of course, no reason why that dissent should identify the reasons supporting a denial of the petition. Matters such as the fact that apparently only one 26-year-old vessel may be affected by the Ninth Circuit's ruling,[1] that apparently no other State has enacted a deballasting prohibition similar to Alaska's, and that the Coast Guard retains the power to modify its regulations relating to deballasting lend support to the Court's discretionary determination that review in this Court is not necessary even if the Court of Appeals' decision is arguably incorrect. I add these few words only because of my concern that unanswered dissents from denial of certiorari sometimes lead the uninformed reader to conclude that the Court is not managing its discretionary docket in a responsible manner. See *Singleton* v. *Commissioner*, 439 U. S. 940, 942, 945 (1978) (opinion of STEVENS, J., respecting the denial of the petition for writ of certiorari).[2]

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit held that the State of Alaska's Tanker Act, former Alaska Stat. Ann. § 46.03.750(e) (Supp. 1977), amended in 1980 and cur-

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[1] Moreover, this vessel is able to comply with the Alaska statute at some ports because of the presence of onshore reception facilities, thus further highlighting the minimal effect of the Court of Appeals' ruling.

[2] As I noted in *Singleton:*

"Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference." 439 U. S., at 945.

rently Alaska Stat. Ann. §§46.03.750(a), (b) (1982), which restricts deballasting by oil tankers in Alaskan waters, was not pre-empted by regulations promulgated by the Coast Guard under Title II of the Ports and Waterways Safety Act of 1972 (PWSA).[1] *Chevron U. S. A., Inc.* v. *Hammond,* 726 F. 2d 483 (1984). I believe that in so holding, the court arguably "decided a federal question in a way in conflict with applicable decisions of this Court." This Court's Rule 17.1(c). Accordingly, I would grant certiorari to review the judgment of the Court of Appeals.

In *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978), we held that federal regulations governing oil tanker design and construction promulgated under Title II of the PWSA pre-empt more stringent state regulations covering the same subject matter. Our holding was based in large part on our conclusion that Title II was intended to authorize comprehensive standards "[t]o implement the twin goals of providing for vessel safety and protecting the marine environment." *Id.*, at 161. Under the statute, we observed, "the Secretary [of Transportation] must issue all design and construction regulations that he deems necessary for these ends, after considering the specified statutory standards." *Id.*, at 165. When a State has imposed a more stringent standard than the Secretary but the state and federal standards "ai[m] at precisely the same ends," we concluded, "[t]he Supremacy Clause dictates that the federal judgment . . . prevail over the contrary state judgment." *Ibid.*

As the court below pointed out, *Ray* dealt with federal standards for tanker design and construction, whereas this case involves standards governing tanker operations—specifically, standards governing the discharge of seawater loaded into cargo compartments and used as ballast.[2] The need for national uniformity in the area of standards for tanker operations, the court concluded, is not so great as the need for uniformity in standards governing

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[1] 86 Stat. 424. Title II of the PWSA, as amended by the Port and Tanker Safety Act of 1978, Pub. L. 95–474, 92 Stat 1471, was, until 1983, codified at 46 U. S. C. § 391a. In 1983, the PWSA/PTSA was recodified at 46 U. S. C. §§ 3701–3718 (1982 ed., Supp. I).

[2] The federal standard prohibits discharge of such water within 50 miles of shore unless the water meets certain standards of cleanliness. 33 CFR §§ 157.03(a)(1), 157.29, 157.37(a)(1) (1982). The state standards forbid *any* discharge of water from a tanker's cargo tanks within Alaskan territorial waters, regardless of the cleanliness of the water.

tanker operation and design; for while a tanker can under some circumstances alter its operating practices to conform to the requirements of the State whose territorial waters it is traversing, it cannot alter its construction or design. Accordingly, the absence of uniform design and construction requirements may be a far more serious impediment to the tanker industry than a lack of uniformity with respect to operations.

Although this distinction is not insubstantial,[3] the similarities between this case and *Ray* strike me as greater than the lower court was willing to recognize. Like *Ray*, this case involves federal regulations promulgated under Title II of the PWSA. As in *Ray*, the Secretary was obliged by the Act to issue "all . . . regulations that he deems necessary" to meet the goal of protecting the marine environment. *Id.*, at 165; see 46 U. S. C. §§ 391a(1)(D), 391a(6)(A). And, as in *Ray*, the state statute at issue in this case aims at precisely the same goal as the federal regulation, and thus amounts to a rejection by the State of the federal judgment as to the level of protection necessary to achieve the common goal. Under these circumstances, I would have thought that there would be a strong presumption that our ruling in *Ray* was applicable here as well.

In rejecting the applicability of *Ray*, the Court of Appeals relied not only on its perception of a diminished need for uniformity in the area of standards governing tanker operations, but also on its belief that the Clean Water Act, 33 U. S. C. § 1251 *et seq.*, reflects congressional recognition of concurrent state and federal authority to protect the environment within the territorial waters of the States. The court placed primary emphasis on those provisions of the Act that establish the National Pollutant Discharge Elimination System (NPDES), 33 U. S. C. § 1342, under which minimum federal standards regulating the discharge of pollutants may be supplanted by more stringent state standards. These

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[3] The distinction should probably not be overstated, however. Design specifications and operating procedures are in many respects inextricably linked, and this linkage is striking where ballasting—the subject of the regulations at issue in this case—is concerned. The design of a tanker may require it to use seawater as ballast in order to operate safely. Such a tanker may be unable to take on oil at a particular port if it may not deballast in waters adjacent to that port. Restrictions on deballasting thus may exclude certain tankers from certain ports fully as effectively as regulations prohibiting all tankers with particular design features.

provisions of the Clean Water Act, however, are of extremely limited relevance to the questions posed by this case, as federal regulations specifically exempt from the NPDES program discharges from vessels incident to their normal operation. 40 CFR § 122.3(a) (1984). The Clean Water Act thus sheds little or no light on the question whether protection of the marine environment against the threats posed specifically by oil tanker traffic is, under Title II of the PWSA, a matter in which federal regulation has displaced state control.

The apparent inconsistency of the decision below with our own decision in *Ray*, coupled with the lower court's reliance on statutory materials of questionable relevance to the case before it, leads me to conclude that this is a case in which we should exercise our discretionary jurisdiction. I therefore dissent from the denial of certiorari.

No. 84–1307. ODEND'HAL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Motion to substitute Harry R. Smith, Jr., as Personal Representative of Estate of Ivan V. Magal, deceased, as a party petitioner granted. Certiorari denied. Reported below: 748 F. 2d 908.

No. 84–1495. KEMP, WARDEN *v.* DAVIS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 752 F. 2d 1515.

No. 84–6449. ROSE *v.* FLORIDA. Sup. Ct. Fla.; and
No. 84–6639. NASH, AKA HENDERSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 84–6449, 461 So. 2d 84; No. 84–6639, 143 Ariz. 392, 694 P. 2d 222.

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. 84–6601. DAVIS *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 1515.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

JUSTICE WHITE, dissenting.

In *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), we held that where intent is an element of the crime charged, a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. In *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), we granted certiorari to resolve the question whether the giving of such a burden-shifting instruction may ever be deemed harmless error. *Johnson*, however, left that question unanswered: a plurality took the position that *Sandstrom* error was virtually never harmless, while four Justices would have found such errors harmless if a reviewing court could say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption. 460 U. S., at 97, n. 5.[1] On two subsequent occasions, we have granted certiorari in cases raising the harmless-error question, but on both occasions we have not resolved it. *Engle* v. *Koehler*, 707 F. 2d 241 (CA6 1983), aff'd by an equally divided Court, 466 U. S. 1 (1984); *Francis* v. *Franklin*, *ante*, p. 307.

In the present case, the Court of Appeals for the Eleventh Circuit, sitting en banc, correctly held that the jury instructions given at petitioner's trial for first-degree murder unconstitutionally shifted the burden of proof on the issues of malice and intent. 752 F. 2d 1515 (1985). See *Francis* v. *Franklin*, *supra*.[2] Noting that this Court in *Johnson* had failed to adopt a rule that *Sandstrom* error was *per se* reversible, the majority held that the error

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[1] JUSTICE STEVENS concurred in the disposition allowing the decision of the Connecticut Supreme Court to stand, but found that no federal question was presented.

[2] The judge instructed the jury that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but the presumption may be rebutted." The jury was further instructed that "while it is true that the law presumes malice when a homicide has been shown, yet that presumption of malice may be rebutted by the defendant." 752 F. 2d, at 1524, 1526, n. 1. In *Francis*, we held that a virtually identical instruction on intent violated the Due Process Clause under *Sandstrom*.

here was harmless because intent was not a contested issue at trial. Petitioner's main defense had been that he had nothing to do with the murder, not that he lacked intent, and the evidence was "overwhelming" that whoever had committed the murder had done so with intent and malice. 752 F. 2d, at 1521. Five judges dissented on this point, arguing that the error was not harmless because, "[e]xcept where it includes a direct admission of intent, no defense, in and of itself, can take the element of intent out of 'issue.'" *Id.*, at 1528.[3] The dissenters also observed that the plurality opinion in *Johnson* "cast serious doubt on whether the doctrine of harmless error can be applied to the shifting of a presumption which is so integral to the concept of a fair trial." 752 F. 2d, at 1527.

This is the fourth time that the Court has been presented with the opportunity to decide whether *Sandstrom* error may be harmless under any circumstances. Because resolution of this important and frequently recurring question is long overdue, I would grant certiorari in this case.[4]

*Rehearing Denied*

No. 84-1299. Arango *v.* Florida, *ante*, p. 1010;
No. 84-1329. Crea *v.* New York, *ante*, p. 1011;
No. 84-5339. Wingo *v.* Louisiana, *ante*, p. 1030;
No. 84-6018. Harrison *v.* Meachum, Director, Oklahoma Department of Corrections, et al., *ante*, p. 1055;
No. 84-6262. Bragg *v.* Cave, Judge, *ante*, p. 1020;
No. 84-6320. Day *v.* Cartwright et al., *ante*, p. 1056;
No. 84-6373. Hernandez *v.* Duncan et al., *ante*, p. 1068; and
No. 84-6431. Primbs *v.* United States, *ante*, p. 1068. Petitions for rehearing denied.

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[3] The plurality opinion in *Johnson* suggested that *Sandstrom* error might be harmless if the defendant had "conceded the issue of intent," and noted that in presenting a defense such as alibi, a defendant might admit that the act alleged by the prosecution was intentional. 460 U. S., at 87. Although the petitioner in this case presented an alibi defense, the majority below noted that "there was no explicit concession of intent and malice." 752 F. 2d, at 1521.

[4] The respondent filed a separate petition for certiorari raising different and "uncertworthy" objections to the opinion below. *Kemp* v. *Davis*, No. 84-1495, cert. denied, *ante*, p. 1143.

No. 84–5801. AUSTIN *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, WAUPUN, WISCONSIN, 470 U. S. 1055. Motion for leave to file petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–6152. FRIEDMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 470 U. S. 1057. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.