JUNE 30, 1986

Appeal Dismissed

No. 85–6900. RICHARDSON *v.* L. S. U. MEDICAL CENTER ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Affirmed. (See No. 85–1500, *ante*, p. 251, and No. 85–6593, *ante*, p. 255.)

Certiorari Granted—Vacated and Remanded

No. 84–1426. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* MCCRAY. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Allen* v. *Hardy*, *ante*, p. 255, and *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Reported below: 750 F. 2d 1113.

No. 85–97. PETROLEUM HELICOPTERS, INC. *v.* SINCOX, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS, SINCOX ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207 (1986). Reported below: 759 F. 2d 19.

No. 85–1028. MICHIGAN *v.* BOOKER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Allen* v. *Hardy*, *ante*, p. 255, and *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Reported below: 775 F. 2d 762.

CHIEF JUSTICE BURGER, dissenting.

I would reverse the decision of the Court of Appeals. The court concluded that the Sixth Amendment prohibits parties in a criminal case from using peremptory challenges to exclude black persons from the petit jury. In *Batson* v. *Kentucky*, 476 U. S. 79, 84–85, n. 4 (1986), petitioner raised precisely this Sixth Amendment argument. JUSTICE REHNQUIST and I rejected this posi-

tion, observing that "because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community." *Id.*, at 138. The Court in *Batson* did not challenge this conclusion and indeed, it refused to even discuss the Sixth Amendment issue. *Id.*, at 84–85, n. 4. Instead, the Court took the highly irregular step of considering an argument not raised by the petitioner, *id.*, at 112 (BURGER, C. J., dissenting), and concluded that the Equal Protection Clause was violated by the case-specific use of peremptory challenges on the basis of race.

It is apparent that the Sixth Amendment argument raised here is without merit. I would therefore simply reverse the decision of the Court of Appeals.

Miscellaneous Orders

No. — — ——. CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A–1011. KEMP, WARDEN *v.* FLEMING. Application of the Attorney General of Georgia for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. 27, Orig. OHIO *v.* KENTUCKY. Accounting of the Special Master is received and ordered filed. The Special Master appointed by the Court is discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, 471 U. S. 153.]

No. 85–663. WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES *v.* PURSER ET AL. Sup. Ct. Wash.; and

No. 85–1821. UTAH ET AL. *v.* UTE INDIAN TRIBE. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85–792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85–793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1081.] Motion of the Solicitor General for divided argument granted.

No. 85–889. COLORADO *v.* BERTINE. Sup. Ct. Colo. [Certiorari granted, 475 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1433. RICHARDSON, WARDEN *v.* MARSH. C. A. 6th Cir. [Certiorari granted, 476 U. S. 1168.] Motion for appointment of counsel granted, and it is ordered that R. Steven Whalen, Esquire, of Detroit, Mich., be appointed to serve as counsel for respondent in this case.

No. 85–1563. CALIFORNIA *v.* BROWN. Sup. Ct. Cal. [Certiorari granted, 476 U. S. 1157.] Motion for appointment of counsel granted, and it is ordered that Monica Knox, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 85–1939. IN RE BRANNEN; and
No. 85–6872. IN RE THAPER. Petitions for writs of mandamus denied.

No. 85–1965. IN RE GAUNCE. Petition for writ of mandamus and/or petition for writ of certiorari denied. C. A. 9th Cir. Reported below: 779 F. 2d 1434.

No. 85–6899. IN RE FISHER. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 85–1199. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE *v.* COUNTY OF LOS ANGELES, CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted.

No. 85–1206. ROSE *v.* ROSE ET AL. Appeal from Ct. App. Tenn. Probable jurisdiction noted.

Certiorari Granted

No. 85–1520. ANDERSON *v.* CREIGHTON ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 766 F. 2d 1269.

No. 85–1656. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* PETTY. C. A. 5th Cir. Certiorari granted. Reported below: 779 F. 2d 299.

No. 85–1672. UNITED STATES *v.* MERCHANT. C. A. 9th Cir. Certiorari granted. Reported below: 760 F. 2d 963.

No. 85–1804. WEST *v.* CONRAIL ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 780 F. 2d 361.

No. 85–1043. PILOT LIFE INSURANCE CO. *v.* DEDEAUX. C. A. 5th Cir. Certiorari granted and case set for oral argument in tandem with No. 85–686, *Metropolitan Life Insurance Co.* v. *Taylor* [certiorari granted, 475 U. S. 1009], and No. 85–688, *General Motors Corp.* v. *Taylor* [certiorari granted, 475 U. S. 1009]. Reported below: 770 F. 2d 1311.

Certiorari Denied. (See also Nos. 85–6900 and 85–1965, *supra.*)

No. 85–1494. FORELAWS ON BOARD ET AL. *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–1587. AGEE ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 884.

No. 85–1624. ROSENFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 10.

No. 85–1659. COAST CATAMARAN CORP. ET AL. *v.* HASSINGER, ADMINISTRATOR OF THE ESTATE OF HASSINGER, ET AL.; and

No. 85–1786. TIDELAND ELECTRIC MEMBERSHIP CORP. *v.* HASSINGER, ADMINISTRATOR OF THE ESTATE OF HASSINGER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 781 F. 2d 1022.

No. 85–1717. WRODA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 1158, 497 N. E. 2d 1041.

No. 85–1755. LEBER *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 372.

No. 85–1805. ROSS ET AL. *v.* AFP IMAGING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 780 F. 2d 202.

No. 85–1809. MILLER CURTAIN CO., INC. *v.* RUIZ. Sup. Ct. Tex. Certiorari denied. Reported below: 702 S. W. 2d 183.

No. 85–1816. ALPINE CONSTRUCTION CO. ET AL. *v.* FRICK CONSTRUCTION CO., BY ITS TRUSTEE, RAVICK. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 581.

No. 85–1822. WILLIS *v.* CLEVELAND TRUST CO., AKA AMERITRUST CO., EXECUTOR OF THE ESTATE OF FIRESTONE, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 20 Ohio St. 3d 66, 485 N. E. 2d 1052.

No. 85–1824. HAREN *v.* CITY OF CANTON, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 85–1825. EVANS ET AL. *v.* OUACHITA LOCAL NUMBER 654, UNITED PAPERWORKERS INTERNATIONAL UNION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1062.

No. 85–1827. GRIDER *v.* TEXAS OIL & GAS CORP. ET AL. Sup. Ct. Okla. Certiorari denied.

No. 85–1828. RHOADES *v.* ACLI GOVERNMENT SECURITIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 4.

No. 85–1831. OTIS ELEVATOR CO. *v.* RUST ENGINEERING CO. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 203.

No. 85–1834. BILLER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 5 Conn. App. 616, 501 A. 2d 1218.

No. 85–1838. MCKENNA *v.* WILLOW PRACTICE. Sup. Ct. S. C. Certiorari denied.

No. 85–1843. RETTIG ET AL. *v.* KENT CITY SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 328.

No. 85–1845. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL. C. A. Fed. Cir. Certiorari denied.

No. 85–1847. MINEO ET AL. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 939.

No. 85–1848. KOEHLER *v.* ILLINOIS CENTRAL GULF RAILROAD CO. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 473, 488 N. E. 2d 542.

No. 85–1851. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 174 Cal. App. 3d 1114, 220 Cal. Rptr. 475.

No. 85–1857. CHOW ET AL., DBA HEALING ART PHARMACY *v.* CALIFORNIA STATE BOARD OF PHARMACY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–1858. JACKSON *v.* PEPSI-COLA BOTTLERS OF TOLEDO, INC. C. A. 6th Cir. Certiorari denied. Reported below: 783 F. 2d 50.

No. 85–1863. MICHIGAN *v.* PAYNE. Sup. Ct. Mich. Certiorari denied. Reported below: 424 Mich. 475, 381 N. W. 2d 391.

No. 85–1865. BERGER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–1874. BARTEL DENTAL BOOK CO. INC. ET AL. *v.* SCHULTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 2d 486.

No. 85–1876. COMSIA *v.* MAGNONE ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 85–1897. MACKECHNIE ET AL. *v.* COUNTY OF SULLIVAN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 52, 490 N. E. 2d 523.

No. 85–1911. BAILEY *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 4th Cir. Certiorari denied.

No. 85–1912. MARR *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 85–1926. HART *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1017.

No. 85–1943. PEARCE *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 328, 784 F. 2d 1132.

No. 85–1952. BASKETT ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 93.

No. 85–1955. SAVINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85–1956. NATHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 85–1969. CITY OF OAKLAND *v.* OAKLAND RAIDERS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 174 Cal. App. 3d 414, 220 Cal. Rptr. 153.

No. 85–1984. GRAHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85–1995. SHORTT ACCOUNTANCY CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 1448.

No. 85–6337. DEJESUS *v.* PERALES, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 316.

No. 85–6386. HOGAN ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 769 F. 2d 886.

No. 85–6848. CHEATEM *v.* ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 85–6859. GRIFFIN *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 1226.

No. 85–6863. MOBLEY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1177.

No. 85–6866. PRUITT *v.* LANDMARK SAVINGS ASSN. ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–6869. CHICCO *v.* JOMAR REALTY, INC. C. A. 1st Cir. Certiorari denied.

No. 85–6870. THRASHER *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 784 F. 2d 327.

No. 85–6874. PLIES *v.* WILLS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 318.

No. 85–6877. MIDWIFE *v.* TUCSON CITIZEN NEWSPAPER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 316.

No. 85-6880. MYER *v.* DORSEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6881. LEDAY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 177 Cal. App. 3d 461, 221 Cal. Rptr. 398.

No. 85-6888. BAKER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 487 So. 2d 26.

No. 85-6894. PEREZ *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1156.

No. 85-6895. PACE *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85-6896. SCOTT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1179.

No. 85-6898. KNIGHT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1154.

No. 85-6902. SIMS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6905. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-6907. HEATH *v.* LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT. Sup. Ct. Ky. Certiorari denied.

No. 85-6908. MABERY *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1154.

No. 85-6910. MATTHEWS *v.* SPEARS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 179.

No. 85-6912. MATHIAS *v.* GREENSPAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6922. SAMPLEY *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 610.

No. 85-6936. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6943. ROBERTSON *v.* ROBERTSON ET AL. Sup. Ct. Cal. Certiorari denied.

No. 85-6954. MILLER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6961. MABERY *v.* KEITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85-6975. KIMBERLIN *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 788 F. 2d 434.

No. 85-6979. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 696.

No. 85-6996. NAVE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6999. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85-7006. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1180.

No. 85-7020. HOGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 653.

No. 85-7032. MELHEM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 795 F. 2d 75.

No. 84-1304. SYNANON CHURCH ET AL. *v.* READER'S DIGEST ASSN., INC., ET AL. Sup. Ct. Cal. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 37 Cal. 3d 244, 690 P. 2d 610.

No. 84-6698. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 756 F. 2d 310.

No. 85–1499. LANDAHL, BROWN & WEED ASSOCIATES, INC. *v.* CITY OF CAPE CORAL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 470 So. 2d 25.

No. 85–5823. WELCH *v.* RICE, WARDEN. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 770 F. 2d 162.

No. 84–6895. SIRECI *v.* FLORIDA. Sup. Ct. Fla.;
No. 85–1525. HARTMAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85–6011. TUGGLE *v.* VIRGINIA. Sup. Ct. Va.;
No. 85–6273. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 85–6440. ZAGORSKI *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85–6649. EVANS *v.* MARYLAND. Ct. App. Md.;*
No. 85–6650. FOSTER *v.* MARYLAND. Ct. App. Md.;*
No. 85–6749. WICKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 85–6846. WALLACE *v.* INDIANA. Sup. Ct. Ind.; and
No. 85–6891. GALL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: No. 84–6895, 469 So. 2d 119; No. 85–1525, 703 S. W. 2d 106; No. 85–6011, 230 Va. 99, 334 S. E. 2d 838; No. 85–6273, 772 F. 2d 668; No. 85–6440, 701 S. W. 2d 808; No. 85–6649, 304 Md. 487, 499 A. 2d 1261, and 305 Md. 306, 503 A. 2d 1326; No. 85–6650, 304 Md. 439, 499 A. 2d 1236, and 305 Md. 306, 503 A. 2d 1326; No. 85–6749, 783 F. 2d 487; No. 85–6846, 486 N. E. 2d 445; No. 85–6891, 702 S. W. 2d 37.

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. 85–1353. BOX *v.* A & P TEA CO. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 772 F. 2d 1372.

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*[REPORTER'S NOTE: For separate dissenting opinion of JUSTICE MARSHALL in these cases, see *post*, p. 1023.]

No. 85–1403. KANSAS GAS & ELECTRIC CO. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 780 F. 2d 1505.

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

In this case, the United States Court of Appeals for the Tenth Circuit has held that 42 U. S. C. § 5851(a),[1] which protects employees of nuclear facilities against retaliation by their employers for offering assistance to the Nuclear Regulatory Commission in carrying out its responsibilities under the Atomic Energy Act of 1954,[2] prohibits an employer from terminating a quality control inspector because the inspector has filed internal safety complaints—that is, complaints directed not to the Commission, but only to the employer itself. 780 F. 2d 1505 (1985). The Tenth Circuit concluded that although the statutory language does not unambiguously include such cases, the statute's purpose and its legislative history indicate that its extension to purely internal complaints is appropriate. *Id.*, at 1510–1513. In so holding, the Court of Appeals took note that the Court of Appeals for the Fifth Circuit had considered precisely the same statutory language and legislative history and reached the opposite conclusion in *Brown & Root, Inc.* v. *Donovan*, 747 F. 2d 1029 (1984). The Tenth Circuit specifically rejected the Fifth Circuit's ruling in *Brown & Root* and instead aligned itself with an earlier ruling of the Ninth Cir-

[1] The statute provides as follows:

"No employer, including a [Nuclear Regulatory] Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

"(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

"(2) testified or is about to testify in any such proceeding or;

"(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended." 92 Stat. 2951.

[2] 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.*

cuit that internal complaints are covered. *Mackowiak* v. *University Nuclear Systems*, 735 F. 2d 1159 (1984).

This direct conflict among the Courts of Appeals should be resolved by this Court. The issue is one of importance to both employees and operators of nuclear installations, and it is an issue that has surfaced either directly or indirectly in at least five appellate decisions in the past four years. See, in addition to the decision below and the cases cited above, the Second Circuit's decision in *Consolidated Edison Co.* v. *Donovan*, 673 F. 2d 61 (1982), and the Illinois Supreme Court's ruling in *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N. E. 2d 372 (1985), cert. denied, 475 U. S. 1122 (1986). I would grant certiorari to resolve the issue.

No. 85–1481. IOWA EX REL. MILLER, ATTORNEY GENERAL OF IOWA, ET AL. *v.* LYNG, SECRETARY OF AGRICULTURE, ET AL.; and

No. 85–1818. LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* IOWA EX REL. MILLER, ATTORNEY GENERAL OF IOWA, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 771 F. 2d 347.

No. 85–1514. MICHIGAN *v.* ESSA. Ct. App. Mich. Certiorari denied. Reported below: 146 Mich. App. 315, 380 N. W. 2d 96.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

Respondent's home began to burn at about 6:20 p.m. on November 27, 1983. Within a short time the fire department responded, extinguished the fire, and departed. An hour and 20 minutes later an arson investigator of the city entered the home to conduct an investigation as to the cause. The Michigan Court of Appeals held that this was a search without a warrant which violated the Fourth Amendment. 146 Mich. App. 315, 380 N. W. 2d 96 (1985). That court relied on the concurrence in *Michigan* v. *Clifford*, 464 U. S. 287, 299 (1984) (STEVENS, J., concurring in judgment), since the inspector gave respondent no notice of the inspection.

In *Michigan* v. *Tyler*, 436 U. S. 499 (1978), we held that the Fourth Amendment was not violated when investigators returned to the scene of a building fire the morning after a fire in order to

continue a warrantless search which had commenced immediately following the fire the night before, but which could not be completed because of darkness, steam, and smoke. We reasoned that "the morning entries were no more than an actual continuation of the first." *Id.*, at 511.

Clifford involved a warrantless search following reentry of a home six hours after a fire had been extinguished. We granted certiorari in that case "to clarify doubt that appears to exist as to the application of our decision in *Tyler*." 464 U. S., at 289. Our effort at clarification, however, proved illusive. A plurality held that an administrative warrant was required for a nonconsensual reentry onto fire-damaged premises. *Id.*, at 291–292 (opinion of POWELL, J.). JUSTICE STEVENS, writing separately, held that a postfire warrantless entry would be reasonable so long as "the inspector either had given the owner sufficient advance notice to enable him or an agent to be present, or had made a reasonable effort to do so." *Id.*, at 303 (footnote omitted). JUSTICE REHNQUIST's dissent for four Members of the Court pointed out that these opinions, "far from clarifying the doubtful aspects of *Tyler*, sow[ed] confusion broadside." *Id.*, at 306.

This case provides another opportunity for the Court to clarify the confusion arising out of the opinions in *Tyler*. Local authorities need direction for their fire inspectors, who are presently left with no clear guidance for conducting important and oft-occurring arson inspections in the wake of *Clifford*'s divided reasoning. Such inspections must be conducted promptly before vandals or weather conditions blur or destroy relevant evidence. I would grant the State's petition for certiorari and set the case for argument.

No. 85–1632. ILLINOIS *v.* HATTERY. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 109 Ill. 2d 449, 488 N. E. 2d 513.

No. 85–1814. EUBANK *v.* INTERNATIONAL PAPER CO. ET AL. C. A. 5th Cir. Motion of respondent International Paper Co. for award of damages denied. Certiorari denied. Reported below: 779 F. 2d 681.

No. 85–1855. JONES *v.* DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA ET AL. C. A. 11th Cir. Motion of respondents to strike petition as frivolous denied. Certiorari denied.

No. 85–1894. FALKOWSKI *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Motion of Christic Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 246 U. S. App. D. C. 274, 764 F. 2d 907, and 251 U. S. App. D. C. 254, 783 F. 2d 252.

Rehearing Denied

No. 84–1340. WYGANT ET AL. *v.* JACKSON BOARD OF EDUCATION ET AL., 476 U. S. 267;

No. 84–1513. CALIFORNIA *v.* CIRAOLO, 476 U. S. 207;

No. 85–121. KEMP, WARDEN *v.* YOUNG, 476 U. S. 1123;

No. 85–1537. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL, 476 U. S. 1110;

No. 85–1652. KEMP, WARDEN *v.* COLEMAN; and KEMP, WARDEN *v.* ISAACS ET AL., 476 U. S. 1164;

No. 85–5273. DAVID *v.* LOUISIANA, 476 U. S. 1130;

No. 85–5491. HOUSTON *v.* TENNESSEE, 476 U. S. 1164;

No. 85–6033. SHAH *v.* KERN COUNTY, CALIFORNIA, ET AL., 476 U. S. 1118;

No. 85–6531. SPRAGGINS *v.* GEORGIA, 476 U. S. 1120;

No. 85–6554. YOUNG *v.* MISSOURI, 476 U. S. 1109;

No. 85–6563. BUFFALOE *v.* ANDERSON, 476 U. S. 1120;

No. 85–6565. GODBEE *v.* NEWSOME, WARDEN, 476 U. S. 1120;

No. 85–6591. LAGRANGE *v.* TEXAS DEPARTMENT OF PUBLIC SAFETY ET AL., 476 U. S. 1121;

No. 85–6610. MYERS *v.* GUILLORY, WARDEN, ET AL., 476 U. S. 1121;

No. 85–6623. BROWN *v.* JEFFERSON, 476 U. S. 1143;

No. 85–6647. DAVIDSON *v.* DAVIS, WARDEN, 476 U. S. 1143;

No. 85–6658. NOVEL *v.* PICARIELLO, JUDGE, ET AL., 476 U. S. 1143;

No. 85–6677. TRAWICK *v.* FLORIDA, 476 U. S. 1143;

No. 85–6737. RANDOLPH *v.* MUNCY, WARDEN, ET AL., 476 U. S. 1173; and

No. 85–6823. IN RE THAPER, 476 U. S. 1139. Petitions for rehearing denied.

No. 85–584. GRANT ET AL. *v.* GENERAL ELECTRIC CREDIT CORP., 476 U. S. 1124. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JULY 7, 1986

Affirmed on Appeal

No. 85-1693. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL. Affirmed on appeal from D. C. D. C.

Appeals Dismissed

No. 85-532. SPORTS & HEALTH CLUB, INC., DBA ST. LOUIS PARK SPORTS & HEALTH CLUB, ET AL. *v.* MINNESOTA, BY GOMEZ-BETHKE, COMMISSIONER OF DEPARTMENT OF HUMAN RIGHTS. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Reported below: 370 N. W. 2d 844.

No. 85-1170. RAPPLEYEA *v.* CAREY ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. JUSTICE STEVENS would vacate the judgment and remand the case for further consideration in light of *Davis* v. *Bandemer*, *ante*, p. 109. Reported below: 66 N. Y. 2d 657, 486 N. E. 2d 830.

Certiorari Granted—Vacated and Remanded

No. 84-1447. SALCER ET AL. *v.* ENVICON EQUITIES CORP. ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Randall* v. *Loftsgaarden*, *ante*, p. 647. Reported below: 744 F. 2d 935.

No. 84-1793. CITY OF MCKEESPORT ET AL. *v.* CUNNINGHAM. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Riverside* v. *Rivera*, 477 U. S. 561 (1986). Reported below: 753 F. 2d 262.

No. 85-50. SHULTZ, SECRETARY OF STATE *v.* PALMER ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Library of Congress* v. *Shaw*, *ante*, p. 310.

No. 85-377. FRESCHI, AS TRUSTEE OF WILLIAM FRESCHI TRUST *v.* GRAND COAL VENTURE ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Randall* v. *Loftsgaarden*, *ante*, p. 647, and *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985). Reported below: 767 F. 2d 1041.

No. 85–553. KEMP, WARDEN *v.* BROOKS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 762 F. 2d 1383.

No. 85–736. KEMP, WARDEN *v.* THOMAS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 766 F. 2d 452.

No. 85–1067. UNITED STATES *v.* BEN M. HOGAN CO., INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 769 F. 2d 1293.

No. 85–1218. KEMP, WARDEN *v.* CORN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 772 F. 2d 681.

No. 85–1300. COLLINS ET AL. *v.* CITY OF NORFOLK ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Thornburg* v. *Gingles*, *ante*, p. 30. Reported below: 768 F. 2d 572.

No. 85–1309. KOEHLER, WARDEN *v.* MCGHAR. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 780 F. 2d 1022.

No. 85–1345. J. A. CROSON CO. *v.* CITY OF RICHMOND. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986). Reported below: 779 F. 2d 181.

No. 85–1461. AIKEN, WARDEN *v.* HYMAN; and

No. 85–6638. HYMAN *v.* AIKEN, WARDEN. C. A. 4th Cir. Motions of William G. Hyman for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and cases

remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570, and *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Reported below: 777 F. 2d 938.

No. 85–1639. GREER, WARDEN *v.* GRAY. C. A. 7th 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 *Murray* v. *Carrier*, 477 U. S. 478 (1986). Reported below: 778 F. 2d 350.

No. 85–1853. CALIFORNIA *v.* HAMILTON. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570. Reported below: 41 Cal. 3d 408, 710 P. 2d 981.

No. 85–5513. POTTS *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Clark*, *ante*, p. 570, and *Francis* v. *Franklin*, 471 U. S. 307 (1985). Reported below: 734 F. 2d 526 and 764 F. 2d 1369.

No. 85–6094. BUCKHALTER *v.* PEPSI-COLA GENERAL BOTTLERS, INC., ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *University of Tennessee* v. *Elliott*, *ante*, p. 788. Reported below: 768 F. 2d 842.

Certiorari Dismissed

No. 85–1265. MICHIGAN *v.* SHABAZ. Sup. Ct. Mich. [Certiorari granted, 475 U. S. 1094.] The order entered March 31, 1986, granting the petition for writ of certiorari is vacated. The petition for writ of certiorari is dismissed as moot.

Miscellaneous Orders

No. A–980. KADANS *v.* GUNDERSON ET AL. Sup. Ct. Nev. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–553. IN RE DISBARMENT OF VELASQUEZ. Disbarment entered. [For earlier order herein, see 476 U. S. 1102.]

No. D–554. IN RE DISBARMENT OF WOOD. Disbarment entered. [For earlier order herein, see 475 U. S. 1115.]

No. D–555. IN RE DISBARMENT OF KERPAN. Disbarment entered. [For earlier order herein, see 475 U. S. 1115.]

No. D–558. IN RE DISBARMENT OF MISHKIN. It is ordered that Stephen A. Mishkin, of Katonah, 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–559. IN RE DISBARMENT OF BURKE. It is ordered that Norman Edmund Burke, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–560. IN RE DISBARMENT OF HEYSER. It is ordered that Fred Peter Heyser, of Upper Marlboro, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–561. IN RE DISBARMENT OF STANTON. It is ordered that Nile Stanton, of Indianapolis, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 105, Orig. KANSAS *v.* COLORADO. It is ordered that the Honorable Wade H. McCree, Jr., of Ann Arbor, Mich., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 475 U. S. 1079.]

No. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 815.] Case restored to the calendar for reargument insofar as it poses the issue whether a presumptively reasonable attorney's fee award under § 304(d) of the Clean Air Act, 42 U. S. C. § 7604(d), may be "multiplied" or otherwise enhanced to reflect the risk that plaintiffs might not have prevailed and, therefore, might have obtained from defendants no attorney's fees at all.

No. 85–1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. [Certiorari granted, 476 U. S. 1139.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied. John H. Corbett, Jr., Esquire, of Pittsburgh, Pa., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

Certiorari Granted

No. 85–1129. JOHNSON *v.* TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 770 F. 2d 752.

No. 85–999. UNITED STATES *v.* PARADISE ET AL. C. A. 11th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 767 F. 2d 1514.

No. 84–6811. MCCLESKEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1, 2, 3, 4, and 5 presented by the petition. Reported below: 753 F. 2d 877.

Certiorari Denied

No. 84–5878. LOCKETT *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 407.

No. 84-6791. EARNEST *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 95, 703 P. 2d 872.

No. 84-6983. BOSQUE *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-177. ORR, SECRETARY OF THE AIR FORCE, ET AL. *v.* TURNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 817.

No. 85-276. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* WALKER. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 942.

No. 85-556. KEMP, WARDEN *v.* DRAKE. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1449.

No. 85-908. CRANKE ET AL. *v.* HAYGOOD. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 1350.

No. 85-1071. RAYBURN *v.* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 1164.

No. 85-1085. AFRO-AMERICAN POLICE ASSN., INC., ET AL. *v.* UNITED STATES; and

No. 85-1404. UNITED STATES *v.* AFRO-AMERICAN POLICE ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 881.

No. 85-1104. SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION *v.* FUSON. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 55.

No. 85-1341. JOHNSON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. *v.* MANZIE. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1161.

No. 85-1394. HAGLER *v.* CALLAHAN, WARDEN; and

No. 85-1550. CALLAHAN, WARDEN, ET AL. *v.* HAGLER. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 711.

No. 85-1592. BURKE ET AL. *v.* MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 780 F. 2d 5.

No. 85–1635. BUTTS ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 141.

No. 85–1688. JOHNS-MANVILLE SALES CORP. *v.* CATHEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 2d 1565.

No. 85–1837. BLOCK ET AL. *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 85–5474. AILLON *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–5589. RUSSELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85–5624. STEINBERG *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85–5913. MARTIN *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 711.

No. 85–6045. LESCALLETT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85–6064. MIDDLETON *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 2d 1083.

No. 85–6158. AGNEW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1043.

No. 85–6283. SLINKER *v.* KEPLINGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 52.

No. 85–6329. BOWEN *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 769 F. 2d 672.

No. 85–492. DEVEREAUX ET AL. *v.* GEARY ET AL. C. A. 1st Cir. Motion of Phil Caruso for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 765 F. 2d 268.

No. 85–976. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 773 F. 2d 136.

No. 85–1225. BAKER *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, ET AL.;

No. 85–1251. TEXAS *v.* HILL, 47TH DISTRICT ATTORNEY OF TEXAS;

No. 85–1412. HILL, 47TH DISTRICT ATTORNEY OF TEXAS *v.* TEXAS; and

No. 85–1512. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, ET AL. *v.* BAKER. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 769 F. 2d 289 and 774 F. 2d 1285.

No. 85–1317. TUCKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 773 F. 2d 136.

No. 85–5802. BROOKS *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 762 F. 2d 1383.

No. 85–6022. CHURCH *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 767 F. 2d 639.

No. 85–6240. HAMILTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 478 So. 2d 123.

No. 85–1583. JOHNS-MANVILLE SALES CORP. ET AL. *v.* JACKSON. C. A. 5th Cir. Motion of Keene Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 781 F. 2d 394.

No. 85–5451. RILEY *v.* DELAWARE. Sup. Ct. Del.;

No. 85–6447. TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir.;

No. 85–6671. ROBERTS *v.* AIKEN, WARDEN, ET AL. Ct. Common Pleas S. C., Berkeley County;

No. 85–6748. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 85–6818. WILLIAMS *v.* KEMP, WARDEN. Sup. Ct. Ga.; and

No. 85–6834. ROOK *v.* RICE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: No. 85–5451, 496 A. 2d 997; No. 85–6447, 776 F. 2d 1487; No. 85–6748, 109 Ill. 2d 391,

488 N. E. 2d 255; No. 85–6818, 255 Ga. 380, 338 S. E. 2d 669; No. 85–6834, 783 F. 2d 401.

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. 85–6648. HUFFINGTON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 559, 500 A. 2d 272, and 305 Md. 306, 503 A. 2d 1326.

JUSTICE BRENNAN, dissenting.

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

JUSTICE MARSHALL, dissenting in this case and in No. 85–6649, *Evans* v. *Maryland*, cert. denied, *ante*, p. 1010, and No. 85–6650, *Foster* v. *Maryland*, *ante*, p. 1010.

Petitioners were sentenced to death pursuant to a procedural scheme that they strenuously contend is unconstitutional. The Maryland Court of Appeals, through a highly creative reading of Maryland law and a heavy dose of procedural technicality, managed to affirm petitioners' sentences without reaching their constitutional claim. I consider such evasion repugnant, and I dissent from the Court's denial of certiorari.

The dispute in these cases rests on Md. Ann. Code, Art. 27, § 413(h) (1957). That section, designed to guide the deliberations of the sentencing jury in capital cases, provides:

> "(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> "(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

> "(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life."

The language of these provisions is clear: death shall be imposed *whenever* mitigating circumstances do not outweigh aggravating circumstances. It follows that death must be imposed when mitigating and aggravating circumstances are in equipoise. Put another way, death must be imposed *unless* mitigating circumstances outweigh aggravating circumstances: the burden of proof on the question of whether mitigating circumstances outweigh aggravating circumstances is on the defendant.

This understanding of the statute is confirmed by Maryland Rule 4–343, a recodification of Md. Rules Proc. 772A (superseded), which prescribes the verdict sheet used in Maryland capital sentencing proceedings. In Section I of that verdict sheet, the jury lists the aggravating circumstances it has found. In Section II, it lists the mitigating circumstances it has found. In Section III, it is instructed to answer "yes" or "no" to the following statement: "Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked 'yes' in Section II outweigh the aggravating circumstances marked 'yes' in Section I." The jury is further instructed that if Section III is marked "no," it must enter a sentence of death. This rule, enacted contemporaneously with § 413, effectuates the plain language of the statute—the jury must return a sentence of death unless the defendant affirmatively proves that mitigating outweigh aggravating circumstances.

Despite the apparent clarity of the statutory language and the verdict sheet, the Maryland Court of Appeals in *Tichnell* v. *State*, 287 Md. 695, 730, 415 A. 2d 830, 848–849 (1980), appeared to read the statute differently. It stated:

> "Section 413 does not explicitly specify which party has the burden of producing evidence and the burden of persuasion. . . . [I]f the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. § 413(h)(2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion

> on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

The court did not attempt to reconcile this reading with the language of § 413(h), or indeed with the court rule it had approved two years earlier.

Pronouncements of the Maryland Court of Appeals in cases subsequent to *Tichnell* were conflicting. The Maryland courts continued to agree that the rule established by that court as Md. Rules Proc. 772A and 4–343, instructing the jury that it must return a sentence of death if mitigating circumstances do not outweigh aggravating, was valid under the Court of Appeals' decisions. Capital defendants, in case after case, continued unsuccessfully to challenge § 413(h) as unconstitutionally allocating that burden. See *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (MARSHALL, J., dissenting from denial of certiorari) (Court should review constitutionality of § 413(h) because it appears to place burden on defendant); *Foster* v. *State*, 304 Md. 439, 471, 499 A. 2d 1236, 1253 (1985) (argument that Maryland capital punishment statute places improper burden on defendants at sentencing phase "made in virtually all death sentence appeals in this Court"). The Maryland Court of Appeals did not return to the point directly, except occasionally to refer back to *Tichnell* or to quote or paraphrase the language of the statute. *E. g.*, *Johnson* v. *State*, 303 Md. 487, 537, 495 A. 2d 1, 26 (1985), cert. denied, 474 U. S. 1093 (1986); *Trimble* v. *State*, 300 Md. 387, 415, n. 16, 478 A. 2d 1143, 1157, n. 16 (1984), cert. denied, 469 U. S. 1230 (1985); *Johnson* v. *State*, 292 Md. 405, 438, 439 A. 2d 542, 560–561 (1982). The jury instruction required by Rules 772A and 4–343 continued in use.

In these cases, petitioners were convicted of murder and sentenced to death. At the trial and appellate levels, they strenuously challenged the burdens established by Maryland law, attacking § 413(h) "as implemented by Md. Rule 772A" as placing the burden on the capital defendant to convince the sentencer that mitigating circumstances outweigh aggravating circumstances. See *Evans* v. *State*, 304 Md. 487, 554, 499 A. 2d 1261, 1296 (1985) (McAuliffe, J., concurring and dissenting) (quoting petitioner Evans' appellate brief).

The Maryland Court of Appeals rejected petitioners' challenge. Their attack, it explained, reflected a misunderstanding of *Tichnell* and of Maryland law. The language of the Maryland statute,

the court stated, in fact did not speak to the "case where the sentencing authority found the aggravating and mitigating circumstances to be evenly balanced or was unable to determine which outweighed the other." *Foster, supra,* at 478–479, 499 A. 2d, at 1256. The burden of proof in such cases, the court definitively stated, was on the prosecution.

One might think that this ruling would have been cause for celebration by petitioners. Petitioners were condemned to death pursuant to instructions that had put the burden of proof on them at a key point in the sentencing proceeding. They had strenuously challenged that scheme both at the trial and appellate levels. And the Maryland Court of Appeals had just held that state law would not permit such an imposition of the burden. One might forgive petitioners for believing that they were therefore due to receive new sentencing proceedings. The Maryland Court of Appeals, however, disagreed.

The Maryland Court of Appeals did not contest that petitioners had challenged the constitutionality of the *statute* at length both at the trial and appellate levels. It held, however, that petitioners had committed a fatal error in drafting their appellate briefs. They had limited their challenge to the statute, and had neglected explicitly to challenge the state-prescribed instructions and verdict sheet, which tracked the statutory language. Since the statute as interpreted was constitutional, the court reasoned, and petitioners had preserved no other challenges, there was no cause for reversal. The court noted that counsel for at least one petitioner had expressly objected at trial when the trial judge, instructing the jury on the weighing of aggravating and mitigating circumstances, used the language of § 413(h). Even were the issue not waived on appeal, the court ruled, there was no error, because the language of § 413(h) itself "'does not place any burden . . . upon the accused.'" *Foster* v. *State*, 305 Md. 306, 318, 503 A. 2d 1326, 1332 (1986).

I find this result unconscionable. I have long believed that the Maryland statute, as written, unconstitutionally places the burden of proof on capital defendants at the sentencing phase of their trials. See *Stebbing* v. *Maryland, supra.* I am gratified that the Maryland Court of Appeals has read that burden of proof out of the statute. But I am wholly unconvinced by the reasoning that that court used to avoid extending the benefits of its decision to petitioners.

First, it is plain that any rational juror would understand the language of § 413(h) and Rule 4–343 as placing the burden of persuasion on the accused. Indeed, I cannot imagine any other way to read the statute that does not completely ignore its words. No fair-minded juror could have understood from these instructions that the burden was upon the State to prove by a preponderance of the evidence that aggravating circumstances must outweigh mitigating circumstances before a sentence of death could be returned. "It is distressing to accept a judicial construction that black is white; it is folly to suggest that jurors will arrive at the same conclusion." *Evans*, *supra*, at 558, 499 A. 2d, at 1298 (McAuliffe, J., concurring and dissenting).

The Court of Appeals' resolution of the waiver issue, further, allowed it to frustrate key federal rights only by means of technicality worthy of 17th-century pleading. Once petitioners attacked the burden of proof imposed by the language of the statute, their failure explicitly to argue that instructions precisely tracking the language of the statute were similarly flawed was, to say the least, understandable. Reasonably prudent counsel could have assumed that if the Court of Appeals had found that the language of the statute impermissibly imposed the ultimate burden on defendants, it would have similarly disapproved instructions to the same effect. Only the court's "interpretation" of § 413(h) to obviate the constitutional claim created petitioners' dilemma. The court stated that it was merely reaffirming what had been the law since *Tichnell;* yet, as the partially dissenting judge below remarked:

> "[T]he frequency with which defense counsel have argued since *Tichnell I* that the statute improperly places the burden of ultimate persuasion upon the defendant, and the failure of experienced and able defense counsel to argue for an instruction to the opposite effect upon the authority of *Tichnell I* suggests to me that the 'interpretation' announced [in this case] must be ranked among the best kept secrets in this State." *Evans*, *supra*, at 556, n. 5, 499 A. 2d, at 1297, n. 5 (McAuliffe, J., concurring and dissenting).

I do not complain about the fact that the Maryland Court of Appeals has chosen to correct the error of the Maryland Legislature in drafting § 413(h). Its decision to deny petitioners the benefit of that change, however, epitomizes the arbitrary and capricious

administration of the death penalty in this Nation. I would grant the petitions for certiorari.

Rehearing Denied

No. 85–1823. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 476 U. S. 1154;

No. 85–5022. RUSHING *v.* LOUISIANA, 476 U. S. 1153;

No. 85–5082. WATSON *v.* BLACKBURN, WARDEN, 476 U. S. 1153;

No. 85–5640. LILES *v.* OKLAHOMA, 476 U. S. 1164;

No. 85–5736. MCDOWELL *v.* NORTH CAROLINA, 476 U. S. 1165;

No. 85–5957. IN RE SHEWCHUN, 476 U. S. 1156;

No. 85–6639. TORNERO *v.* UNITED STATES, 476 U. S. 1143;

No. 85–6729. GORDON *v.* NUCCI ET AL., 476 U. S. 1173; and

No. 85–6774. JUDD *v.* UNITED STATES ET AL., 476 U. S. 1184.

Petitions for rehearing denied.

JULY 8, 1986

Miscellaneous Order

No. A–5. MESSER *v.* KEMP, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

JULY 11, 1986

Dismissal Under Rule 53

No. 85–1985. WALDRON ET UX. *v.* SHELL OIL CO. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 785 F. 2d 936.

JULY 14, 1986

Dismissal Under Rule 53

No. 85–2073. NORTHERN PETROCHEMICAL CO. *v.* STUDIENGESELLSCHAFT KOHLE, MBH. C. A. Fed. Cir. Certiorari dis-

missed under this Court's Rule 53. Reported below: 784 F. 2d 351.

JULY 22, 1986

Dismissals Under Rule 53

No. 85–663. WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES *v.* PURSER ET AL. Sup. Ct. Wash. Certiorari dismissed under this Court's Rule 53. Reported below: 104 Wash. 2d 159, 702 P. 2d 1196.

No. 85–2009. COCA-COLA BOTTLING COMPANY OF THE SOUTHWEST ET AL. *v.* TEXAS. Appeal from Ct. App. Tex., 4th Sup. Jud. Dist., dismissed under this Court's Rule 53. Reported below: 697 S. W. 2d 677.

No. 85–1726. ESCALANTE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 782 F. 2d 1052.

JULY 28, 1986

Miscellaneous Order

No. A–53. ARAVE, WARDEN, ET AL. *v.* CREECH. Application of the Solicitor General of Idaho for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Ninth Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE STEVENS took no part in the consideration or decision of this application.

JULY 31, 1986

Miscellaneous Order

No. A–72. SMITH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application. JUSTICE STEVENS took no part in the consideration or decision of this application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

AUGUST 5, 1986

Miscellaneous Order

No. A–75 (86–5026). WINGO *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, 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.

AUGUST 6, 1986

Miscellaneous Order

No. A–67. BERRY *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

AUGUST 12, 1986

Dismissal Under Rule 53

No. 85–184. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1157.] Writ of certiorari as to petitioners Alumex Inc. and Hunter Engineering Inc. dismissed under this Court's Rule 53.

AUGUST 19, 1986

Dismissal Under Rule 53

No. 86–187. TEXACO INC. ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari dismissed under this Court's Rule 53. Reported below: 795 F. 2d 1021.

Miscellaneous Orders

No. A–940 (85–7002). DAWSON *v.* UNITED STATES. C. A. 3d Cir. Application for bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–1006. CITY OF YONKERS ET AL. *v.* UNITED STATES ET AL. D. C. S. D. N. Y. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–1008 (85–1535). VEREZ ET AL. *v.* VIRGINIA. Sup. Ct. Va. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

Certiorari Denied

No. 86–5299 (A–114). WOOLLS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 798 F. 2d 695.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 84–1948. LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL., 476 U. S. 926;

No. 85–755. REED *v.* CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICKER, 476 U. S. 852;

No. 85–1411. MCCALLUM *v.* UNITED STATES, 476 U. S. 1182;

No. 85–1459. POWELL *v.* POWELL, 476 U. S. 1180;

No. 85–1641. MULLIGAN *v.* HAZARD ET AL., 476 U. S. 1174;

No. 85–1648. CALIFORNIA HOSPITAL ASSN. ET AL. *v.* HENNING, LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA, 477 U. S. 904; and

No. 85–1711. GRIMES *v.* LOUISVILLE & NASHVILLE RAILROAD CO., 476 U. S. 1160. Petitions for rehearing denied.

No. 85–1740. KANANEN ET UX. *v.* SUN BANK OKEECHOBEE, FKA COMMERCIAL BANK OKEECHOBEE, FLORIDA, ET AL., 476 U. S. 1182;

No. 85–1793. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH, 477 U. S. 905;

No. 85–1872. COOK *v.* PETER KIEWIT SON'S CO. ET AL., 476 U. S. 1183;

No. 85–1875. SCHUCHMAN ET UX. *v.* UNITED STATES ET AL., 477 U. S. 905;

No. 85–5466. CELESTINE *v.* BLACKBURN, WARDEN, 476 U. S. 1164;

No. 85–5886. RAULT *v.* LOUISIANA, 476 U. S. 1178;

No. 85–5986. JONES *v.* LOUISIANA, 476 U. S. 1178;

No. 85–6308. LOWENFIELD *v.* LOUISIANA, 476 U. S. 1153;

No. 85–6347. BIRDSELL *v.* UNITED STATES, 476 U. S. 1119;

No. 85–6389. FOSTER, AKA LEE *v.* MISSOURI, 476 U. S. 1178;

No. 85–6498. CARDINAL *v.* UNITED STATES, 476 U. S. 1161;

No. 85–6710. KOENIG *v.* FOSHEIM ET AL., 476 U. S. 1172;

No. 85–6717. OBOLENSKY *v.* POTTER ET AL., 476 U. S. 1172;

No. 85–6742. JOHNSTON *v.* PERROTT, 476 U. S. 1166;

No. 85–6826. SELLNER *v.* PANAGOULIS, AKA HUDNALL, ET AL., 477 U. S. 907;

No. 85–6843. BRYANT *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, 477 U. S. 907; and

No. 85–6948. IN RE GAY, 477 U. S. 903. Petitions for rehearing denied.

No. 85–6404. KEPFORD *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL., 476 U. S. 1158. Motion for leave to file petition for rehearing denied.

AUGUST 21, 1986

Miscellaneous Order

No. A–131. SMITH *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

AUGUST 25, 1986

Miscellaneous Order

No. A–140. WICKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN 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 in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

SEPTEMBER 2, 1986

Dismissal Under Rule 53

No. 86–5137. PARK HUNG QUAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 789 F. 2d 711.

SEPTEMBER 3, 1986

Miscellaneous Orders

No. A–12 (85–1722). O'LONE, ADMINISTRATOR, LEESBURG PRISON COMPLEX, ET AL. *v.* ESTATE OF SHABAZZ ET AL. C. A. 3d Cir. Application for recall and stay of mandate, addressed to JUSTICE WHITE and referred to the Court, denied. JUSTICE REHNQUIST would grant this application.

No. A–49 (85–2132). KEHOE *v.* HOFMANN. C. A. 3d Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–550. IN RE DISBARMENT OF MICHAELS. Disbarment entered. [For earlier order herein, see 475 U. S. 1092.]

No. D–551. IN RE DISBARMENT OF NICHOLS. Disbarment entered. [For earlier order herein, see 475 U. S. 1093.]

No. D–562. IN RE DISBARMENT OF DRAKE. It is ordered that Robert F. Drake, of Hattiesburg, Miss., 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–563. IN RE DISBARMENT OF JAMES. It is ordered that Edith L. James, of Austin, Tex., 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. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 815.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo. [Certiorari granted, 475 U. S. 1118.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 85–495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motions of Council on Religious Freedom, Catholic League for Religious and Civil Rights, American Jewish Congress, and General Conference of Seventh-day Adventists for leave to file briefs as *amici curiae* granted.

No. 85–608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. [Certiorari granted, 475 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–693. ASAHI METAL INDUSTRY CO., LTD. *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST). Sup. Ct. Cal. [Certiorari granted, 475 U. S. 1044.] Motion of California Manufacturers Association for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 85–792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85–793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1081.] Motion of respondents Brotherhood of Locomotive Engineers et al. for divided argument granted.

No. 85–1180. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* KEENE. D. C. E. D. Cal. [Probable jurisdiction noted, 475 U. S. 1117.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 85–1513. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* AGUILLARD ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 476 U. S. 1103.] Motion of appellants for divided argument denied.

No. 85–5221. GRIFFITH *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 476 U. S. 1157.] Motion of petitioner to reschedule oral argument denied.

No. 85–5915. WRIGHT ET AL. *v.* CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY. C. A. 4th Cir. [Certiorari granted, 474 U. S. 1081.] Motion of National Association of Housing and Redevelopment Officials et al. for leave to file a brief as *amici curiae* out of time denied.

No. 85–6461. MARTIN *v.* OHIO. Sup. Ct. Ohio. [Certiorari granted, 475 U. S. 1119.] Motion of Ohio Public Defender Commission for leave to file a brief as *amicus curiae* granted. Motion of Ohio Public Defender Commission for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

Rehearing Denied

No. 84–2015. MACDONALD, SOMMER & FRATES *v.* COUNTY OF YOLO ET AL., 477 U. S. 340;

No. 85–162. NEW MEXICO *v.* EARNEST, 477 U. S. 648;

No. 85–1225. BAKER *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, ET AL., *ante*, p. 1022;

No. 85–1317. TUCKER *v.* UNITED STATES, *ante*, p. 1022; and

No. 85–1380. WOODHOUSE *v.* UNITED STATES BUREAU OF INDIAN AFFAIRS ET AL., 476 U. S. 1181. Petitions for rehearing denied.

No. 85–1500. ACOSTA *v.* LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL., *ante*, p. 251;

No. 85–1876. COMSIA *v.* MAGNONE ET AL., *ante*, p. 1006;

No. 85–1965. IN RE GAUNCE, *ante*, p. 1003;

No. 85–5319. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 477 U. S. 168;

No. 85–5990. MONTGOMERY *v.* SEITER ET AL., 476 U. S. 1160;

No. 85–6022. CHURCH *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, *ante*, p. 1022;

No. 85–6541. SPANN *v.* CLARK, 475 U. S. 1143;

No. 85–6671. ROBERTS *v.* AIKEN, WARDEN, ET AL., *ante*, p. 1022;

No. 85–6748. WILLIAMS *v.* ILLINOIS, *ante*, p. 1022;

No. 85–6877. MIDWIFE *v.* TUCSON CITIZEN NEWSPAPER ET AL., *ante*, p. 1007; and

No. 85–6899. IN RE FISHER, *ante*, p. 1003. Petitions for rehearing denied.

SEPTEMBER 4, 1986

Miscellaneous Order

No. A–161 (86–5379). WATSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition 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.

SEPTEMBER 11, 1986

Miscellaneous Orders

No. A–87 (86–5436). GLASS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, 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. A–130. MOORE *v.* BLACKBURN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending appeal to the United States Court of Appeals for the Fifth Circuit. THE CHIEF JUSTICE would deny the application for stay.

No. A–186 (86–5426). BRODGON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the disposition 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–557. IN RE DISBARMENT OF KEIDEN. Disbarment entered. [For earlier order herein, see 476 U. S. 1138.]

No. D–564. IN RE DISBARMENT OF HOLZER. It is ordered that Reginald Jack Holzer, of Chicago, Ill., 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–565. IN RE DISBARMENT OF MCCLOSKEY. It is ordered that James Burns McCloskey, of Timonium, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–566. IN RE DISBARMENT OF FRAZIN. It is ordered that Barry Stephan Frazin, of Chicago, Ill., 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–567. IN RE DISBARMENT OF KIRWAN. It is ordered that Joseph Kevin Kirwan, of St. Joseph, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–568. IN RE DISBARMENT OF MOUNTAIN. It is ordered that Richard Keith Mountain, of Newton, Kan., be suspended from the practice of law in this Court and that a rule issue, return-

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

No. D–569. IN RE DISBARMENT OF CHRISTAKIS. It is ordered that Lee J. Christakis, of Gary, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–570. IN RE DISBARMENT OF PAYNE. It is ordered that K. Richard Payne, of Fort Wayne, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–571. IN RE DISBARMENT OF WILLIAMS. It is ordered that David F. Williams, of Springfield, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–573. IN RE DISBARMENT OF SHIELDS. It is ordered that William J. Shields, of Garfield Heights, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–574. IN RE DISBARMENT OF BRANNEN. It is ordered that Joseph Carchner Brannen, of Coral Gables, 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–575. IN RE DISBARMENT OF SICKMEN. It is ordered that Russell T. Sickmen, of Hauppauge, 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–576. IN RE DISBARMENT OF WEISS. It is ordered that Steven J. Weiss, 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–577. IN RE DISBARMENT OF HARRISON. It is ordered that Charles Julian Harrison, of Towson, Md., be suspended from

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

Rehearing Denied

No. 85-140. BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL., *ante*, p. 186. Petition for rehearing denied.

SEPTEMBER 15, 1986

Dismissal Under Rule 53

No. 85-2122. HOPE ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1245 ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 785 F. 2d 826.

SEPTEMBER 16, 1986

Miscellaneous Orders

No. A-205. RILES *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

No. A-213. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* RILES. Application of the Attorney General of Texas for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the Southern District of Texas, presented to JUSTICE WHITE, and by him referred to the Court, denied.

SEPTEMBER 17, 1986

Miscellaneous Order

No. A-207. RAULT *v.* BLACKBURN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE

WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay teminates 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 18, 1986

Miscellaneous Order

No. A–211 (86–5500). ROOK *v.* RICE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

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

II

But even if I did not hold this view, I would grant the stay of execution in this case and vote to hold the petition for certiorari pending this Court's disposition of *McCleskey* v. *Kemp*, cert. granted, *ante*, p. 1019, and *Hitchcock* v. *Wainwright*, cert. granted, 476 U. S. 1168 (1986). Rook contends that newly available social science evidence demonstrates unconstitutional, systemwide racial disparities in North Carolina's capital sentencing system. He maintains that the evidence is sufficient to warrant a hearing on his claim. These questions are similar to those presented in *McCleskey* and *Hitchcock*, cases that will be argued in October of the 1986 Term, and other petitions that are before the Court and upon which the Court has not yet acted.

Other petitioners have presented similar claims of systemwide racial disparities in capital sentencing and have requested stays of execution from this Court in light of our grants of certiorari in *McCleskey* and *Hitchcock*. This Court has granted stays of

execution in *Berry* v. *Phelps*, *ante*, p. 1030; *Wingo* v. *Blackburn*, *ante*, p. 1030; *Watson* v. *Blackburn*, *ante*, p. 1036; *Glass* v. *Blackburn*, *ante*, p. 1036; *Moore* v. *Blackburn*, *ante*, p. 1037; *Brogdon* v. *Blackburn*, *ante*, p. 1037; and most recently, *Rault* v. *Blackburn*, *ante*, p. 1039.

In this case, the District Court and the Fourth Circuit, 783 F. 2d 401 (1986), have refused to grant a stay of execution on the ground that Rook's petition for habeas corpus relief is successive and therefore barred pursuant to Habeas Corpus Rule 9(b). Rook concedes that his arguments regarding the unconstitutional application of the death penalty in North Carolina were presented in his previous federal petition; he maintains, however, that his petition should be heard pursuant to the "ends of justice" exception recognized by this Court in *Sanders* v. *United States*, 373 U. S. 1 (1963). He contends that a new study, Arbitrariness of the Capital Death Penalty (to be published in January 1987 by University Press), authored by Professors Nakell and Hardy of the University of North Carolina, does not suffer from the inadequacies which the District Court found in the evidence submitted in support of his first petition. Moreover, the study was not available at the time Rook filed his initial petition for habeas relief. He further argues that the new study provides substantial support for his theory that the administration of the death penalty in North Carolina suffers from a systemic unconstitutional flaw.

The Fourth Circuit held that Rook had not made the necessary showing that he did not receive a "full and fair" hearing on the question and found that the new evidence did not "bear upon the constitutionality of the applicant's detention." See *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). This Court evidently agrees that the petition is successive, and I therefore dissent.

Initially, I note that Rule 9(b) is phrased in permissive, and not mandatory terms:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In *Sanders* v. *United States*, *supra*, this Court set forth guidelines for cases involving potentially successive petitions:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15.

The Court recently stated that, as a means of identifying those cases in which federal courts should exercise their discretion to hear a successive petition, we will "continue to rely on the reference in *Sanders* to the 'ends of justice.'" *Kuhlmann* v. *Wilson*, 477 U. S. 436, 451 (1986) (plurality opinion). See also *id.*, at 470–471 (BRENNAN, J., dissenting).

Petitioner has made the necessary showing that the "ends of justice" will be served by the hearing of his second petition. When petitioner initially raised his racial-disparity claim in petitions for both state and federal postconviction relief, the study upon which he now relies, which examines the imposition of the death penalty in North Carolina between 1977 and 1978, was not available. When Rook filed the instant petition, he raised only the racial-disparity claim and presented in support of that claim the Nakell and Hardy manuscript.

The Fourth Circuit felt that petitioner's new evidence was inadequate because (1) it does not address the time period in which Rook's punishment was assessed, and (2) it does not demonstrate that Rook's sentence was the result of intentional discrimination. As to the first point, the significance of the new study is a matter to be determined at an evidentiary hearing and not in haste on a stay application. The question presented in *Hitchcock* involves the evidentiary showing necessary to obtain a hearing on one's claim that the imposition of the death penalty in a certain State is tainted by a systemic flaw. We simply do not now know whether the Nakell and Hardy study would raise a serious question about the constitutionality of petitioner's sentence. The Court has, in effect, prejudged the value of petitioner's proffered evidence. As to the second point, the necessity of proof of intentional discrimination is the subject of the upcoming *McCleskey* case.

Under these circumstances, it cannot be said that petitioner has not presented sufficient evidence to invoke the "ends of justice"

exception to the successive petition rule. Petitioner has not deliberately withheld evidence; he has at no point abandoned his claim. He has persisted in asserting the unconstitutionality of his sentence and now seeks to present evidence supporting his claim, *which he could not have presented at any earlier moment.* His petition is nonetheless deemed successive and is summarily rejected. I suggest that today's action leaves habeas petitioners with a cold choice: omit the claim from the initial federal petition and be deemed to abuse the writ when the claim is raised in a second petition after the discovery of new evidence, or include the claim in the initial petition and be deemed to have filed a successive petition in the event new evidence arises to justify a second petition. Under well-established standards of this Court, the petition is not successive.*

III

Finally, the Court finds itself once again in the morally compromised position taken in *Straight* v. *Wainwright*, 476 U. S. 1132, 1134 (1986). Four Justices have voted to stay Rook's execution and hold the case until a decision is reached in *McCleskey*. Thus, there are four votes to stay the execution, and four votes to hold the petition for certiorari, but not a fifth vote to stay the execution. Under normal circumstances, then, this case would be held pending the decision of this Court in *McCleskey*. "It is unthinkable to me that the practice that four votes to grant certiorari trigger an 'automatic' fifth vote to stay an execution should not apply to a 'hold' when a man's life is in the balance." 476 U. S., at 1135.

I dissent.

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*Most recently, in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), this Court examined the boundaries of the "ends of justice" exception to the successive petition rule, and a plurality suggested that the "ends of justice" are served by successive review only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. Initially, I note that the plurality's analysis plainly has no bearing on the instant case, which involves the constitutionality of a sentence of death, rather than the constitutionality of a conviction. The presence of aggravating circumstances and the legitimacy of the sentencing procedures are the crucial questions when one assesses the validity of the death sentence, not the justification for the conviction. See *id.*, at 471–472, n. 7 (BRENNAN, J., dissenting).

SEPTEMBER 22, 1986

Dismissals Under Rule 53

No. 86-124. HABERSHAM AT NORTHRIDGE *v.* FULTON COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 791 F. 2d 170.

No. 85-2060. MINGEY ET AL. *v.* LLAGUNO ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 804 F. 2d 143.

SEPTEMBER 23, 1986

Miscellaneous Orders

No. A-224. DAVIS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. JUSTICE REHNQUIST and JUSTICE O'CONNOR would deny the application for stay.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.*

Allen Davis and Kenneth Hardwick were scheduled to be executed on September 23, 1986. On the morning of September 22, Davis and Hardwick filed habeas corpus petitions in the Florida Supreme Court, that has original jurisdiction to issue extraordinary writs under Florida Rule of Appellate Procedure 9.030(a)(3). The Florida court denied both applications by order, stating in each case that it would "file an opinion at a later date setting forth its reasons for the denial of the Petition." At 10:25 p.m. on that day, less than nine hours before the scheduled executions, Davis and Hardwick filed applications with me, as Circuit Justice, seeking stays of execution until this Court can consider their petitions for writs of certiorari to review the Florida decisions. The sole basis for their request is a claim that in Florida capital punishment

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*[REPORTER'S NOTE: This opinion also applies to No. A-225, *post*, p. 1046.]

is applied discriminatorily on the basis of the race of the victim. I granted a temporary stay until September 23 at 3 p.m. and referred the applications to the full Court.

I

The State asks us to deny the applications, claiming that Davis and Hardwick were barred by state law from raising their claims in the Florida Supreme Court. The State asserts that Davis' claim was barred because he did not raise it on direct appeal from his conviction. See *Stone* v. *State*, 481 So. 2d 478, 479 (Fla. 1985). The State also asserts that Hardwick's claim was filed in the wrong forum. See *Ford* v. *Wainwright*, 451 So. 2d 471 (Fla. 1984) (a claim may not be raised for the first time in original habeas proceedings in the Florida Supreme Court). According to the State, Hardwick's claim should have been filed in a Florida trial court under Florida Rule of Criminal Procedure 3.850. Davis and Hardwick ask us to ignore these procedural questions.

We note that Davis filed a habeas petition last night, September 22, in the Federal District Court for the Middle District of Florida (Black, J.). This morning, that court denied the petition and refused to grant a certificate of probable cause. Judge Black concluded that Davis had abused the writ by "intentionally delaying the raising of grounds for habeas relief."[1] 644 F. Supp. 269, 270 (1986).

Despite this record of unexplained delay, I concur in the Court's decision to grant these applications. They now raise claims similar to the issue presented in *Hitchcock* v. *Wainwright*, 476 U. S. 1168 (1986) (writ of certiorari granted), to be argued here on October 15, 1986. No Florida court has specifically addressed the State's contentions that the claims are procedurally barred. The Florida Supreme Court decisions may rest on those grounds, but that court has not published an opinion. In the past I have found procedural bars apparent on the face of a stay application. See *Woodard* v. *Hutchins*, 464 U. S. 377, 378 (1984) (POWELL, J., concurring). I am reluctant to do so here, however, because the alleged bars depend on an interpretation of state law. In these applications, I am unwilling to assume that the Florida Supreme

[1] Cf. Habeas Corpus Rule 9(a) (a petition may be dismissed if the State is "prejudiced in its ability to respond to the petition by delay in its filing" unless the petitioner shows that it is based on newly discovered grounds).

Court decisions rest on procedural grounds not apparent on the face of the orders.

II

No explanation has been offered either by Davis or by Hardwick for waiting more than a month, and until the eve of the execution date, to assert the present claims in any court, state or federal. It is my understanding that the Florida Bar, at least since 1984, has assured state and federal courts that it would provide counsel promptly when needed in capital cases. Although unlikely, it may be that neither Davis nor Hardwick knew that counsel always were available. Nor are we informed as to when counsel were engaged in these cases. In any event, I suggest that counsel owe this Court a duty to explain why no action was taken until the day before the execution date, making it difficult both for the courts below and for this Court to make the carefully considered judgments so essential in capital cases. In the future, and here I can write only for myself, I will expect counsel whose papers are filed with me as Circuit Justice on the eve of the execution date to make an appropriate explanation.[2] Respect for this Court, as well as duty to the client, requires no less. If there has been deliberate or inexcusable delay, the appropriate Committee of the Florida Bar will be advised.

No. A–225. HARDWICK *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. JUSTICE REHNQUIST and JUSTICE O'CONNOR would deny the application for stay.

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[2] Indeed, such an explanation should not be limited to the period following the setting of an execution date. As noted above, counsel are made available in Florida in every capital case. Following conviction and exhaustion of appeal remedies, counsel have a duty to proceed with reasonable promptness to pursue state and federal postconviction remedies *without awaiting* the setting of execution dates.

*[REPORTER'S NOTE: For separate concurring opinion of JUSTICE POWELL in this case, see *ante*, p. 1044.]

SEPTEMBER 24, 1986

Miscellaneous Orders

No. A–35. MELENDEZ-CARRION ET AL. *v.* UNITED STATES. Application for release from pretrial confinement, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–69. BARONOWSKI *v.* SECRETARY OF THE TREASURY ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–93 (86–182). POLYAK *v.* BUFORD EVANS & SONS. C. A. 6th Cir. Application for stay of mandate, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–94 (85–1991). IN RE POLYAK. Application for recall, stay, and other relief, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–223 (86–5544). WELCOME *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, 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–558. IN RE DISBARMENT OF MISHKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 1018.]

No. D–572. IN RE DISBARMENT OF CHASE. It is ordered that Sydney J. Chase, of Plainview, 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. 85–184. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. [Certiorari granted, 476 U. S. 1157.] Motion of the Solicitor General for divided argument granted.

No. 85–495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–899. CONNECTICUT *v.* BARRETT. Sup. Ct. Conn. [Certiorari granted, 476 U. S. 1114.] Motion of National District Attorneys Association for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–971. CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSN.; and

No. 85–972. SECURITY PACIFIC NATIONAL BANK *v.* SECURITIES INDUSTRY ASSN. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1044.] Motion of the Solicitor General for divided argument granted.

No. 85–1092. KEYSTONE BITUMINOUS COAL ASSN. ET AL. *v.* DUNCAN, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ET AL. C. A. 3d Cir. [Certiorari granted, 475 U. S. 1080.] Motion of Pennsylvania State Grange et al. for leave to file a brief as *amici curiae* granted.

No. 85–1222. INTERSTATE COMMERCE COMMISSION *v.* TEXAS ET AL.; and

No. 85–1267. MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. [Certiorari granted, 476 U. S. 1157.] Motion of the Solicitor General for divided argument granted.

No. 85–1244. CITY OF PLEASANT GROVE *v.* UNITED STATES. D. C. D. C. [Probable jurisdiction noted, 476 U. S. 1113.] Motion of Democratic National Committee for leave to file a brief as *amicus curiae* granted.

No. 85–1277. SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE. C. A. 11th Cir. [Certiorari granted, 475 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. [Certiorari granted, 476 U. S. 1139.] Motion of Appellate Committee of the District Attorneys Association of California for leave to file a brief as *amicus curiae* granted.

No. 85–1370. ARKANSAS WRITERS' PROJECT, INC. *v.* RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS. Sup. Ct. Ark. [Probable jurisdiction noted, 476 U. S. 1113.] Motions for

leave to file briefs as *amici curiae* filed by the following are granted: City & Regional Magazine Association, Time Inc., Magazine Publishers Association, Times Mirror Co. et al., American Civil Liberties Union Foundation et al., and Miami Herald Publishing Co. et al.

No. 85–1517. COLORADO *v.* SPRING. Sup. Ct. Colo. [Certiorari granted, 476 U. S. 1104.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1581. SOLORIO *v.* UNITED STATES. Ct. Mil. App. [Certiorari granted, 476 U. S. 1181.] Motion of American Civil Liberties Union for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–1658. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FLORIDA POWER CORP. ET AL.; and

No. 85–1660. GROUP W CABLE, INC., ET AL. *v.* FLORIDA POWER CORP. ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 476 U. S. 1156.] Motion of the Solicitor General for divided argument granted.

No. 85–1804. WEST *v.* CONRAIL ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 1004.] Motion of petitioner to dispense with printing the joint appendix granted.

SEPTEMBER 26, 1986

Assignment Orders

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the District of Columbia Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the Fourth Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the Federal Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE O'CONNOR be, and she is hereby, assigned to the Ninth Circuit as Circuit Justice, effective September 26, 1986.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE SCALIA be, and he is hereby, assigned to the Sixth Circuit as Circuit Justice, effective September 26, 1986.

OCTOBER 3, 1986

Dismissal Under Rule 53

No. 86–7. CONNECTICUT GENERAL LIFE INSURANCE CO. *v.* DREDGE ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 746 F. 2d 1420.

Miscellaneous Order

No. A–252. STEWART *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

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

Roy Allen Stewart was convicted of first-degree murder in Dade County Circuit Court and sentenced to death. The Florida Supreme Court affirmed the conviction and sentence. *Stewart* v. *State*, 420 So. 2d 862 (1982), cert. denied, 460 U. S. 1103 (1983). The Governor signed Stewart's death warrant. Stewart filed a petition for postconviction relief under Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel. The court stayed the execution, held an evidentiary hearing, and denied the petition. The Florida Supreme Court affirmed. *Stewart* v. *State*, 481 So. 2d 1210 (1985).

The Governor signed a second death warrant scheduling the execution for 7 a.m. on October 7, 1986. Stewart then filed a post-trial motion and application for stay of execution in the Florida Supreme Court, arguing that the State's administration of the death penalty violates the Eighth and Fourteenth Amend-

ments because capital punishment is imposed disproportionately on prisoners whose victims were members of the white race. This question is similar to those presented in *McCleskey* v. *Kemp*, No. 84–6811, and *Hitchcock* v. *Wainwright*, No. 85–6756, cases that are to be argued before this Court on October 15, 1986. The Florida Supreme Court denied Stewart's motion and application for stay, ruling that "Stewart did not raise this claim in his previous 3.850 motion, and he is procedurally barred from raising it in this petition." *Stewart* v. *Wainwright*, 494 So. 2d 489, 490 (1986). Stewart then filed a second motion for postconviction relief and application for stay in Circuit Court, raising the *McCleskey/Hitchcock* claim. The Circuit Court denied the petition and stay application. *State* v. *Stewart*, No. 79–6621, slip op., at 2 (Sept. 26, 1986). The Florida Supreme Court affirmed the Circuit Court's finding of a procedural bar, reasoning that Stewart had shown no justification for his failure to raise the *McCleskey/Hitchcock* claim in his first motion for postconviction relief. *Stewart* v. *State*, 495 So. 2d 164, 165 (1986).

On October 1, 1986, Stewart filed an application for stay of execution pending filing of a petition for certiorari with this Court. A majority of this Court today denies that application. Because this denial may rest, in part, on an incomplete application of the doctrine of procedural default, as recently set forth in *Smith* v. *Murray*, 477 U. S. 527 (1986), I respectfully dissent.

Smith requires that, before refusing to consider a state prisoner's constitutional challenge to his conviction and sentence on the ground of procedural default, a federal court must answer two separate questions: (1) As a matter of state law, is consideration of the claim foreclosed by a valid procedural bar? And (2) as a matter of federal law, notwithstanding the state procedural bar, would rejection of the claim result in a "fundamental miscarriage of justice?" *Id.*, at 538.

In *Smith*, a state prisoner failed to raise, on direct appeal of his conviction and sentence to the Virginia Supreme Court, his constitutional challenge to the prosecution's use of the testimony of a psychiatrist, to whom the prisoner had related information about a prior incident of deviant sexual conduct on a school bus. This Court, reviewing the denial of Smith's petition for federal habeas corpus relief, held that the prisoner had failed to demonstrate cause for his noncompliance with state procedural rules. The Court then proceeded to the second inquiry of whether appli-

cation of the doctrine of procedural bar would offend principles of justice:

> "As we noted in *Engle* and reaffirmed in *Carrier*, '"[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration."' *Murray* v. *Carrier*, [477 U. S. 478, 495 (1986)], quoting *Engle* v. *Isaac*, 456 U. S. [107, 135 (1982)]. Accordingly, 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.' *Murray* v. *Carrier*, [*supra*, at 496].
>
> "We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result in a 'fundamental miscarriage of justice.' *Engle*, *supra*, at 135. There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice." *Id.*, at 537–538.

In this case, Roy Allen Stewart predicates his application for a stay of execution on a claim that "because the State of Florida has applied its capital sentencing statute in an arbitrary and capricious manner by allowing race to determine, in significant part, who will receive the death penalty, his sentence was imposed in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States."* As noted, his claim is similar to the claims advanced by the petitioners in *McCleskey* v. *Kemp*, No. 84–6811, and *Hitchcock* v. *Wainwright*, No. 85–6756.

As a matter of Florida law, it appears that Stewart's claim is procedurally barred. No one, however, has yet carried out the second inquiry mandated by *Smith:* whether as a matter of federal law the refusal to consider his claim on the merits would constitute a "fundamental miscarriage of justice" if, as Stewart asserts, the fact that his victim was a member of the white race was a critical element in the decision to impose the death sentence upon him. No federal court has yet decided whether this claimed racially discriminatory factor, in the Court's words in *Smith*, served "to pervert the jury's deliberations concerning the ultimate question" whether he should be put to death.

Today the Court declines to grant Stewart's application for stay of execution even though his procedurally barred claims, if true, raise profoundly serious and as yet unresolved questions about the federal constitutionality of his capital sentence. Arguably, the Court's decision is justified by the facts that this case comes to us as a request for review of the Florida courts' denial of collateral relief and the "fundamental miscarriage of justice" inquiry can better be performed by a federal district court in a federal habeas corpus proceeding which Stewart may now commence. Nevertheless, in order to make sure that this critical inquiry may be performed before the case becomes moot, I would stay Stewart's execution until the Court has decided the *McCleskey* and *Hitchcock* cases.

I respectfully dissent.

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*Application for Stay of Execution Pending Filing and Disposition of Petition for Writ of Certiorari to the Supreme Court of Florida, filed in the Supreme Court of the United States on October 1, 1986, App. 10 (Initial Brief of Appellant in the Supreme Court of Florida filed September 29, 1986).

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1053 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.