ORDERS FROM JULY 1 THROUGH OCTOBER 2, 1985

JULY 1, 1985

Dismissal Under Rule 53

No. 84–545. HICO INDEPENDENT SCHOOL DISTRICT ET AL. *v.* WELLS ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 736 F. 2d 243.

Appeals Dismissed

No. 84–1591. BOUDREAUX *v.* GRICE. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 462 So. 2d 131.

No. 84–6755. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84–494. NATIONAL LABOR RELATIONS BOARD *v.* MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, DISTRICT LODGE 115, ET AL.; and

No. 84–528. LAPINSKI ET AL. *v.* MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, DISTRICT LODGE 115, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Pattern Makers* v. *NLRB*, *ante*, p. 95. Reported below: 725 F. 2d 1212.

No. 84–1324. ADAMS ET AL. *v.* JASINSKI. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). Reported below: 745 F. 2d 70.

No. 84–1756. CITY OF SHEPHERDSVILLE, KENTUCKY, ET AL. *v.* RYMER. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985). Reported below: 754 F. 2d 198.

Miscellaneous Orders

No. A–869 (84–6868). VALENTINO *v.* SUPERIOR COURT OF THE COUNTY OF CONTRA COSTA. Ct. App. Cal., 1st App. Dist. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–928. PUGH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–935 (84–1244). DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Application for stay of the December 13, 1984, order of the United States District Court for the Southern District of Indiana, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. A–944. FABER ET AL. *v.* FARGNOLI ET AL. Application for stay of the order of the Appellate Division, Supreme Court of New York, Third Judicial Department, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–972 (84–1923). HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* NEW YORK ET AL. C. A. 2d Cir. Application for a partial stay of the judgment of the United States District Court for the Eastern District of New York, case No. CV–83–0457, as set forth in the order of January 31, 1984, presented to JUSTICE MARSHALL, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D–490. IN RE DISBARMENT OF HOLTZMAN. Disbarment entered. [For earlier order herein, see 471 U. S. 1063.]

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. Request of the Special Master for award of costs and compensation granted, and he is awarded a total of $32,110.74 to be divided equally by the parties. The Special Master is hereby discharged. [For earlier decision herein, see, *e. g.*, 471 U. S. 377.]

No. 82–1889. SPRINGFIELD TOWNSHIP SCHOOL DISTRICT ET AL. *v.* KNOLL, 471 U. S. 288. Motion of respondent to retax costs

granted and the parties are to bear their own costs. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of petitioners to dispense with printing the joint appendix granted and counsel shall file with the Clerk nine copies of the record that was before the United States Court of Appeals for the Third Circuit. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–1531. MICHIGAN *v.* JACKSON. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion for appointment of counsel granted, and it is ordered that James Krogsrud, Esquire, of Detroit, Mich., be appointed to serve as counsel for respondent in this case.

No. 84–1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion for appointment of counsel granted, and it is ordered that Ronald J. Bretz, Esquire, of Lansing, Mich., be appointed to serve as counsel for respondent in this case.

No. 84–1745. SCHILLING, COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR ILLINOIS *v.* TELEGRAPH SAVINGS & LOAN ASSOCIATION OF CHICAGO ET AL. Sup. Ct. Ill.; and

No. 84–1747. SHOULTZ *v.* MONFORT OF COLORADO, INC., ET AL. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Probable Jurisdiction Noted

No. 84–1803. ATTORNEY GENERAL OF NEW YORK *v.* SOTO-LOPEZ ET AL. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 755 F. 2d 266.

Certiorari Granted

No. 84–1725. UNITED STATES *v.* CITY OF FULTON ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 751 F. 2d 1255.

No. 84–1554. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* CARRIER. C. A. 4th Cir. Motion of respondent

for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 754 F. 2d 520.

No. 84–1737. UNITED STATES *v.* AMERICAN COLLEGE OF PHYSICIANS. C. A. Fed. Cir. Motion of American Business Press for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 743 F. 2d 1570.

No. 84–6807. LEE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 129 Ill. App. 3d 1167, 491 N. E. 2d 1391.

Certiorari Denied. (See also No. 84–6755, *supra.*)

No. 83–421. CONSOLIDATED X-RAY SERVICE CORP. *v.* BUGHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 1426.

No. 84–636. BROWN, CONSERVATOR OF BRISCOE *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 362.

No. 84–677. AMERICAN WAREHOUSEMEN'S ASSN. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.;

No. 84–684. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.;

No. 84–691. INTERNATIONAL ASSOCIATION OF NVOCCS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 84–696. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.; and

No. 84–869. HOUFF TRANSFER, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 966.

No. 84–1256. HECKMANN ET AL. *v.* CEMETERIES ASSOCIATION OF GREATER CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 451, 468 N. E. 2d 1354.

No. 84–1372. THOMASSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–1444. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 363.

No. 84–1463. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 453 So. 2d 413.

No. 84–1566. CHRISTOFFERSEN ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 749 F. 2d 513.

No. 84–1617. ALABAMA PUBLIC SERVICE COMMISSION *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 883.

No. 84–1665. CAMPBELL *v.* WASHINGTON STATE BAR ASSN. C. A. 9th Cir. Certiorari denied.

No. 84–1676. PLUECKHAHN *v.* FARMERS INSURANCE EXCHANGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 241.

No. 84–1684. ALLIED CORP. *v.* DISTRICT 17, UNITED MINE WORKERS OF AMERICA, ET AL.; and

No. 84–1863. DISTRICT 17, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* ALLIED CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 412.

No. 84–1693. FLORIDA *v.* CRUZ; and FLORIDA *v.* HOLLIDAY ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 465 So. 2d 516 (first case); 465 So. 2d 524 (second case).

No. 84–1708. OKLAHOMA PUBLISHING CO. *v.* OKLAHOMA HOSPITAL ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 748 F. 2d 1421.

No. 84–1718. CRABTREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1200.

No. 84–1722. PORT PACKET CORP. *v.* LEWIS ET AL.; and

No. 84–1723. LEWIS ET AL. *v.* PORT PACKET CORP. Sup. Ct. Va. Certiorari denied. Reported below: 229 Va. 1, 325 S. E. 2d 713.

No. 84–1730. MONTGOMERY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1175, 481 N. E. 2d 368.

No. 84–1739. ALTAMONT FARMS, INC., ET AL. *v.* RIOS ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 792, 476 N. E. 2d 312.

No. 84–1743. BELLETIRE, DIRECTOR, DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, ET AL. *v.* PARKS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1397.

No. 84–1749. ARMSTRONG, TRUSTEE OF THE ESTATE OF GELKING *v.* STATE BANK OF TOWNER. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 778.

No. 84–1754. CAVANAGH *v.* GOLDBERG, JUDGE, RHODE ISLAND FAMILY COURT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 84–1755. MODELL *v.* GRIES SPORTS ENTERPRISES, INC., ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 284, 473 N. E. 2d 807.

No. 84–1757. HELLMAN *v.* UNIVERSITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 257.

No. 84–1758. DURANTE BROS. & SONS, INC. *v.* NATIONAL BANK OF NEW YORK CITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 239.

No. 84–1760. CANALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 84–1767. KONZEN *v.* KONZEN. Sup. Ct. Wash. Certiorari denied. Reported below: 103 Wash. 2d 470, 693 P. 2d 97.

No. 84–1782. SMYTHE, CRAMER CO. ET AL. *v.* SMITH ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 180.

No. 84–1786. WELENKEN HIMMELFARB & CO. ET AL. *v.* HOLT, AKA ATCHISON. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 652.

No. 84–1787. BOWERS *v.* CONTINENTAL INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1574.

No. 84–1789. SIMON ET AL. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84–6351. SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 930.

No. 84–6384. THOMAS *v.* KADISH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 276.

No. 84–6398. HARGRAVE *v.* LANDON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 379.

No. 84–6432. FULTON ET AL. *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 1026.

No. 84–6452. LECROY *v.* FLORIDA; and
No. 84–6475. LECROY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 461 So. 2d 88.

No. 84–6469. GAST *v.* YOUNG, WARDEN. Sup. Ct. Wis. Certiorari denied. Reported below: 122 Wis. 2d 785, 367 N. W. 2d 224.

No. 84–6500. RODGERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 755 F. 2d 533.

No. 84–6544. REDDICK *v.* CALLAHAN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 84–6578. SLOANE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–6610. RANDOLPH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 463 So. 2d 186.

No. 84–6631. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 1239.

No. 84–6706. AVERY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 887, 476 N. E. 2d 1010.

No. 84–6710. ALSTON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 156.

No. 84–6747. REED *v.* WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1291.

No. 83–2076. POLLARD *v.* BOARD OF POLICE COMMISSIONERS ET AL. Sup. Ct. Mo. Certiorari denied. JUSTICE BRENNAN,

JUSTICE MARSHALL, and JUSTICE POWELL would grant certiorari. Reported below: 665 S. W. 2d 333.

No. 84–761. DATA GENERAL CORP. *v.* DIGIDYNE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 1336.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner in this case manufactured and sold a central processing unit for computers known as NOVA. Petitioner also created and sold a copyrighted operating system for NOVA called RDOS. RDOS was a very popular operating system, but petitioner's licensing agreement prevented customers from using it with any central processing unit other than petitioner's NOVA.

Respondents sued, claiming that petitioner's marketing strategy amounted to an illegal tie-in in violation of the antitrust laws. After a jury trial, the District Court granted petitioner's motion for a judgment notwithstanding the verdict, defining the appropriate market as the "market for general purpose minicomputers and microprocessors." *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 821 (ND Cal. 1981). No reasonable juror could find, the court determined, that within this large and dynamic market with much larger competitors petitioner had the market power to restrain trade through an illegal tie-in arrangement. The Court of Appeals for the Ninth Circuit reversed and reinstated the jury verdict in favor of respondents. 734 F. 2d 1336 (1984). The court concluded that the tying arrangement was illegal *per se*, because petitioner's RDOS operating system was sufficiently unique and desirable to an appreciable number of buyers to enable petitioner to force those consumers to buy its tied product, the NOVA central processing unit.

The Court of Appeals' decision in this case is suspect on several grounds. As we have consistently explained, a particular tying arrangement may have procompetitive justifications, and it is thus inappropriate to condemn such an arrangement without considerable market analysis. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 26 (1984); *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U. S. 2, 11–14 (1984). Anticompetitive forcing only exists if consumers are forced to buy a tied product as a result of the

sellers' market power, not simply because of the desirability of the package. *Id.*, at 24–25. The Court of Appeals looked to market power over "locked in" customers who had already purchased petitioner's wares, viewed the copyright on the operating system as creating a presumption of market power, and seemingly concluded that forcing power is sufficiently established to demonstrate *per se* antitrust liability if some buyers find the tying product unique and desirable.

Drawing distinctions between the permissible and the forbidden in this area is difficult, and the posture of this case—a jury verdict overturned by the District Court but reinstated on appeal—creates an additional layer of complexity, since each court below took a different view of what facts were relevant. Nonetheless, this case raises several substantial questions of antitrust law and policy, including what constitutes forcing power in the absence of a large share of the general market, whether market power over "locked in" customers must be analyzed at the outset of the original decision to purchase, and what effect should be given to the existence of a copyright or other legal monopoly in determining market power.

At stake is more than the resolution of this single controversy or even the clarification of what may seem at times to be a collection of arcane legal distinctions. In the highly competitive, multibillion dollar a year computer industry, bundling of software and hardware, or of operating systems and central processing units, is somewhat common, and any differentiated product is especially attractive to some buyers. The reach of the decision in this case is potentially enormous, and as the United States strongly urges us to do, I would grant certiorari to address the substantial issues of federal law presented.

No. 84–1230. CITY OF NORTH MUSKEGON ET AL. *v.* BRIGGS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 746 F. 2d 1475.

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

In 1977, respondent Briggs, then a married police officer separated from his wife, maintained an intimate relationship with a woman married to another man, and moved into an apartment

with her. After this living arrangement was brought to the attention of the Police Chief, respondent was suspended from the Police Department for conduct unbecoming an officer. When respondent continued his conduct, he was informed that it violated state law, and he was discharged. The disciplinary sanctions were upheld by petitioner city's City Council.

Respondent sued, claiming that his discharge amounted to an unlawful violation of his civil rights. 563 F. Supp. 585 (WD Mich. 1984). The District Court and Court of Appeals for the Sixth Circuit rejected the argument that respondent's activities were prohibited by state statutes forbidding adultery and lewd and lascivious cohabitation. Those courts also found that respondent's fundamental right of sexual privacy was infringed. Respondent was awarded $35,000 in compensatory damages, and this award was upheld on appeal. 746 F. 2d 1475 (1984).

The decision below stands in marked contrast to that issued by another Federal Court of Appeals. In *Shawgo* v. *Spradlin*, 701 F. 2d 470 (1983), cert. denied *sub nom. Whisenhunt* v. *Spradlin*, 464 U. S. 965 (1983), the Fifth Circuit held that unmarried police officers could be disciplined for cohabiting with each other. Despite that in *Shawgo* there was no allegation of violation of state law, the Court of Appeals there ruled that any right to privacy implicated was qualified and was overridden by the governmental interests at stake in running a police department.

The difference between the approaches of these two federal courts is evidence of a broader disagreement over whether extramarital sexual activity, including allegedly unlawful adulterous activity, is constitutionally protected in a way that forbids public employers to discipline employees who engage in such activity. Compare, *e. g.*, *Baron* v. *Meloni*, 556 F. Supp. 796 (WDNY 1983); *Suddarth* v. *Slane*, 539 F. Supp. 612 (WD Va. 1982); *Johnson* v. *San Jacinto Junior College*, 498 F. Supp. 555 (SD Tex. 1980), with *Baker* v. *Wade*, 553 F. Supp. 1121, 1140 (ND Tex. 1982); *New York* v. *Onofre*, 51 N. Y. 2d 476, 487, 415 N. E. 2d 936, 940 (1980), cert. denied, 451 U. S. 987 (1981); *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974, 978–979 (MD Ala. 1974) (three-judge court).

This case presents an important issue of constitutional law regarding the contours of the right of privacy afforded individuals for sexual matters. It is an issue over which courts are divided, and I would grant certiorari to address it squarely.

No. 84–1677. GREEN BAY PACKAGING, INC. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari to resolve a conflict between the decisions of the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Fifth Circuit. Reported below: 752 F. 2d 137.

No. 84–1720. HOLDING *v.* SOVRAN BANK, EXECUTOR AND TRUSTEE OF THE ESTATE OF MUSE. Sup. Ct. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84–1734. JOHNSON *v.* PENNSYLVANIA STATE UNIVERSITY ET AL. C. A. 3d Cir. Motion of Student Association of the State University of New York et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 752 F. 2d 854.

No. 84–1741. BOWEN *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6700. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6714. CARTWRIGHT *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6728. INGRAM *v.* GEORGIA. Sup. Ct. Ga.; and
No. 84–6808. MILLS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84–1741, 715 P. 2d 1093; No. 84–6700, 697 P. 2d 165; No. 84–6714, 695 P. 2d 548; No. 84–6728, 253 Ga. 622, 323 S. E. 2d 801; No. 84–6808, 462 So. 2d 1075.

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. 84–6447. TEAGUE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 680 S. W. 2d 785.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

At the sentencing stage of a capital proceeding, Tennessee requires a capital defendant to prove that any mitigating circum-

stances he has established outweigh any aggravating circumstances the State has proved. State law provides:

> "If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances the sentence *shall* be death." Tenn. Code Ann. § 39–2–203(g) (1982) (emphasis added).

Sentencing juries are instructed that the defendant's failure to carry this burden requires automatic imposition of a death sentence. As the State Supreme Court has held: "[I]f the State does prove an aggravating circumstance beyond a reasonable doubt, then unless the jury finds that mitigation exists and outweighs the aggravating circumstance, it can only impose the death penalty." *State* v. *Melson*, 638 S. W. 2d 342, 366 (Tenn. 1982), cert. denied, 459 U. S. 1137 (1983). The jury in this case was so instructed.

I continue to believe such instructions and statutes are inconsistent with the Court's Eighth Amendment precedents.* They impermissibly suggest to the jury a more limited role than the Eighth Amendment requires it to play. A jury must always be free to confront the ultimate question whether "'death is the appropriate punishment'" in the specific case, even where mitigating factors do not outweigh aggravating factors. *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). The jury may wish to vote for life out of a desire to render mercy, or it may believe that the death penalty is simply inappropriate for the specific crime the defendant has committed. These factors are properly part of the sentencing process. "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'"

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*See *White* v. *Maryland*, 470 U. S. 1062 (1985) (dissenting from denial of certiorari); *Maxwell* v. *Pennsylvania*, 469 U. S. 971 (1984) (dissenting from denial of certiorari); *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (dissenting from denial of certiorari); *Jones* v. *Illinois*, 464 U. S. 920 (1983); *King* v. *Mississippi*, 461 U. S. 919 (1983) (dissenting from denial of certiorari); see also *Smith* v. *North Carolina*, 459 U. S. 1056 (1982) (STEVENS, J., respecting denial of certiorari).

Lockett, *supra*, at 60 (quoting *Woodson*, *supra*, at 304). See also *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977).

Tennessee's statute appears to write less quantifiable mitigating factors, such as the desire to render mercy, out of the sentencing proceeding. Because the statute is likely to mislead sentencing juries into believing that only mitigating factors they can label and "weigh" against aggravating ones can properly be considered, I would grant certiorari to review the statute's constitutionality. I therefore dissent.

No. 84–6473. GONZALEZ-MARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 752 F. 2d 1485.

No. 84–6520. DAVIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 461 So. 2d 67.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was charged with the brutal beating and shooting of a woman and her two young daughters in Duval County, Florida. The murders and petitioner's arrest were the subject of enormous pretrial publicity in the Duval County area. The major local newspapers carried numerous stories on the crime and the details of petitioner's arrest, and many minutes of prime-time news coverage were devoted to the subject. Among the specific and prejudicial facts disclosed by this pretrial publicity were that petitioner had failed a lie detector test, that he had a history of violent crime, that he was on parole at the time of his arrest, that he had admitted being in the victim's home around the time of the murders, and that particular pieces of evidence appeared to link petitioner to the crimes.

Based on the substantial showing of prejudicial pretrial publicity he had made, petitioner moved for a change of venue. Attached to this motion were affidavits from 15 Duval County attorneys who believed the extent and nature of the pretrial publicity would make it impossible for petitioner to receive a fair and impartial jury in Duval County. Petitioner also moved for individual and sequestered *voir dire*, and the trial judge deferred ruling on the change-of-venue motion until after *voir dire* was completed. During *voir dire*, at least 10 of the 40 veniremen admitted having prior knowledge about the case. The trial judge, however, re-

fused to allow these jurors to be questioned individually and, as a result, defense counsel was precluded from learning the specific information they had heard or read. To have pursued such a line of questioning in front of the entire jury pool undoubtedly would have contaminated the remainder of the venire. After the group *voir dire*, the trial court denied the change-of-venue motion. Four of the veniremen who admitted to prior knowledge of the case ultimately sat on the jury that convicted petitioner and sentenced him to death.

Petitioner argues that the refusal to grant individual *voir dire* in the circumstances of this case violated his Sixth Amendment right to a fair and impartial jury. I recognize that "exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively depriv[e] the defendant of due process." *Murphy* v. *Florida*, 421 U. S. 794, 799 (1975). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961). The question here, however, is not whether the jury actually was biased against petitioner, but whether he was unconstitutionally deprived of the opportunity to uncover such bias and to exercise his for-cause challenges to root it out. The right to an impartial jury encompasses the right to take reasonable steps designed to insure that the jury is impartial. See, *e. g.*, *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971); *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Aldridge* v. *United States*, 283 U. S. 308 (1931); see also *Ham* v. *South Carolina*, 409 U. S. 524, 532 (1973) (opinion of MARSHALL, J.). Moreover, the informed exercise of jury challenges is an essential element in insuring jury impartiality. Indeed, the first Justice Harlan, speaking for a unanimous Court, called the right to challenge "one of the most important of the rights secured to the accused" and concluded that "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894); see also *Lewis* v. *United States*, 146 U. S. 370, 376 (1892); *Johnson* v. *Louisiana*, 406 U. S. 356, 379 (1972) (opinion of POWELL, J.).

This Court has not addressed whether, and upon what threshold showing, individual *voir dire* is constitutionally required to guarantee a defendant's right to "have sufficient information brought out on voir dire to enable him to exercise his challenges in a rea-

sonably intelligent manner." *United States* v. *Rucker*, 557 F. 2d 1046, 1048 (CA4 1977). Members of the Court, however, have urged that individual *voir dire* may be required to ferret out the damaging effect of pretrial publicity. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 602 (1976) (BRENNAN, J., concurring in judgment). Moreover, lower courts have concluded that this practice is constitutionally required under circumstances similar to those presented here. In *United States* v. *Davis*, 583 F. 2d 190, 196 (CA5 1978), the court held that "where the nature of the publicity as a whole raised a significant possibility of prejudice," due process required more than general questions to the venire as a group regarding their ability to render an impartial verdict. The court found the extensive pretrial publicity potentially prejudicial on the basis of the "sensational nature of some of the reports" and disclosure of the arrest and conviction records of the defendants. *Ibid.* See also *United States* v. *Hawkins*, 658 F. 2d 279 (CA5 1981). Similarly, the Louisiana Supreme Court, apparently relying on the Federal Constitution, see *Michigan* v. *Long*, 463 U. S. 1032 (1983), ordered individual *voir dire* when pretrial publicity had disclosed the defendant's confession and had linked him to a series of highly publicized crimes. See generally ABA Standards for Criminal Justice 8–3.5 (2d ed. 1980) (recommending individual *voir dire* when substantial possibility that potentially prejudicial material will make jurors ineligible to serve).

In this case, there can be little doubt of the extensive publicity the triple murder and petitioner's arrest received. Much of this information was prejudicial. Four members of the petit jury acknowledged their exposure to at least some of this material, but because the trial judge denied individual *voir dire*, defense counsel was effectively precluded from learning the nature of their pretrial knowledge or its potential effect on their impartiality, and from intelligently exercising his challenges. Apparently viewing petitioner's constitutional claim as one of state law only, the State Supreme Court concluded in a short paragraph that the refusal to grant individual *voir dire* was not an "abuse of discretion."* 461 So. 2d 67, 69 (1984). Trial judges certainly have broad discretion

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*The state court noted that, once the jury had been selected, petitioner was "satisfied" with it. 461 So. 2d 67, 69 (1984). This statement was made in the context of rejecting petitioner's appeal from the denial of his venue motion; after rejecting this venue challenge, the state court went on to address the merits of the asserted right to individual *voir dire*.

over the structuring of *voir dire*, but as federal and state courts have recognized, the extent and nature of pretrial publicity may necessitate individual *voir dire* to assure fair process in the selection of an impartial jury. In light of petitioner's substantial showing in the trial court of the need for individual *voir dire*, I would grant certiorari to address whether, and upon what showing, the Constitution requires trial judges to grant individual *voir dire*.

No. 84–6681. HENDERSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 463 So. 2d 196.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner, after contacting police and admitting involvement in a series of murders, unambiguously asserted his right to counsel and his desire to have no discussions with the police concerning his case outside the presence of counsel. The legal import of this assertion, made while in police custody, is clear; our cases establish a "'bright-line rule' that *all* questioning must cease after an accused requests counsel." *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984); see also *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966). The reason for this rule is also clear from our cases, for "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, *supra*, at 98. This "bright-line rule" is thus an essential "protective devic[e] . . . employed to dispel the compulsion inherent in custodial surroundings" and to thereby assure that any statements by an accused are the product of free will rather than subtle coercion. *Miranda* v. *Arizona*, *supra*, at 458.

I

In this case, petitioner contends that police violated this "bright-line rule" and through custodial interrogation did persuade him to incriminate himself further notwithstanding his earlier request for counsel's assistance during questioning; yet the Florida Supreme Court sustained the admission of the subsequently obtained evidence simply on the fact that petitioner was eventually

persuaded and signed a waiver form. 463 So. 2d 196 (1985). Such a rationale cannot be made to conform to this Court's precedents, which establish that *as a precondition to a finding of waiver* a court must find that the accused, rather than the police, reopened dialogue about the subject matter of the investigation. See *Edwards* v. *Arizona*, *supra*, at 485; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion); *id.*, at 1054 (MARSHALL, J., dissenting).

This Court has not always found it easy to define exactly when and by whom dialogue was reopened, *ibid.*, and perhaps the instant case can be explained as resulting from these difficulties. Here, however, the State argues that petitioner "initiated" further dialogue by minimally responding to an unrequested police explanation of the accused's fate and by "conveying" a willingness to talk through nonverbal expressions and unrelated "subtle comments." The valuable right to be free from police interrogations in the absence of counsel cannot be made to be so fragile as to crumble under the weight of elicited and subjective inconsequentials. I would grant the petition to make clear that waiver of this right is not so lightly to be assumed.

II

A few days after his assertion of the right to counsel and his consultation with an attorney, petitioner was transported from one jail to another in connection with an unrelated criminal investigation. The drive lasted almost five hours, and the police officers accompanying petitioner were informed that he had asserted his right to counsel and had been advised by his counsel not to talk with the police. The police officers had nevertheless equipped themselves for the trip by taking along specially prepared forms by which petitioner could waive his right to be free from police interrogation in spite of his previous assertion of that right. In particular, the form declared that the signatory desired to make a statement to the police, that he did not want a lawyer, and that he was aware of his "constitutional rights to disregard the instruction of [his] attorney and to speak with the officers" transporting him. Response to Pet. for Cert. A–24.

During the course of the 5-hour drive, the police engaged in extended "casual conversation" with petitioner. Although the police officers asserted that none of this conversation concerned any as-

pect of the case, they also asserted that petitioner's general manner as well as various "subtle comments" conveyed to them that "his conscience was bothering him," *id.*, at A–21, and that "he wanted to discuss the [criminal] matter." *Id.*, at A–20. Near the end of the 5-hour drive, the police stopped the car and one of the officers got out to make a phone call. The officer who remained with the accused perceived that petitioner "acted like he was interested in what we were doing," *id.*, at A–60, so he explained that they were "calling the chief of detectives just to tell him that we were here." *Ibid.* When the accused "wanted to know what we would do then," the officer explained that they would probably place petitioner in jail. According to the officer, petitioner then responded with a "look on his face" that made clear his willingness to talk with the police. As the officer put it, "[i]t's hard to describe an expression," but he could see that petitioner was thinking: "You've got to be kidding. . . . Here I am. I know all these things, and all you're going to do is take me to jail." *Id.*, at A–61. The officer then directly asked petitioner if there was anything he would like to tell the police. When petitioner expressed a tentative willingness to give information about the location of his victims' bodies, the police confronted him with the previously prepared waiver forms, which he signed.

III

It is clear that the direct question by the police officer easily meets this Court's definition of interrogation. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300–301 (1980). And the fact of the arrest, even without the 5-hour drive, makes the context clearly custodial. Thus the issue is whether petitioner "initiated" a dialogue with the police concerning the subject matter of the investigation. By the police officer's own testimony, the only actual speech by petitioner that directly related to his case was the casual question of what would happen after the officer telephoned the "chief of detectives." Although four Members of this Court found a similar statement to be "initiation" of dialogue in *Bradshaw*, *supra*, there the comment was at least unrelated to any prior police-initiated conversation. Here, in contrast, the comment was a response to the police officer's unsolicited partial explanation of the police's intentions. If petitioner's question is deemed a general inquiry regarding the investigation, then the police officer's comment that elicited it must

have been a similar reinitiation of dialogue. It is thus not surprising that the police insist that petitioner made clear his desire to talk through repeated, though "subtle," hints. But surely, the right to counsel cannot turn on a police officer's subjective evaluations of what must stand behind an accused's facial expressions, nervous behavior, and unrelated subtle comments made in casual conversation. If it were otherwise, the right would clearly be meaningless.

I dissent from the Court's denial of certiorari.

No. 84–6689. RUMBAUGH ET AL., INDIVIDUALLY AND AS NEXT FRIENDS OF RUMBAUGH *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 395.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioners, Harvey and Rebecca Rumbaugh, are the parents of Charles Rumbaugh, who has been sentenced to death. They seek to present a next friend petition for writ of habeas corpus on behalf of their son, while their son refuses to seek collateral review of his conviction or death sentence and resists his parents' efforts to secure such review. The son's reason for wanting no review is that he desires to die as quickly as possible so as to end feelings of intolerable depression that plague him. A Federal District Court found that Charles Rumbaugh was mentally competent to waive his rights and thus to assure his own death, and it accordingly dismissed the petition for writ of habeas corpus. *Rumbaugh* v. *Estelle*, 558 F. Supp. 651 (ND Tex. 1983). The Court of Appeals affirmed. *Rumbaugh* v. *Procunier*, 753 F. 2d 395 (CA5 1985). The issue presented is whether those determinations comported with the standard for waiver set forth in *Rees* v. *Payton*, 384 U. S. 312 (1966). Because the decisions below substantially strayed from the *Rees* standard, so that they, in essence, allow a state capital punishment scheme to become an instrument for the effectuation of a suicide by a mentally ill man, I dissent from the denial of certiorari.

Rees specified the findings necessary to a determination that one who seeks to waive further review of a criminal conviction is competent to make such a grave choice. Under *Rees* the courts

below were required to determine "whether [Charles Rumbaugh] has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.*, at 314. Rumbaugh was examined by numerous psychiatrists, and based on their testimony and reports, a Federal District Court found Rumbaugh competent.

This conclusion, however, was not based on a finding that Rumbaugh's choice was uninfluenced by mental illness. To the contrary, the court found that Rumbaugh suffered from severe mental illness and that this illness was a major influence on his choice. The courts below relied on a determination that Rumbaugh "logically" chose death *because* he had become a victim of mental illness, suffering from "frequent bouts of paranoia," "auditory hallucinations," and severe "depression." Rumbaugh seeks death because he knows himself to be mentally ill and has lost hope of obtaining treatment. If not for his illness and his pessimism regarding access to treatment, he would probably continue to challenge his death sentence; but faced with his vision of life without treatment for severe mental illness, Rumbaugh chooses to die.

The choice the courts below describe is a choice of a desperate man seeking to use the State's machinery of death as a tool of suicide. It is no more nor less rational than the tragic choices of those driven to suicide by their tormented inner lives in a myriad of contexts. Although the District Court and the divided panel of the Fifth Circuit determined that Rumbaugh was rational in his calculation that continued life would for him bring misery, this was not the sort of free and uncoerced "rational" choice that we required in *Rees*. As Circuit Judge Goldberg said in dissent below:

> "[R]ational choice requires that the ends of [a person's] actions are *his* ends. That is, rational choice embraces 'autonomous' choice. If a person takes logical steps toward a goal that is substantially the product of a mental illness, the decision in a fundamental sense is not his: He is incompetent." *Rumbaugh* v. *Procunier*, 753 F. 2d, at 404.

This Court should not allow the erosion of the standard set in *Rees*, and it should certainly prevent such erosion in the context of capital punishment. In the context of capital punishment, such

an erosion allows a State's machinery of death to go forth, regardless of the presence of possible constitutional infirmities in a death sentence, because it has become a tool offered to the hopeless as a means of ending their own lives.

I dissent from the denial of certiorari.

Rehearing Denied

No. 84–1319. DENSMORE *v.* CITY OF BOCA RATON, FLORIDA, ET AL., 471 U. S. 1124;

No. 84–1570. JOHNSON *v.* MERIT SYSTEMS PROTECTION BOARD, 471 U. S. 1102;

No. 84–1632. SUTER *v.* UNITED STATES, 471 U. S. 1103;

No. 84–1637. HOLDERMAN *v.* UNITED STATES, 471 U. S. 1095;

No. 84–1638. HOLDERMAN *v.* UNITED STATES, 471 U. S. 1095;

No. 84–5484. JARRELL *v.* BALKCOM, WARDEN, 471 U. S. 1103;

No. 84–6033. BROGDON *v.* LOUISIANA, 471 U. S. 1111;

No. 84–6074. GREGORY *v.* MARYLAND, 471 U. S. 1103;

No. 84–6222. BOCOOK *v.* TATE, 471 U. S. 1118;

No. 84–6280. ZARRILLI *v.* BRAUNSTEIN, 471 U. S. 1020;

No. 84–6372. HAAS *v.* NICHOLS ET AL., 471 U. S. 1105;

No. 84–6399. CERVI *v.* KEMP, WARDEN, 471 U. S. 1131;

No. 84–6437. SAVAGE *v.* CITY OF COLUMBUS, 471 U. S. 1118;

No. 84–6497. WESER *v.* MASCHNER ET AL., 471 U. S. 1118; and

No. 84–6534. STEWART *v.* ILLINOIS, 471 U. S. 1131. Petitions for rehearing denied.

No. 84–465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO, 471 U. S. 606; and

No. 84–5765. ROBERTSON *v.* ROBERTSON, 469 U. S. 1164. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

JULY 2, 1985

Appointment of Director of Administrative Office of U. S. Courts

It is ordered that L. Ralph Mecham be appointed Director of the Administrative Office of the United States Courts to succeed William E. Foley, effective July 15, 1985, pursuant to the provisions of § 601 of Title 28 of the United States Code.

Appeals Dismissed

No. 84–1292. STEARNS COAL & LUMBER CO., INC. *v.* KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION

CABINET. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. Reported below: 678 S. W. 2d 378.

No. 84–1343. FERGUSON ET AL. *v.* WAMBLE ET AL.; and

No. 84–1355. BENNETT, SECRETARY OF EDUCATION, ET AL. *v.* WAMBLE ET AL. Appeals from D. C. W. D. Mo. Motion of Baptist Joint Committee on Public Affairs for leave to file a brief as *amicus curiae* granted. Appeals dismissed for want of jurisdiction. Reported below: 598 F. Supp. 1356.

No. 84–1528. WAMBLE ET AL. *v.* BENNETT, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. W. D. Mo. dismissed for want of jurisdiction. Reported below: 598 F. Supp. 1356.

Certiorari Granted—Vacated and Remanded

No. 84–604. JOEL ET AL. *v.* CIRRITO ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co.*, *ante*, p. 479, and *American National Bank* v. *Haroco, Inc.*, *ante*, p. 606. Reported below: 741 F. 2d 524.

No. 84–657. BANKERS TRUST CO. *v.* RHOADES ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co.*, *ante*, p. 479, and *American National Bank* v. *Haroco, Inc.*, *ante*, p. 606. Reported below: 741 F. 2d 511.

No. 84–1033. UNITED STATES *v.* PFLAUMER. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Bagley*, *ante*, p. 667. Reported below: 740 F. 2d 1298.

No. 84–1084. TIFFANY INDUSTRIES, INC. *v.* ALEXANDER GRANT & CO.; and

No. 84–1222. KAHN *v.* ALEXANDER GRANT & CO. C. A. 8th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Sedima, S. P. R. L.* v. *Imrex Co.*, *ante*, p. 479, and *American National Bank* v. *Haroco, Inc.*, *ante*, p. 606. JUSTICE BLACKMUN would deny the petitions for writs of certiorari. Reported below: 742 F. 2d 408.

No. 84–1500. CONTICOMMODITY SERVICES, INC. *v.* SCHOR ET AL.; and

No. 84–1519. COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL. C. A. D. C. Cir. Certiorari granted, judgment

vacated, and cases remanded for further consideration in light of *Thomas* v. *Union Carbide Agricultural Products Co.*, *ante*, p. 568. Reported below: 239 U. S. App. D. C. 159, 740 F. 2d 1262.

Certiorari Granted

No. 84–1279. DELAWARE *v.* VAN ARSDALL. Sup. Ct. Del. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 486 A. 2d 1.

Certiorari Denied

No. 84–722. LONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–5554. HENAO-CASTANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1364.

JULY 18, 1985

Miscellaneous Order

No. A–5. OFFICE OF PERSONNEL MANAGEMENT ET AL. *v.* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, ET AL. C. A. D. C. Cir. Motion of National Treasury Employees Union for leave to intervene granted. Motions of National Treasury Employees Union and American Federation of Government Employees, AFL–CIO, to stay the order entered by THE CHIEF JUSTICE on July 3, 1985, denied. JUSTICE BRENNAN and JUSTICE POWELL took no part in the consideration or decision of these motions.

JULY 27, 1985

Dismissal Under Rule 53

No. 84–1939. CATHOLIC BISHOP OF CHICAGO *v.* F. E. L. PUBLICATIONS, LTD. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 754 F. 2d 216.

AUGUST 13, 1985

Dismissal Under Rule 53

No. 85–85. MCCLENDON *v.* GUIN, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, ET AL. C. A. 11th Cir. Petition for writ of certiorari and/or other relief dismissed under this Court's Rule 53.

AUGUST 14, 1985

Miscellaneous Orders

No. D–476. IN RE DISBARMENT OF WHITTINGTON. Disbarment entered. [For earlier order herein, see 469 U. S. 1203.]

No. D–482. IN RE DISBARMENT OF BRUNWIN. Disbarment entered. [For earlier order herein, see 470 U. S. 1047.]

No. D–491. IN RE DISBARMENT OF PECORARO. Disbarment entered. [For earlier order herein, see 471 U. S. 1097.]

No. D–492. IN RE DISBARMENT OF SURGENT. Disbarment entered. [For earlier order herein, see 471 U. S. 1097.]

No. D–495. IN RE DISBARMENT OF DICKER. Disbarment entered. [For earlier order herein, see 471 U. S. 1133.]

Rehearing Denied

No. 84–1436. DUGAN & MEYERS CONSTRUCTION CO., INC., ET AL. *v.* WORTHINGTON PUMP CORP. (USA), 471 U. S. 1135;

No. 84–1482. KARAPINKA *v.* UNION CARBIDE CORP., 472 U. S. 1008;

No. 84–1553. ARANGO *v.* FLORIDA BAR, 472 U. S. 1003;

No. 84–1573. DESAI *v.* TOMPKINS COUNTY TRUST CO., 471 U. S. 1125;

No. 84–1674. ENDER *v.* CHRYSLER CORP. ET AL., 472 U. S. 1009;

No. 84–1685. YEE *v.* VITOUSEK ET AL., 472 U. S. 1009;

No. 84–1763. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 471 U. S. 1132;

No. 84–1764. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES, 471 U. S. 1132;

No. 84–1817. THIBAULT *v.* WEISS ET AL., 472 U. S. 1013;

No. 84–1818. WILLIAMS ET UX. *v.* GOVINE ET AL., 472 U. S. 1013;

No. 84–6414. MARLOW *v.* TULLY, COMMISSIONER, DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK STATE, 472 U. S. 1010;

No. 84–6579. MARCH *v.* MARCH, 472 U. S. 1004; and

No. 84–6612. MAURER *v.* OHIO, 472 U. S. 1012. Petitions for rehearing denied.

No. 84–6617. LUCAS *v.* SOUTH CAROLINA, 472 U. S. 1012;
No. 84–6627. THOMAS *v.* ANGELONE, WARDEN, ET AL., 472 U. S. 1020;
No. 84–6641. SPAN *v.* MCCALL, 472 U. S. 1020;
No. 84–6672. WESER *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL., 472 U. S. 1030;
No. 84–6675. MEADOWS *v.* HOLLAND, WARDEN, 472 U. S. 1020;
No. 84–6727. CELESTINE *v.* BLACKBURN, WARDEN, 472 U. S. 1022; and
No. 84–6763. DUNTON *v.* DEPARTMENT OF THE NAVY, 472 U. S. 1021. Petitions for rehearing denied.

No. 83–1919. CITY OF OKLAHOMA CITY *v.* TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE, 471 U. S. 808. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84–6420. CONNOR *v.* HAUGH ET AL., 471 U. S. 1105. Motion of petitioner for leave to file petition for rehearing denied.

AUGUST 15, 1985

Dismissal Under Rule 53

No. 84–1608. BAILEY, TRUSTEE *v.* BUTCHER. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 753 F. 2d 465.

Miscellaneous Order

No. A–127 (85–5220). PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death scheduled for Thursday, August 15, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE and JUSTICE WHITE would deny the application. JUSTICE REHNQUIST took no part in the consideration or decision of this application.

JUSTICE POWELL, concurring.

Ordinarily, I would vote to deny the petition for writ of certiorari and the application for stay as I find no substance to any of petitioner's claims. But it is not clear from the votes of the other Justices absent from Washington, whether there will be four votes to grant the petition for writ of certiorari, and at this late hour it has not been possible to clarify their positions. In view of this doubt, I will vote to grant the stay.

AUGUST 28, 1985

Miscellaneous Orders

No. A–28. SAN FRANCISCO POLICE OFFICERS' ASSN. ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. D. C. N. D. Cal. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–32. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* REDBUD HOSPITAL DISTRICT, DBA REDBUD COMMUNITY HOSPITAL, ET AL. D. C. N. D. Cal. Motion to vacate the stay entered by JUSTICE REHNQUIST on July 24, 1985 [*post*, p. 1308], denied.

Rehearing Denied

No. 82–2157. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL., 472 U. S. 559;

No. 84–351. ATASCADERO STATE HOSPITAL ET AL. *v.* SCANLON, *ante*, p. 234;

No. 84–761. DATA GENERAL CORP. *v.* DIGIDYNE CORP. ET AL., *ante*, p. 908;

No. 84–1292. STEARNS COAL & LUMBER CO., INC. *v.* KENTUCKY NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, *ante*, p. 921;

No. 84–1444. PRICE *v.* UNITED STATES, *ante*, p. 904;

No. 84–1716. WILSON ET AL. *v.* NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM ET AL., 472 U. S. 1018;

No. 84–1843. HILJER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HILJER *v.* WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS, 472 U. S. 1029; and

No. 84–5717. MOORE *v.* MAGGIO, WARDEN, ET AL., 472 U. S. 1032. Petitions for rehearing denied.

No. 84–6621. JENKINS *v.* OHIO, 472 U. S. 1032;
No. 84–6636. ROSS *v.* GEORGIA, 472 U. S. 1022;
No. 84–6694. WILLIAMS ET AL. *v.* GRAND LODGE OF FREEMASONRY ET AL., 472 U. S. 1023;
No. 84–6696. SEITU *v.* COUNTISS ET AL., 472 U. S. 1031; and
No. 84–6728. INGRAM *v.* GEORGIA, *ante*, p. 911. Petitions for rehearing denied.

No. 83–1842. GARRETT *v.* UNITED STATES, 471 U. S. 773. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84–1811 (A–39). AFFLERBACH ET AL. *v.* UNITED STATES, 472 U. S. 1029. Application for suspension of the effect of the order denying certiorari, addressed to JUSTICE BRENNAN and referred to the Court, denied. Petition for rehearing denied.

AUGUST 29, 1985

Dismissal Under Rule 53

No. 83–1234. ASHLAND OIL, INC., ET AL. *v.* GOOD ET AL. Sup. Ct. Kan. Certiorari dismissed under this Court's Rule 53. Reported below: 233 Kan. 846, 667 P. 2d 337.

SEPTEMBER 3, 1985

Miscellaneous Order

No. A–181. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, September 4, 1985, presented to JUSTICE POWELL, and by him referred to the Court, denied.

CHIEF JUSTICE BURGER, concurring.

Because this Court has had three prior opportunities to review the issues raised in this application and two opportunities to review applicant's petition for a federal writ of habeas corpus, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (dismissing certiorari as improvidently granted); *Darden* v. *Wainwright*, 467 U. S. 1230 (1984) (denying certiorari); *Wainwright* v. *Darden*, 469 U. S. 1202 (1985) (vacating and remanding 725 F. 2d 1526 (CA11 1984)), and because the issues raised in this application have been thoroughly

considered and resolved by federal and state courts, I concur in the denial of the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

Because this Court has not yet had an opportunity to review the denial of applicant's first petition for a federal writ of habeas corpus, we would grant the application for a stay of execution to enable this Court to consider whether to grant certiorari in the normal course of business.

Certiorari Granted

No. 85–5319 (A–181). DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Upon request of counsel for petitioner, the application for stay of execution has been considered as a petition for writ of certiorari. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The order of this date denying the application for stay is vacated. The application for stay of execution of the sentence of death is granted pending the sending down of the judgment of this Court. JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application. Reported below: 767 F. 2d 752.

JUSTICE POWELL, concurring in the granting of the application for a stay.

My vote is to grant the application for a stay, although I find no merit whatever in any of the claims advanced in the petition for certiorari. All of these claims have been carefully considered and repeatedly rejected by the courts below, including as recently as this afternoon the Federal District Court for the Middle District of Florida, and this evening the Court of Appeals for the Eleventh Circuit. Indeed the petition for certiorari was merely the stay application that had been denied, and restyled on the request of counsel as a petition for certiorari. But in view of the unusual situation in which four Justices have voted to grant certiorari

(doing so without waiting for the Court of Appeals to act on Darden's second federal habeas petition that was before that court this evening), and in view of the fact that this is a capital case with petitioner's life at stake, and further in view of the fact that the Justices are scattered geographically and unable to meet for a Conference, I feel obligated to join in granting the application for a stay.

CHIEF JUSTICE BURGER, dissenting.

In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (dismissing certiorari as improvidently granted); *Darden* v. *Wainwright*, 467 U. S. 1230 (1984) (denying certiorari); *Wainwright* v. *Darden*, 469 U. S. 1202 (1985) (vacating and remanding 725 F. 2d 1526 (CA11 1984)); *Darden* v. *Wainwright*, *ante*, p. 927 (order dated September 3, 1985, denying application for stay), and have been passed upon no fewer than 95 times by federal and state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent.

SEPTEMBER 6, 1985

Miscellaneous Order

No. A–182 (84–6953). BURGER *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death scheduled for Monday, September 9, 1985, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SEPTEMBER 13, 1985

Dismissal Under Rule 53

No. 84–1875. REICHHOLD CHEMICALS, INC. *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 755 F. 2d 1559.

SEPTEMBER 17, 1985

Dismissal Under Rule 53

No. 84–1668. CITY OF NEW ORLEANS, LOUISIANA *v.* MIDDLE SOUTH ENERGY, INC., ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 241 U. S. App. D. C. 326, 747 F. 2d 763.

SEPTEMBER 18, 1985

Dismissal Under Rule 53

No. 84–1838. 168–176 EAST 88TH STREET CORP. ET AL. *v.* EVANGELISTA ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 755 F. 2d 913.

Miscellaneous Orders

No. A–941. IN RE PETRILLO. Super. Ct. N. J., Law Div. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–489. IN RE DISBARMENT OF MCGARRY. Disbarment entered. [For earlier order herein, see 471 U. S. 1096.]

No. D–494. IN RE DISBARMENT OF EDWARDS. Disbarment entered. [For earlier order herein, see 471 U. S. 1133.]

No. D–508. IN RE DISBARMENT OF SHORT. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D–510. IN RE DISBARMENT OF CODY. It is ordered that John Cody, of Sierra Vista, Ariz., 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–511. IN RE DISBARMENT OF STOCK. It is ordered that Eugene A. Stock, of Marysville, 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–512. IN RE DISBARMENT OF MEISNER. It is ordered that Anthony B. Meisner, of Berkley, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–513. IN RE DISBARMENT OF NASH. It is ordered that Donald Dean Nash, of Portland, Ore., 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–514. IN RE DISBARMENT OF LEBOVITZ. It is ordered that Robert Alan Lebovitz, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–515. IN RE DISBARMENT OF KANTER. It is ordered that Jeffrey Marc Kanter, of Roslyn Heights, 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–516. IN RE DISBARMENT OF MCKABA. It is ordered that Raymond McKaba, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–517. IN RE DISBARMENT OF SABISTON. It is ordered that William Devine Sabiston, Jr., of Carthage, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–1968. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. D. C. E. D. N. C. [Probable jurisdiction noted, 471 U. S. 1064.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of American Association of Exporters & Importers et al. for leave to file a brief as *amici curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–495. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLO-

GISTS ET AL. C. A. 3d Cir. [Probable jurisdiction postponed, 471 U. S. 1014.] Motion of Alan Ernest to allow counsel to represent children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–836. VASQUEZ, WARDEN *v.* HILLERY. C. A. 9th Cir. [Certiorari granted, 470 U. S. 1026.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–1160. PEMBAUR *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. [Certiorari granted, 472 U. S. 1016.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* 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 Indiana State Conference of NAACP Branches for leave to file out-of-time motion for divided argument denied.

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. [Certiorari granted, 471 U. S. 1098.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–1340. WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 471 U. S. 1014.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–1360. CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 471 U. S. 1013.] Motions of National Institute of Municipal Law Officers, National League of Cities et al., and Freedom Council Foundation for leave to file briefs as *amici curiae* granted.

No. 84–1379. DIAMOND ET AL. *v.* CHARLES ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of

Alan Ernest to allow counsel to represent children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 84–1484. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 84–1485. MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE. C. A. 1st Cir. [Certiorari granted, 471 U. S. 1098.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument 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, 471 U. S. 1098.] Motion of petitioners for divided argument granted.

No. 84–1503. CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL–CIO, ET AL. *v.* HUDSON ET AL. C. A. 7th Cir. [Certiorari granted, 472 U. S. 1007.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 84–1601. AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL. Sup. Ct. Ala. [Probable jurisdiction postponed, 471 U. S. 1134.] Motion of Association of Southern California Defense Counsel et al. for leave to file a brief as *amici curiae* granted.

No. 84–1686. SORENSON *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. [Certiorari granted, 472 U. S. 1016.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 84–1725. UNITED STATES *v.* CITY OF FULTON ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 903.] Motion of

the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 84–1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, 472 U. S. 1026.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 84–1803. ATTORNEY GENERAL OF NEW YORK *v.* SOTO-LOPEZ ET AL. C. A. 2d Cir. [Probable jurisdiction noted, *ante*, p. 903.] Motion of appellant to dispense with printing the joint appendix denied.

Rehearing Denied

No. 84–6005. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 472 U. S. 1018. Petition for rehearing denied.

No. 84–1720. HOLDING *v.* SOVRAN BANK, EXECUTOR AND TRUSTEE OF THE ESTATE OF MUSE, *ante*, p. 911. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

SEPTEMBER 19, 1985

Dismissal Under Rule 53

No. 84–1929. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* ZEMBOWER ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 755 F. 2d 174.

SEPTEMBER 20, 1985

Dismissal Under Rule 53

No. 85–209. UNITED STATES *v.* MOLSBERGEN. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 757 F. 2d 1016.

SEPTEMBER 23, 1985

Dismissal Under Rule 53

No. 85–146. BANCO CREDITO AGRICOLA DE CARTAGO ET AL. *v.* ALLIED BANK INTERNATIONAL, AS AGENT FOR FIDELITY

UNION TRUST CO. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 757 F. 2d 516.

Miscellaneous Order

No. A–220. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BOOKER. Application to vacate the order of the United States Court of Appeals for the Eleventh Circuit, dated September 9, 1985, staying the execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, granted. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application to vacate the stay.

JUSTICE POWELL, concurring.*

My vote was to grant Florida's application to vacate the stay of execution in this case. I write as it seems important to address two points raised by JUSTICE MARSHALL's dissent.

I

The dissent contends that our action in this case conflicts with our customary deference to the decisions of courts of appeals on stay applications. Such deference is not absolute. We have noted previously that "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the court of appeals that has denied a writ of habeas corpus." *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983). To the contrary, stays in cases of this sort should be granted only when (i) it is reasonably probable that four Members of the Court would vote to grant certiorari or to note probable jurisdiction, and also (ii) there is a significant possibility that this Court will reverse the decision below. *Ibid.*[1] In this case, after examining the State's application to vacate, the respondent's response, the application for a stay filed with the Court of Appeals, and the opinions of the Court of Appeals and the District Court, I concluded that there was no basis for finding that either prong of the *Barefoot* v. *Estelle* test was satisfied. The Court of Appeals offered no reasons for its decision to grant the stay application, and no plausible reason appeared from the record.

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*This opinion was filed September 24, 1985.

[1] The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.

Deference is a two-way street. Although my vote did not depend on speculation as to the Court of Appeals' reason for granting respondent's stay application, it would not be surprising if that court was confused by the seeming absence of deference in our decisions in *Pinkerton* v. *McCotter*, *ante*, p. 925, and *Darden* v. *Wainwright*, *ante*, p. 928. In both of those cases, this Court reversed denials of stays of execution, on the ground that four Justices either had voted to grant certiorari or had suggested that such a vote was likely. I joined those decisions out of a concern that the Court ordinarily should not permit an execution to moot our consideration of a case that we had agreed, or probably would agree, to hear on the merits. I noted, however, that in my view the petitions in those cases were wholly without merit. *Darden*, *ante*, at 928 (POWELL, J., concurring); *Pinkerton*, *ante*, at 926 (POWELL, J., concurring). Consequently, and given the Court of Appeals' greater familiarity with the case, there was a strong argument that the proper course was to accept that court's evaluation of the likelihood of reversal. I declined to accept that argument in those cases, although the decision was a close one.[2]

If affirmance was not required in *Pinkerton* and *Darden* under an appropriately deferential standard of review, it cannot be *necessary* here. In *Pinkerton* and *Darden*, the Court of Appeals' judgment that reversal on the merits was unlikely had substantial force; in this case, the Court of Appeals' decision lacks a plausible justification. Only a generalized preference for delay in capital punishment cases would justify affirming the issuance of a stay solely on deference grounds, while according little or no deference where a stay has been denied below. In my view, the degree of deference accorded court of appeals rulings on stay applications cannot properly depend so completely on the result reached below.[3] Rather, this Court should both hesitate to overturn lower courts' decisions—since those decisions often reflect superior knowledge of and familiarity with the particular case—and yet remain constant in our duty to reverse those decisions in which it

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[2] *Darden* v. *Wainwright*, *ante*, at 928 (POWELL, J., concurring); *Pinkerton* v. *McCotter*, *ante*, at 926 (POWELL, J., concurring).

[3] If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, *Barefoot* v. *Estelle*'s statement that stays of execution are not automatic in capital cases, 463 U. S., at 895, would effectively be overruled.

appears that a court of appeals has abused its discretion. Application of these principles in *Pinkerton* and *Darden* was difficult, given my view that the petitions in those cases were meritless. This case plainly presents weaker grounds for affirming the decision reached below.[4]

II

The second point which the dissent raises requires less discussion. The dissent appears to conclude that it is inappropriate, in cases such as this one, to vacate a stay prior to the filing of the petition for certiorari. This position would render the grant of a stay effectively unreviewable in capital cases. The role of a stay in such cases is to delay the execution while the petition for certiorari is prepared and filed. If a stay, once entered, must necessarily remain in place until it has accomplished its purpose, then review of decisions to grant stays is senseless. This Court has never suggested that the discretion to grant or deny stays in capital cases (or any other class of cases) is total.

Finally, it bears emphasizing that the State has a legitimate interest in carrying out its lawfully imposed sentences. Respondent was sentenced to death for a particularly brutal murder in 1978. His conviction and sentence have thrice been reviewed by the Florida Supreme Court. *Booker* v. *State*, 441 So. 2d 148 (1983); *Booker* v. *State*, 413 So. 2d 756 (1982); *Booker* v. *State*, 397 So. 2d 910, cert. denied, 454 U. S. 957 (1981). He has filed two petitions for habeas corpus in federal court; both have been denied. *Booker* v. *Wainwright*, 764 F. 2d 1371 (CA11 1985); *Booker* v. *Wainwright*, 703 F. 2d 1251 (CA11), rehearing denied, 708 F. 2d 734, cert. denied, 464 U. S. 922 (1983). This Court has twice denied certiorari. *Booker* v. *Wainwright*, 464 U. S. 922 (1983); *Booker* v. *Florida*, 454 U. S. 957 (1981). None of the many opinions that have been filed in this protracted litigation suggests that respondent is innocent or that his conviction raises any serious constitutional issues. For our system of justice to function effectively, litigation in cases such as this one must cease when there is no reasonable ground for questioning either the guilt of the defendant or the constitutional sufficiency of the procedures employed to convict and sentence him.

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[4] I should emphasize that nothing in either *Pinkerton*, *Darden*, or this case alters the test that we set forth in *Barefoot* v. *Estelle* for determining when entry of a stay is appropriate.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Today the Court vacates a stay pending certiorari granted by the Court of Appeals for the Eleventh Circuit, although we have not even received the petition for certiorari. In so doing, the Court ignores repeated reminders by Justices of the Court that our power to vacate a stay entered by a lower court should be reserved only for exceptional circumstances, see, *e. g.*, *Kemp* v. *Smith*, 463 U. S. 1321 (1983) (POWELL, J., in chambers); *O'Connor* v. *Board of Education*, 449 U. S. 1301 (1980) (STEVENS, J., in chambers), and that the lower court's decision is "deserving of great weight," *Commodity Futures Trading Comm'n* v. *British American Commodity Options Corp.*, 434 U. S. 1316, 1319 (1977) (MARSHALL, J., in chambers).

Although the State's brief application fails even to suggest that it has met this heavy burden, the Court has moved "with an impetuousness and arrogance that is truly astonishing," *Wainwright* v. *Adams*, 466 U. S. 964, 966 (1984) (MARSHALL, J., dissenting from the grant of application to vacate stay of execution). The apparent basis for the State's application is a concern that the Court of Appeals understood our recent decisions in *Pinkerton* v. *McCotter*, *ante*, p. 925, and *Darden* v. *Wainwright*, *ante*, p. 928, to mandate the grant of a stay in this case. However, this Court has provided detailed guidance to the courts of appeals as to stays in capital cases, see *Barefoot* v. *Estelle*, 463 U. S. 880, 887–896 (1983). There is no reason for us to assume, on the meager record before us, that the Court of Appeals was unaware of, or misapplied, those standards—let alone that it committed the gross abuse of discretion necessary to support a grant of this application, see *Wainwright* v. *Adams*, *supra*, at 965. I am therefore at a loss to understand the Court's unwillingness to let matters run their ordinary course.

I dissent.

SEPTEMBER 25, 1985

Miscellaneous Order

No. A–236 (85–5466). CELESTINE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death scheduled for Saturday, September 28, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of

certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

OCTOBER 2, 1985

Miscellaneous Order

No. A–235. THREE MILE ISLAND ALERT, INC. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. Application to continue the stay entered on June 7, 1985, by the United States Court of Appeals for the Third Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BRENNAN would continue the stay pending the timely filing and disposition of a petition for writ of certiorari.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 939 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.