

ORDERS FOR FEBRUARY 24 THROUGH
MAY 13, 1988

FEBRUARY 24, 1988

Certiorari Granted. (See No. 86-1430, *ante*, at 84, n. 4.)

FEBRUARY 25, 1988

Dismissals Under Rule 53

No. 87-1163. AMERICAN FERMAC, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. *Certiorari* dismissed under this Court's Rule 53. Reported below: 831 F. 2d 269.

No. 87-883. HONDA MOTOR CO., LTD., ET AL. *v.* CAMACHO ET UX. Sup. Ct. Colo. *Certiorari* dismissed under this Court's Rule 53. Reported below: 741 P. 2d 1240.

No. 87-183. DUFF & PHELPS, INC., ET AL. *v.* JORDAN. C. A. 7th Cir. *Certiorari* dismissed under this Court's Rule 53. Reported below: 815 F. 2d 429.

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Dismissal Under Rule 53

No. 87-828. SZABO FOOD SERVICE, INC., ET AL. *v.* CANTEEN CORP. C. A. 7th Cir. *Certiorari* dismissed under this Court's Rule 53. Reported below: 823 F. 2d 1073.

Appeals Dismissed

No. 87-747. DUFFY ET UX. *v.* CITY OF ARCADIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 195 Cal. App. 3d 308, 243 Cal. Rptr. 87.

No. 87-1179. WEIL ET AL. *v.* CHU ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 70 N. Y. 2d 783, 515 N. E. 2d 908.

No. 87-1133. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF CLAREMORE, OKLAHOMA, ET AL. *v.* OKLAHOMA TAX COMMISSION. Appeal from Sup. Ct. Okla. dismissed for want of juris-

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diction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 743 P. 2d 640.

No. 87-1145. POTTER *v.* WACKENHUT CORP. ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1148. NORTON *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 152 Ill. App. 3d 1167, 515 N. E. 2d 1068.

No. 87-6258. HOWARD *v.* VIACOM INTERNATIONAL ET AL. Appeal from D. C. N. D. Ind. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 87-5269. OHSE *v.* HUGHES ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Forrester v. White*, 484 U. S. 219 (1988). Reported below: 816 F. 2d 1144.

Miscellaneous Orders

No. 103, Orig. SOUTH DAKOTA *v.* NEBRASKA ET AL. Pending motion for leave to file bill of complaint denied without prejudice to renewal of the motion. [For earlier order herein, see, *e. g.*, 475 U. S. 1093.]

No. 86-1294. WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE *v.* DOE. C. A. D. C. Cir. [Certiorari granted, 482 U. S. 913.] Motion of respondent for leave to file a supplemental brief after argument granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87-573. UNITED STATES *v.* TAYLOR. C. A. 9th Cir. [Certiorari granted, 484 U. S. 1025.] Motion for appointment of counsel granted, and it is ordered that Ian G. Loveseth, Esq., of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 87-1068. OKLAHOMA TAX COMMISSION *v.* MUSCOGEE (CREEK) NATION ET AL. C. A. 10th Cir. The Solicitor General

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is invited to file a brief in this case expressing the views of the United States.

No. 87-1080. *MARYLAND NATIONAL BANK v. MARYLAND STATE DEPARTMENT OF ASSESSMENTS AND TAXATION*. Appeal from Ct. App. Md. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 87-1279. *MORRISON, INDEPENDENT COUNSEL v. OLSON ET AL.* C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of Whitney North Seymour, Jr., Independent Counsel, for leave to file a brief as *amicus curiae* granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87-5277. *AMADEO v. KEMP, WARDEN*. C. A. 11th Cir. [Certiorari granted, 484 U. S. 912.] Motion of petitioner for an extension of time to file a reply brief denied.

Probable Jurisdiction Noted

No. 87-746. *MICHAEL H. ET AL. v. GERALD D.* Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted. Reported below: 191 Cal. App. 3d 995, 236 Cal. Rptr. 810.

Certiorari Granted

No. 86-1879. *NATIONAL TREASURY EMPLOYEES UNION ET AL. v. VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE*. C. A. 5th Cir. Certiorari granted. Reported below: 816 F. 2d 170.

No. 86-1904. *ARIZONA v. YOUNGBLOOD*. Ct. App. Ariz. Certiorari granted. Reported below: 153 Ariz. 50, 734 P. 2d 592.

No. 87-1097. *BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES v. GEORGETOWN UNIVERSITY HOSPITAL ET AL.* C. A. D. C. Cir. Certiorari granted. Reported below: 261 U. S. App. D. C. 262, 821 F. 2d 750.

No. 87-1190. *UNITED STATES v. BROCE ET AL.* C. A. 10th Cir. Certiorari granted.

No. 87-981. *BEECH AIRCRAFT CORP. v. RAINEY ET AL.*;

No. 87-1028. *BEECH AEROSPACE SERVICES, INC. v. RAINEY ET AL.*; and

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No. 87-1146. PRATT & WHITNEY CANADA INC. *v.* RAINEY ET AL. C. A. 11th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 827 F. 2d 1498.

No. 87-751. CARLUCCI, SECRETARY OF DEFENSE, ET AL. *v.* DOE. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 261 U. S. App. D. C. 96, 820 F. 2d 1275.

No. 87-1277. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* NELSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 828 F. 2d 446.

Certiorari Denied. (See also Nos. 87-1133, 87-1145, and 87-1148, *supra.*)

No. 86-203. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* MOLDOVAN ET AL., AS TRUSTEES FOR THE TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND; and

No. 86-208. MOLDOVAN ET AL., AS TRUSTEES FOR THE TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND *v.* GREAT ATLANTIC & PACIFIC TEA CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 790 F. 2d 894.

No. 86-262. U. A. 198 HEALTH & WELFARE, EDUCATION & PENSION FUNDS *v.* RESTER REFRIGERATION SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 790 F. 2d 423.

No. 86-1019. SIGN, PICTORIAL & DISPLAY INDUSTRY PENSION TRUST FUND ET AL. *v.* FORMETRICS, INC. C. A. 9th Cir. Certiorari denied.

No. 86-1854. NEW BEDFORD FISHERMEN'S WELFARE FUND ET AL. *v.* BALTIC ENTERPRISES, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 813 F. 2d 503.

No. 87-421. BRAVO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 43 Cal. 3d 600, 738 P. 2d 336.

No. 87-644. SCHMIDT ET AL. *v.* SERPAS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 2d 23.

No. 87-655. GOLDBERG *v.* UNITED STATES DEPARTMENT OF STATE. C. A. D. C. Cir. Certiorari denied. Reported below: 260 U. S. App. D. C. 205, 818 F. 2d 71.

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No. 87-814. *TERMINAL REALTY PENN CO. v. AUERBACH ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 390, 829 F. 2d 175.

No. 87-875. *REDDINGTON v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES.* C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87-903. *CROCKER ET AL. v. FEDERAL DEPOSIT INSURANCE CORPORATION ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 347.

No. 87-949. *CONGREGATION SONS OF ISRAEL v. SHAFTAN.* Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-953. *KONIZESKI ET AL. v. LIVERMORE LABS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 982.

No. 87-1105. *ARKANSAS v. MAYFIELD.* Sup. Ct. Ark. Certiorari denied. Reported below: 293 Ark. 216, 736 S. W. 2d 12.

No. 87-1106. *PYLE ET UX. v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 360.

No. 87-1115. *EBAUGH v. CESSNA AIRCRAFT Co.* C. A. 4th Cir. Certiorari denied. Reported below: 830 F. 2d 535.

No. 87-1125. *HOLMES v. WEST VIRGINIA.* Sup. Ct. App. W. Va. Certiorari denied.

No. 87-1127. *KONARSKI v. NEW YORK MEDICAL COLLEGE, INC., ET AL.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 129 App. Div. 2d 1018, 513 N. Y. S. 2d 905.

No. 87-1129. *ALASKA TRAMS CORP., AKA ALASKA TRAMS, INC. v. ALASKA ELECTRIC LIGHT & POWER ET AL.* Sup. Ct. Alaska. Certiorari denied. Reported below: 743 P. 2d 350.

No. 87-1134. *CONSULATE GENERAL OF NIGERIA ET AL. v. JOSEPH.* C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1018.

No. 87-1137. *KIRK v. MICHAEL REESE HOSPITAL & MEDICAL CENTER ET AL.* Sup. Ct. Ill. Certiorari denied. Reported below: 117 Ill. 2d 507, 513 N. E. 2d 387.

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No. 87-1141. KOCH REFINING CO. ET AL. *v.* FARMERS UNION CENTRAL EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1339.

No. 87-1144. IN RE VANNIER. Sup. Ct. Mo. Certiorari denied.

No. 87-1147. VILLAGE OF NEW LENOX, ILLINOIS *v.* UNION NATIONAL BANK & TRUST COMPANY OF JOLIET, AS TRUSTEE, ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 919, 505 N. E. 2d 1.

No. 87-1149. REAGIN *v.* TERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 36.

No. 87-1158. FORASTIERE, CHAIRMAN OF THE BOARD OF FIRE COMMISSIONERS OF SPRINGFIELD, MASSACHUSETTS *v.* BREAUULT. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 401 Mass. 26, 513 N. E. 2d 1277.

No. 87-1171. CODY ET AL. *v.* HILLARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 912.

No. 87-1175. PARKER-HANNIFIN CORP. *v.* KISER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 423.

No. 87-1188. CASTANEDA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 501.

No. 87-1204. JONES ET UX. *v.* BOROUGH OF MORRISVILLE, PENNSYLVANIA, ET AL; and JONES ET UX. *v.* PRINCETON UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied.

No. 87-1211. GUIDER *v.* SMITH ET AL. Ct. App. Mich. Certiorari denied. Reported below: 157 Mich. App. 92, 403 N. W. 2d 505.

No. 87-1233. MACDONALD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 741.

No. 87-1242. GOAD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1096.

No. 87-1247. McDONOUGH *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 352, 533 A. 2d 857.

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No. 87-1255. *KAPLAN v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 676.

No. 87-5564. *MERCADO v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 828 F. 2d 20.

No. 87-5581. *WHITE v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied. Reported below: 726 P. 2d 905.

No. 87-5647. *THOMPSON v. PFEIFFER ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 2d 57.

No. 87-5674. *BROWN v. CALIFORNIA*. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 191 Cal. App. 3d 761, 236 Cal. Rptr. 506.

No. 87-5755. *LEGGINS v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION*. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 764.

No. 87-5788. *MILLER v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-5849. *JONES v. JONES, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 774.

No. 87-5869. *SALISBURY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87-5929. *NORMAN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1068.

No. 87-5958. *McKoy v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 518 A. 2d 1013.

No. 87-6006. *PEREZ v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 288.

No. 87-6117. *PAGE v. GEORGIA*. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 538, 361 S. E. 2d 153.

No. 87-6168. *ABOKHAI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 666.

No. 87-6176. *STOUT v. GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT ET AL.* Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 733 S. W. 2d 290.

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No. 87-6193. *COOK v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION*. C. A. 8th Cir. Certiorari denied.

No. 87-6195. *CAZARES v. REFUGIA SANDOVAL*. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 87-6197. *DONEGAN v. MCWHERTER, WARDEN, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87-6204. *MILTON v. WORLD SAVINGS & LOAN ASSN.* C. A. 5th Cir. Certiorari denied.

No. 87-6208. *ROBINSON v. CITY OF DECATUR, ALABAMA, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87-6210. *HALLINGSTAD v. HARVEY ET AL.* Sup. Ct. Wis. Certiorari denied.

No. 87-6218. *MUNGIN v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 183 Ga. App. 290, 358 S. E. 2d 673.

No. 87-6229. *SAZENSKI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 741.

No. 87-6249. *ROSS v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6280. *ESCH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 832 F. 2d 531.

No. 87-6288. *WILSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87-6290. *BROWN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 991.

No. 87-6303. *SMITH v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6305. *FERRIS v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1023.

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No. 87-6309. *HARDIN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1008.

No. 87-6313. *GRIFFIN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 2d 1108.

No. 86-1963. *ARIZONA v. CHICAGO TITLE INSURANCE CO. ET AL.* C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 815 F. 2d 696.

No. 86-7002. *BRECHEEN v. OKLAHOMA*. Ct. Crim. App. Okla. Certiorari denied. Reported below: 732 P. 2d 889.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court has insisted that an accused be tried by "a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, 309 U. S. 227, 236-237 (1940). We have recognized that failure to ensure the impartiality of a jury "violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U. S. 717, 722 (1961). The Oklahoma court's denial of petitioner's unopposed motion for change of venue raises serious doubts about whether those minimal standards were met in this case. These doubts demand that we undertake two separate inquiries. First, we must consider whether and to what extent our precedents regarding jury impartiality set constitutional limits on state change of venue standards. Second, we must address the proper application of those precedents to the unique setting of capital sentencings.

I

On March 23, 1983, Marie Stubbs, wife of Hilton Stubbs, a prominent storekeeper in Ardmore, Oklahoma, was shot and killed in her home. The murder and the subsequent arrest of petitioner Robert Brecheen were the subject of extensive local newspaper and television coverage. Ardmore, which has a population of approximately 25,000, is located in Carter County, which has a population of approximately 40,000. Petitioner's attorney filed a motion, accompanied by affidavits, for change of venue from Carter County. Although the motion was unopposed, the trial judge refused to grant it after conducting *voir dire*. The jury that was finally empaneled contained one person who knew the victim, one

who knew the victim's daughter, and three who knew the victim's husband. All but one of the jurors were customers at the Stubbs' family store. Three jurors knew the prosecuting attorney and three knew officers who would testify for the prosecution. All of the jurors had heard of the case through pretrial publicity. The jury convicted petitioner of burglary and homicide and sentenced him to death.

On appeal, petitioner challenged, *inter alia*, the trial court's refusal to grant him a change of venue. The Oklahoma Court of Criminal Appeals rejected petitioner's claim, holding that "[i]t is only when a criminal defendant establishes by clear and convincing evidence that a fair trial is a virtual impossibility that such a motion should be granted." App. to Pet. for Cert. 2.

II

This Court has established that a refusal to grant a motion for change of venue may constitute a violation of due process. See *Groppi v. Wisconsin*, 400 U. S. 505 (1971); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Irvin v. Dowd*, *supra*. A defendant seeking to establish such a violation must demonstrate either that his trial resulted in "identifiable prejudice" or that it gave rise to a presumption of prejudice because it involved "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U. S. 532, 542-543 (1965). In deciding whether such a presumption of prejudice is warranted, courts must examine "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Murphy v. Florida*, 421 U. S. 794, 799 (1975).

We have had little occasion to apply these basic principles to determine whether particular state standards for change of venue comport with the requirements of due process. Most of our precedents regarding due process and jury neutrality consist of careful examinations of the circumstances surrounding specific trials to determine whether they give rise to a presumption of prejudice. See, e. g., *Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Turner v. Louisiana*, 379 U. S. 466 (1965). Although we did strike down one state venue statute which categorically denied change of venue for misdemeanors, see *Groppi v. Wisconsin*, *supra*, we have not considered any other wholesale restrictions on venue change.

In this vacuum of constitutional precedent, States have taken divergent paths. Most States have followed the well-trod course of granting motions for venue change when the totality of the circumstances establish "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." *Martinez v. Superior Court*, 29 Cal. 3d 574, 577-578, 629 P. 2d 502, 503 (1981) (quoting *Maine v. Superior Court*, 68 Cal. 2d 375, 383, 438 P. 2d 372, 377 (1968)). The *Martinez* court defined "reasonable likelihood" as a lesser standard of proof than "more probable than not." 29 Cal. 3d, at 578, 629 P. 2d, at 503. See also *People v. Gendron*, 41 Ill. 2d 351, 243 N. E. 2d 208 (1968) (adopting "reasonable likelihood" standard), cert. denied, 396 U. S. 889 (1969); *State v. Cuevas*, 288 N. W. 2d 525 (Iowa 1980) (same); *State v. Beier*, 263 N. W. 2d 622 (Minn. 1978) (same). Other States have decided to grant change of venue motions when the circumstances establish a substantial likelihood of prejudice. See, e. g., *Commonwealth v. Cohen*, 489 Pa. 167, 413 A. 2d 1066, cert. denied, 449 U. S. 840 (1980). The American Bar Association has explicitly endorsed this latter approach in its Standards Relating to Fair Trial and Free Press 8-3.3(c) (2d ed. 1980). Oklahoma, however, diverges sharply from its sister States in setting a much higher threshold for granting a change of venue motion, requiring "clear and convincing evidence" that a fair trial is a "virtual impossibility."

In my view, Oklahoma's strong presumption against venue change fails to accommodate properly the concerns expressed in our due process precedents. Those precedents implicitly acknowledge that the defendant's interest in a fundamentally fair trial outweighs the State's interest in holding that trial in a particular district. Oklahoma's standard is out of step with this Court's repeated recognition that "our system of law has always endeavored to prevent *even the probability* of unfairness." *In re Murchison*, 349 U. S. 133, 136 (1955) (emphasis added), quoted in *Sheppard v. Maxwell*, *supra*, at 352; *Estes v. Texas*, *supra*, at 543. We frequently have invoked the opinion of Chief Justice Taft 50 years ago, which held that "[e]very procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U. S. 510, 532 (1927) (emphasis added), cited in *Irvin v. Dowd*, *supra*, at 722; *Estes v. Texas*,

supra, at 543. We should grant certiorari to establish clearly the minimal requirements of the Due Process Clause for state change of venue standards.

III

Our prior precedents have left a second gap of perhaps even more importance. We have failed to give any guidance as to the circumstances that might give rise to a presumption of prejudice in the sentencing phase of a bifurcated capital trial. Our cases have dealt exclusively with factors that might influence the jury in its factfinding function when it makes determinations of guilt or innocence. We held, for example, that the pretrial broadcast of a defendant in the act of confessing to the charged crime inherently prejudiced the jury's ability to evaluate objectively his guilt. See *Rideau v. Louisiana*, *supra*. Similarly, we held that when key government witnesses doubled as official guardians of the jury during deliberations, the ability of the jury to assess witness credibility was presumptively prejudiced. See *Turner v. Louisiana*, *supra*. But the influences that might impair the truth-seeking function of the jury in guilt determinations are not identical to those that impinge on its responsibility to administer fairly the death penalty.

This case demonstrates that lack of congruence. The fact that many of the jurors knew the victim or members of the victim's family might not presumptively establish the fundamental unfairness of the guilt proceedings. There may be little reason to doubt the testimony of such jurors at *voir dire* that they could put aside their knowledge of the consequences of the crime in order to establish the facts of its commission. But the jury wears an altogether different hat when it sits as sentencer. It must make a moral decision whether a defendant already found guilty deserves to die for his crime. As we have previously recognized, the function of the sentencing jury is to "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U. S. 510, 519 (1968). When a jury is composed, as this petitioner's was, of people who are personally familiar with the consequences of a defendant's crime, it cannot perform this function in an impartial manner. We held as much just last Term, when we declared that the Eighth Amendment forbids the introduction of a victim impact statement during the sentencing phase of a capital trial. We concluded that a description of the effects of the murder on the victim's family and friends

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was too likely to inflame the jury and lead to a sentence based on caprice or emotion rather than reason. See *Booth v. Maryland*, 482 U. S. 496 (1987). Surely empaneling a jury with personal knowledge of these effects would have much the same result. The likelihood of such a result should give rise to a presumption of prejudice during the sentencing phase, just as extensive news coverage might establish that presumption in the guilt phase.

IV

This petition raises two important issues that call for this Court's review. We must establish what the Due Process Clause requires of state legislatures and courts in formulating general standards for change of venue. Oklahoma's strong presumption against granting such motions raises serious concerns about the fundamental fairness of its criminal proceedings. In addition, we must recognize and rule on the difference between the guilt and penalty phases of a capital trial for the purpose of presuming prejudice when jury impartiality is called into question. This distinction is required not because death is a qualitatively different penalty from any other (although it is), but because the jury's function is profoundly altered when it sits as sentencer.

No. 87-699. *MARYLAND ET AL. v. ANDERSON*. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 310 Md. 217, 528 A. 2d 904.

No. 87-771. *CLARK-COWLITZ JOINT OPERATING AGENCY v. FEDERAL ENERGY REGULATORY COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 264 U. S. App. D. C. 58, 826 F. 2d 1074.

No. 87-841. *MISSISSIPPI v. DAVIS*. Sup. Ct. Miss. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 512 So. 2d 1291.

No. 87-970. *HUGHES ET UX. v. UNITED VAN LINES, INC., ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 829 F. 2d 1407.

JUSTICE WHITE, dissenting:

The Court of Appeals for the Seventh Circuit held in this case that the Carmack Amendment to the Interstate Commerce

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Act, 49 U. S. C. § 10103, bars a shipper from pursuing state and common-law remedies against a carrier for damages to goods shipped in interstate commerce. The court reasoned that the Act was designed to establish "uniform federal guidelines" that would "remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment." 829 F. 2d 1407, 1415 (1987). The congressional intent to eliminate such uncertainty would be defeated, said the court, if shippers were allowed to choose among federal, state, and common-law remedies. The court's decision relied in large measure on *Adams Express Co. v. Croninger*, 226 U. S. 491 (1913), which construed an earlier version of the Carmack Amendment as pre-empting state regulation of carrier liability.

The court recognized that its view of the pre-emptive scope of the Carmack Amendment was shared by three other Circuits. See 829 F. 2d, at 1414 (citing *Air Products & Chemicals, Inc. v. Illinois Central Gulf R. Co.*, 721 F. 2d 483, 484-485 (CA5 1983), cert. denied, 469 U. S. 832 (1984); *Fulton v. Chicago, R. I. & P. R. Co.*, 481 F. 2d 326, 331-332 (CA8), cert. denied, 414 U. S. 1040 (1973); *W. D. Lawson & Co. v. Penn Central Co.*, 456 F. 2d 419, 421 (CA6 1972)). The court noted that a divergent position had been taken by the Tenth Circuit, however, in *Reed v. AAACON Auto Transport, Inc.*, 637 F. 2d 1302, 1304-1305 (1981); *Litvak Meat Co. v. Baker*, 446 F. 2d 329 (1971); and *L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F. 2d 488 (1964). For example, the *Litvak* court held that the Carmack Amendment "did not oust all other remedial rights of shippers" against interstate carriers. 446 F. 2d, at 337.

Accordingly, because a conflict exists among the Circuits concerning the pre-emptive scope of the Carmack Amendment, I would grant certiorari.

No. 87-999. *MCQUILLEN v. WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 659.

JUSTICE WHITE, dissenting.

This case presents the question whether a plaintiff may prevail on a disparate treatment claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, only by establishing that the employer's discriminatory intent was the "but for" cause of the adverse employment action.

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The Court of Appeals for the Seventh Circuit held in this case that a Title VII plaintiff must prove that "the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation." 830 F. 2d 659, 664 (1987). The court found support for this "but for" standard of causation in the language of Title VII, which prohibits employers from discriminating against an employee or potential employee "because of such individual's race, color, religion, sex or national origin." § 2000e-2(a)(1) (emphasis added).

The Seventh Circuit expressly rejected the standard of causation adopted by the Eighth Circuit in *Bibbs v. Block*, 778 F. 2d 1318 (1985) (en banc). A plaintiff can establish Title VII liability under *Bibbs* merely by proving that "an unlawful motive played some part in the employment decision." *Id.*, at 1323. If the employer establishes that discriminatory intent was not the determinative factor in the employment decision, however, the plaintiff's recovery is limited to declaratory relief, an injunction against future or continued discrimination, and partial attorney's fees.

The Seventh Circuit's view that Title VII liability is established only when an unlawful motive was the "but for" cause of the challenged employment action is shared by three other Circuits. See *Haskins v. United States Dept. of Army*, 808 F. 2d 1192, 1198 (CA6), cert. denied, 484 U. S. 815 (1987); *Lewis v. University of Pittsburgh*, 725 F. 2d 910, 915-916 (CA3 1983), cert. denied, 469 U. S. 892 (1984); *Mack v. Cape Elizabeth School Bd.*, 553 F. 2d 720, 722 (CA1 1977). Two Circuits have indicated that the discriminatory motive must be a "significant" or "substantial" factor, but not necessarily the determinative factor, before liability may be imposed on an employer under Title VII. See *Fadhl v. City and County of San Francisco*, 741 F. 2d 1163, 1166 (CA9 1984); *Whiting v. Jackson State University*, 616 F. 2d 116, 121 (CA5 1980).

Accordingly, in view of the divergent positions taken by the Federal Courts of Appeals with regard to the standard of causation to be applied in determining Title VII liability, I would grant certiorari.

No. 87-1119. PARAVECCHIO *v.* MEMORIAL HOSPITAL OF LARAMIE COUNTY ET AL. Sup. Ct. Wyo. Motion of Dean Crocker

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et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 742 P. 2d 1276.

No. 87-1132. TOLEDO TRUST CO., AS TRUSTEE OF TRUST NO. 4117, ET AL. v. SANTA BARBARA FOUNDATION. Sup. Ct. Ohio. Motions of Ohio Bankers Association Trust Division and American Bankers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 32 Ohio St. 3d 141, 512 N. E. 2d 664.

No. 87-1143. HOLLIS v. CAMPBELL COUNTY DISTRICT COURT. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment. Reported below: 829 F. 2d 38.

No. 87-5323. STEFFEN v. OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 31 Ohio St. 3d 111, 509 N. E. 2d 383.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins and JUSTICE BLACKMUN joins as to Part II, 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) (BRENNAN, J., dissenting), I would grant the petition for a writ of certiorari and vacate the death sentence in this case. But even if I did not hold this view, I would grant this petition in order to address the important unresolved issue whether an instruction that reduces a jury's sense of responsibility over a death sentence is nonetheless *per se* constitutional if it is accurate and non-misleading, even when the instruction serves no legitimate state penological interest.

II

In this case, petitioner was sentenced to death in accordance with the jury's recommendation. The trial court had instructed the jury:

"You must understand, however, the jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the

Court follows certain additional procedures required by the laws of this State. Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment." Pet. for Cert. 6.

The Ohio Supreme Court characterized this as an "instruction to the jury that their recommendation of death would not be binding on the court, and that the final responsibility for the imposition of the death penalty rests with the court." 31 Ohio St. 3d 111, 113, 509 N. E. 2d 383, 387 (1987). The Ohio Supreme Court then rejected petitioner's argument that "such an instruction impermissibly reduces the jury's sense of responsibility and increases the likelihood of a recommendation of death," *ibid.*, relying upon *State v. Buell*, 22 Ohio St. 3d 124, 489 N. E. 2d 795 (1986), a prior Ohio Supreme Court case that had rejected the same challenge to a substantially similar instruction. Although *Buell* went out of its way to "emphatically emphasize [that] the better procedure would be to have no comment by the prosecutor or by the trial judge on the question of who bears the ultimate responsibility," the court concluded that the instruction was neither an inaccurate nor a misleading statement of Ohio law and held that the instruction was thus constitutional. *Id.*, at 144, 489 N. E. 2d, at 813.

I have no cause to second-guess the conclusion that this instruction accurately reflects the state of Ohio law, as authoritatively construed by the Ohio Supreme Court itself. I note, however, that although an Ohio jury's recommendation of death is not binding on a trial court, a trial court cannot impose the death sentence when the jury recommends life imprisonment. Ohio Rev. Code Ann. §2929.03(D)(2) (1987). Ohio's statutory scheme thus contemplates that juries will bear a crucial responsibility in deciding whether Ohio will impose a death sentence: making their recommendation necessary, if not sufficient, to any sentence of death. The question this case presents is whether an instruction stressing the preliminary nature of a jury's decision can so minimize the jury's sense of responsibility for its decision and so increase the likelihood of a recommendation of death as to be unconstitutional despite the accuracy of the instruction. This question is particularly sharpened here, where the state court evidently concedes that the instruction serves no valid state interest and in-

deed "emphatically emphasize[s]" that the instruction should not be given.

In *Caldwell v. Mississippi*, 472 U. S. 320 (1985), this Court laid down a general prohibition against trial comments that minimize a jury's sense of responsibility for a death sentence. We stated: "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Id.*, at 341. The Eighth Amendment was thus violated, we concluded, when the State attempted "to minimize the jury's sense of responsibility for determining the appropriateness of death," *ibid.*, by suggesting that the sentencing jury was not ultimately responsible because appellate review would be available. Such a suggestion, we reasoned, biased a jury in favor of death sentences in four ways: (1) a jury comprised of laypersons might not understand the limited nature of appellate review; (2) a jury might reach a death verdict, even if it was unconvinced death was the appropriate punishment, in order to "send a message" of extreme disapproval; (3) some jurors might correctly assume that judicial review can reverse a death sentence but not a life sentence and thus might reach a death verdict in order to delegate, and thus avoid, responsibility for making a decision between death and life; and (4) jurors otherwise reluctant to vote for a death sentence might, particularly on a divided jury, view the availability of judicial review as a good argument for giving in to a death sentence verdict. *Id.*, at 330-333.

Of these four sources of bias, only the first is arguably not present in this case because a jury's recommendation of death is subject to plenary judicial review in Ohio. The other three sources of bias cited in *Caldwell* are, however, just as applicable here as they were in *Caldwell*. This suggests that an accurate and non-misleading instruction may still raise sufficient fear of jury bias to make it unconstitutional under the *Caldwell* analysis. Indeed, a four-Justice plurality of the Court implied that an instruction that minimized a jury's sense of responsibility for a death sentence had to be "both accurate and relevant to a legitimate state penological interest" to survive Eighth Amendment scrutiny. *Id.*, at 335-336 (MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.) (emphasis added). The plurality went on to suggest that an accurate and nonmisleading instruction about appellate review

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might be invalid because it would serve no valid state penological interest:

"That appellate review is available to a capital defendant sentenced to death is no valid basis for a jury to return such a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence. The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible. Creating this image in the minds of the capital sentencers is not a valid state goal" *Id.*, at 336.

This analysis is equally applicable to an accurate instruction regarding the nonbinding nature of an Ohio jury's recommendation of death. JUSTICE O'CONNOR, however, did not join the part of *Caldwell* articulating this analysis and wrote separately to state her view that an accurate and nonmisleading instruction would present no constitutional difficulties. *Id.*, at 341–343 (concurring in part and concurring in judgment). Accordingly, because Justice Powell did not take part in *Caldwell*, see *id.*, at 341, a majority of this Court has never expressed a view as to the constitutional status of accurate and nonmisleading instructions that minimize jury responsibility by emphasizing the preliminary nature of their decision.

I would therefore vote to grant the petition and set the case for oral argument on the issue left unresolved by *Caldwell*.

No. 87–5449. *ANDREWS v. SHULSEN, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 802 F. 2d 1256.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence. Even if I did not hold this view, I would grant the petition because petitioner William Andrews was convicted of murder and sentenced to death under circumstances raising grave concerns

of impermissible racial bias. These circumstances include a mid-trial incident in which a juror handed the bailiff a napkin with a drawing of a man on a gallows above the inscription, "Hang the Niggers." The District Court in this case refused even to undertake an evidentiary hearing to investigate petitioner's substantial allegations of racial prejudice. The Constitution cannot countenance such indifference and summary treatment when a person's life is at stake.

I

Petitioner was convicted for his role in a multiple murder during the robbery of a hi-fi shop in Ogden, Utah. The ringleader of the crimes, Dale Pierre, was executed last year. Evidence at trial indicated that petitioner had a substantially less active role in the murders than Pierre. The two men entered the shop together and forced five people into the store's basement. There the victims were forced to drink liquid drain cleaner, which induced violent vomiting. One of the two victims who survived the robbery testified that petitioner said, "I can't do it, I'm scared," and that petitioner left the scene shortly thereafter. Only after petitioner left did Pierre carry out, in particularly gruesome fashion, the multiple murders for which petitioner has been sentenced to die. Pet. for Cert. 3.

The murders understandably attracted substantial attention in the local press and the community from which the jury venire was drawn. The incident also may have generated racist sentiments, inasmuch as the defendants were black people and the victims were white members of the local community. The single black member of the venire was excluded, and an all-white jury was empaneled.

An ugly racial incident involving the jury occurred during the trial. The jury was eating lunch in a separate dining room when a juror presented the bailiff with a drawing that had been made on a napkin. The drawing represented a stick figure hanging on a gallows. Underneath the figure were the words, "Hang the Niggers." The bailiff was unable to say who had made the drawing or how many other jurors had seen it, although he did inform the court that "some of the jurors" had asked him "what the court may do about this." The only action the trial court took in response was to issue a general instruction to the jury to "ignore communications from foolish people." *Id.*, at 9-10, and n. 4.

After petitioner and Pierre were convicted, the court ordered a 5-day recess. The jury was not sequestered. During this time, media coverage of the conviction was widespread and, petitioner alleges, racially inflammatory. Petitioner alleges, for example, that one newspaper ran a false report that petitioner had directed a "Black Power" closed-fist gesture at one of the surviving victims after the verdict was read. *Id.*, at 10. The jury returned for the separate sentencing hearing and voted unanimously to sentence petitioner to death.

In his petition for a writ of habeas corpus, petitioner alleged that adverse publicity and hostile community sentiment had injected racial animus into his trial and undermined his right to a fair trial. The District Court refused to convene an evidentiary hearing to consider this claim. 600 F. Supp. 408, 415-416 (Utah 1984). The Court of Appeals for the Tenth Circuit upheld this refusal with little discussion, stating: "Having reviewed the briefs and the appellate record, we conclude that no hearing is required under the principles of *Townsend v. Sain*, 372 U. S. 293 (1963), and that the constitutional standard for a fair trial has been met." 802 F. 2d 1256, 1260 (1986) (citations omitted).

II

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U. S. 209, 215 (1982). Such a hearing is, of course, especially vital when the defendant has been condemned to die. In *Turner v. Murray*, 476 U. S. 28 (1986), the Court vacated a death sentence entered in a case in which the trial court had refused the defendant's request to question the prospective jurors on racial prejudice. The plurality recognized that "in light of the complete finality of the death sentence," the Constitution requires district courts to be especially solicitous of allegations of racial prejudice in capital cases. *Id.*, at 35. The Court therefore vacated the sentence, even though no specific allegations of racial prejudice had been made other than the fact that the case involved a black defendant and a white victim. The plurality concluded that "the risk that racial prejudice may have infected petitioner's capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized." *Id.*, at 36.

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This case involves far more serious and specific allegations of racial animus than did *Turner*, including a vulgar incident of lynch-mob racism reminiscent of Reconstruction days. Moreover, petitioner is not asking this Court to decide whether there is sufficient evidence of racial prejudice to impeach the conviction and sentence. He seeks only to have the District Court undertake an evidentiary hearing to consider his charges. I would think it clear that the Constitution, not to mention common decency, requires no less than this modest procedure. See *Tanner v. United States*, 483 U. S. 107, 142 (1987) (MARSHALL, J., concurring in part and dissenting in part).

III

Was it one (or more) of petitioner's jurors who drew a black man hanging on a gallows and attached the inscription, "Hang the Niggers"? How many other jurors saw the incendiary drawing before it was turned over to the bailiff? Might it have had any effect on the deliberations? Was the jury's decision to sentence petitioner to die influenced by racially charged media coverage of the trial between the guilt and penalty phases? These are among the questions that petitioner deserves to have at least considered before he is put to death for a series of murders in which he played only a secondary role. It is conscience shocking that all three levels of the federal judiciary are willing to send petitioner to his death without so much as investigating these serious allegations at an evidentiary hearing. Not only is this less process than due; it is no process at all. I dissent.

No. 87-5722. *PATTERSON v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1188.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *Michigan v. Tucker*, 417 U. S. 433, 447 (1974), this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in *Miranda v. Arizona*, 384 U. S. 436 (1966). Since that time, the state and federal courts have been divided on this question.¹ Indeed, in *Massachusetts v. White*, 439 U. S. 280

¹Some courts faced with this question have concluded that physical evidence so obtained must be suppressed. See, e. g., *United States v. Castellana*, 488 F. 2d 65, 67 (CA5 1974); *State v. Preston*, 411 A. 2d 402, 407-408 (Me. 1980); *Commonwealth v. White*, 374 Mass. 132, 371 N. E. 2d 777 (1977),

(1978), this Court was evenly divided on the issue of the admissibility of physical evidence obtained from an interrogation that violated *Miranda*.

Here, petitioner was arrested in Mexico by local officials when he attempted to pass a counterfeit \$20 bill at a store in Tijuana. While still in the custody of Mexican police, petitioner was questioned by United States Secret Service agents who failed to inform him of his rights under *Miranda*. During the questioning, petitioner provided agents with a detailed description of a counterfeiting operation based in San Diego, California. Agents used petitioner's confession to obtain a warrant to search the facility petitioner described; there, a variety of items relating to the counterfeiting enterprise were discovered.

Petitioner argued that the physical evidence obtained in the search of the counterfeiting operation should be suppressed, claiming that this evidence was inadmissible as "fruits" of the interrogation which violated *Miranda*. But the Court of Appeals for the Ninth Circuit affirmed the District Court's rejection of this contention. 812 F. 2d 1188 (1987). The Court of Appeals rested its conclusion in part on prior Ninth Circuit decisions, *e. g.*, *United States v. Lemon*, 550 F. 2d 467, 473 (1977), and in part on our decision in *Oregon v. Elstad*, 470 U. S. 298, 304-309 (1985), which held that a confession that was the "fruit" of an earlier violation of *Miranda* (but not the Fifth Amendment) was admissible.

While *Elstad* has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a *Miranda* violation,² that decision did not squarely address the question presented here, and in fact, left the matter open. *Elstad*, 470 U. S., at 308; *id.*, at 347, n. 29 (BRENNAN, J., dissenting). Consequently, I would grant certiorari in this case

aff'd by an equally divided Court, 439 U. S. 280 (1978). Others have reached the opposite conclusion. See, *e. g.*, *United States ex rel. Hudson v. Cannon*, 529 F. 2d 890, 894-895 (CA7 1976); *United States v. Massey*, 437 F. Supp. 843, 860-861 (MD Fla. 1977); *Wilson v. Zant*, 249 Ga. 373, 377-379, 290 S. E. 2d 442, 447-448, cert. denied, 459 U. S. 1092 (1982).

Many courts have noted the conflict, but have declined to take a position. See, *e. g.*, *United States v. Scaf*, 708 F. 2d 1540, 1545-1546 (CA10 1983); *United States v. Downing*, 665 F. 2d 404, 409, n. 5 (CA1 1981).

² See, *e. g.*, 812 F. 2d, at 1193 (case below); *United States v. Quinn*, 815 F. 2d 153, 160 (CA1 1987); *United States v. Morales*, 788 F. 2d 883, 886-887 (CA2 1986).

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to resolve the conflict which has existed since *Tucker*, and answer the question presented here.

No. 87-5781. *ENGLE v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 510 So. 2d 881.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence.

I

Even if I did not hold this view, I would grant the petition for certiorari to consider petitioner's contention that the Florida Supreme Court is applying the review standard of *Tedder v. State*, 322 So. 2d 908, 910 (1975) (*per curiam*), in a manner that has denigrated the role of legitimate mitigating circumstances in Florida's sentencing scheme and that has led to the arbitrary infliction of the death penalty. Petitioner's sentencing jury recommended life imprisonment, but the trial judge overrode the jury's recommendation and imposed the death sentence. Under Florida's unusual system of capital sentencing, the trial judge is given the power to overturn a sentencing jury's rejection of the death penalty. In upholding Florida's sentencing system against various constitutional challenges, this Court repeatedly has relied on the Florida rule, announced in *Tedder*, that "[i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," *ibid.* See *Spaziano v. Florida*, 468 U. S. 447, 465-466 (1984); *Barclay v. Florida*, 463 U. S. 939, 955-956, 958 (1983) (REHNQUIST, J., joined by Burger, C. J., and WHITE and O'CONNOR, JJ.); *Proffitt v. Florida*, 428 U. S. 242, 249 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). The trial judge in this case failed even to consider the reasonableness of the jury's recommendation and refused to recognize petitioner's lesser role in the crime as a valid mitigating circumstance. The Florida Supreme Court nonetheless affirmed the override of the jury's recommendation, arguing that it would be

"unreasonable . . . to conclude that [petitioner] played no part in the brutal slaying." 510 So. 2d 881, 884 (1987) (*per curiam*). This reasoning evinces a cramped view of mitigating circumstances regarding evidence of petitioner's lesser role that is contrary to the constitutional principles recognized in *Lockett v. Ohio*, 438 U. S. 586 (1978), and *Eddings v. Oklahoma*, 455 U. S. 104 (1982). In addition, a review of this and other cases convinces me that the Florida Supreme Court has embraced conflicting views of whether such mitigating evidence may justify the jury's recommendation of life imprisonment. The court's inconsistent application of the *Tedder* standard in felony-murder cases has led to the arbitrary imposition of the death penalty.

Petitioner was charged, along with Rufus Stevens, with the murder of Eleanor Tolin, a cashier at the Majik Market in Jacksonville, Florida.¹ Evidence presented by the State at trial indicated that Stevens had a leadership role and planned the robbery of the market, whereas petitioner was the follower in the scheme. Evidence also indicated that Stevens was the actual killer. During guilt-phase deliberations, the jurors twice asked the judge whether they had "to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree." Pet. for Cert. 5.² The penalty phase of the trial began immediately after the jury returned the guilty verdict. No additional evidence was presented. Counsel presented closing arguments and the jury was instructed to base its penalty recommendation on the evidence presented during the guilt phase. In his summation to the jury prior to the sentencing phase, the prosecutor stated:

"You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. . . . But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he

¹ Stevens was convicted of Eleanor Tolin's murder in a separate trial. The same trial judge, Judge Santora, overrode the jury's recommendation of life imprisonment and sentenced Stevens to death. The conviction and sentence were affirmed by the Florida Supreme Court. *Stevens v. State*, 419 So. 2d 1058 (1982), cert. denied, 459 U. S. 1228 (1983).

² Under Florida law, an individual is guilty of first-degree murder when a killing occurs during the commission of a robbery even though the individual did not actually do the killing. See *Hawkins v. State*, 436 So. 2d 44, 46 (Fla. 1983).

formed the intent to kill her for that purpose, that is first degree murder and then if you believe that [petitioner] gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens." *Id.*, at 6-7.

After deliberating for only 25 minutes, the jury returned a recommendation that petitioner be sentenced to life imprisonment.

Defense counsel argued to the trial judge that the jury's recommendation was reasonable because it was based on the view that Rufus Stevens was the leader, planner, and dominant participant in the robbery and murder, whereas petitioner was the follower and not the actual killer. The trial judge responded: "Are you under the impression that if two men participate in a crime like this, one of them kills her and the other one sits there and aids and abets, that he is not equally guilty? . . . That he should not suffer the same fate?" *Id.*, at 8. The trial judge proceeded to override the jury's recommendation and sentenced petitioner to death. On direct appeal, the Florida Supreme Court affirmed petitioner's conviction but reversed the death sentence because the trial judge had considered the testimony of Rufus Stevens at his separate trial in violation of petitioner's Sixth Amendment right of confrontation. See *Engle v. State*, 438 So. 2d 803, 813-814 (1983).

Following a new sentencing hearing, the same trial judge found four aggravating circumstances and no mitigating circumstances, and he again sentenced petitioner to death. The judge did not refer to the jury's recommendation of life imprisonment and made no attempt to evaluate the reasoning behind that recommendation. On appeal, petitioner argued that the jury's recommendation of life imprisonment was reasonable and thus should be upheld under the standard of *Tedder v. State*, 322 So. 2d 908 (1975). As developed by the Florida Supreme Court, and relied on by this Court, the *Tedder* standard requires an inquiry into whether the jury reasonably could have based its recommendation on statutory or nonstatutory mitigating circumstances. See *Amazon v. State*, 487 So. 2d 8, 13 (1986); *Welty v. State*, 402 So. 2d 1159, 1164 (1981). Petitioner argued that evidence before the jury—evidence presented by the State's own witnesses—indicated that petitioner played a lesser role in the robbery and murder and that Stevens did the actual killing. The jury's questions during its guilt-phase deliberations, and the remarks of the prosecutor prior

to the sentencing phase, reinforced the view that the jury returned its life recommendation based on this lesser role.

The Florida Supreme Court affirmed the imposition of the death sentence. The court held that there was "ample support . . . for each of the aggravating circumstances," 510 So. 2d, at 884, and found no error in the trial judge's determination that there were no mitigating circumstances. The court noted petitioner's claim that the jury's recommendation was reasonable because it may have believed that Stevens actually did the killing and was the dominant force behind the robbery. The court concluded, however, that "[i]t would be unreasonable under these circumstances to conclude that [petitioner] *played no part* in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment." *Ibid.* (emphasis added).

The Florida Supreme Court's reasoning thus requires that unless petitioner can show he "played no part" in the killing, evidence that he was not the actual killer, and that his role was as a follower rather than a leader, are not mitigating circumstances on which a reasonable juror could rely in recommending a life sentence. Such a view is wrong as a matter of federal law. In *Lockett v. Ohio*, *supra*, and *Eddings v. Oklahoma*, *supra*, this Court held that any aspect of the defendant's character and the circumstances of the offense may be considered in mitigation. This Court often has recognized that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime." *Sumner v. Shuman*, 483 U. S. 66, 79 (1987). Indeed, in *Tison v. Arizona*, 481 U. S. 137, 151 (1987), the Court recognized that a State may never constitutionally impose the death penalty for felony murder unless the defendant was a major participant in the felony and displayed a reckless indifference to human life. By finding the jury's recommendation unreasonable because petitioner was unable to show he played no part in the killing, the Florida Supreme Court ignored the presence of valid mitigating evidence that the jury apparently relied on in rendering its recommendation of life imprisonment. The court's determination denigrates the role of valid mitigating circumstances in Florida's sentencing scheme, contrary to the principles of *Lockett* and *Eddings*.

Completely apart from this infirmity, the Florida Supreme Court's endorsement of the trial judge's refusal to consider the mitigating effect of petitioner's lesser role in this case is at odds with other Florida Supreme Court decisions applying the *Tedder* standard. This inconsistency is unexplained. The haphazard application of the *Tedder* standard in cases in which an accomplice's lesser role may have influenced the jury's recommendation of life imprisonment convinces me that the Florida sentencing scheme is being applied in a manner inconsistent with the requirements of due process.

The Florida Supreme Court's decisions in *Barclay v. State*, 470 So. 2d 691 (1985), and *Hawkins v. State*, 436 So. 2d 44 (1983), illustrate the court's occasional readiness to defer to jury recommendations of life imprisonment based on the defendant's lesser role in the capital crime. In *Barclay* the court reversed the trial judge's override of the jury's recommendation of life imprisonment. The defendant Barclay was a member of a group that called itself the Black Liberation Army. The group abducted a hitchhiker and drove him to a trash dump. The victim was then stabbed repeatedly by Barclay, and shot twice in the head by the apparent leader of the group, Jacob Dougan. See *Barclay v. State*, 343 So. 2d 1266, 1267 (1977). The Florida Supreme Court held that the jury's recommendation of life imprisonment for Barclay was reasonable. The court argued:

"The jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation." 470 So. 2d, at 695.

Similarly, in *Hawkins* the court reversed an override of the jury's recommendation of life imprisonment, noting that evidence indicated that the defendant was not the triggerman, and holding that under those circumstances "there was a reasonable basis for the jury not to recommend the imposition of the death sentence." 436 So. 2d, at 47. Just as Barclay's and Hawkins' roles as followers justified the jury's recommendation of life, petitioner's role as a follower would seem to justify the jury's life recommendation. In the present case, the court did not cite or try to distinguish

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its holdings in *Barclay* and *Hawkins*, and simply concluded that because petitioner played some part in the murder, the jury's life recommendation was unreasonable. Without more, I fail to see how this reasoning can be squared with *Barclay* and *Hawkins*, in which both defendants also clearly played some part in the murders.

Defendants Barclay, Hawkins, and Engle all were present during violent murders. Each presented evidence in mitigation indicating that they were followers, not leaders, and that they did not do the actual killings. All three were sentenced to die by the trial judge after their juries determined that death was an inappropriate sentence. Barclay and Hawkins are now serving life sentences. If the Florida Supreme Court's decision in this case is allowed to stand, Engle will die in the electric chair. The Florida Supreme Court has not explained how these cases can be reconciled. As petitioner explains, these holdings create confusion as to whether it is wise, or even competent, for defense counsel to emphasize at trial the defendant's lesser role in a capital crime. The opinions in *Barclay*, *Hawkins*, and *Engle* appear collectively to "stand for the proposition that trying a penalty phase or appealing a 'life override' under Florida's capital sentencing scheme is akin to Russian Roulette." Pet. for Cert. 26. I believe the Florida Supreme Court has failed to apply the *Tedder* review standard in a consistent manner in these cases, leading to the arbitrary imposition of the death penalty. I also believe that in the present case the Florida Supreme Court based its decision on a view of mitigation that is contrary to the constitutional principles of *Lockett* and *Eddings*. I would therefore grant the petition for certiorari.

No. 87-5834. *WILLIAMSON v. FLORIDA*. Sup. Ct. Fla.;
No. 87-5860. *BARNARD v. TEXAS*. Ct. Crim. App. Tex.;
No. 87-5976. *CLAYTON v. PENNSYLVANIA*. Sup. Ct. Pa.;
No. 87-6150. *GHEENT v. CALIFORNIA*. Sup. Ct. Cal.;
No. 87-6158. *HAYS v. ALABAMA*. Sup. Ct. Ala.;
No. 87-6159. *DAVIS v. KEMP, WARDEN*. C. A. 11th Cir.;
No. 87-6203. *KIGHT v. FLORIDA*. Sup. Ct. Fla.; and
No. 87-6212. *DELONG v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. Reported below: No. 87-5834, 511 So. 2d 289; No. 87-5860, 730 S. W. 2d 703; No. 87-5976, 516 Pa. 263, 532 A. 2d 385; No. 87-6150, 43 Cal. 3d 739, 739 P. 2d 1250; No. 87-6158, 518 So.

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2d 768; No. 87-6159, 829 F. 2d 1522; No. 87-6203, 512 So. 2d 922; No. 87-6212, 234 Va. 357, 362 S. E. 2d 669.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 87-460. *BOSCIO v. UNITED STATES*, 484 U. S. 1004;

No. 87-720. *HAGEN, EXECUTRIX OF THE ESTATE OF HAGEN v. SOUTH DAKOTA ET AL.*, 484 U. S. 998;

No. 87-890. *WALKER v. CONSUMERS POWER Co.*, 484 U. S. 1011;

No. 87-5782. *BECKER v. ADAMS DRUG Co., INC., ET AL.*, 484 U. S. 1015;

No. 87-5797. *VERHAGEN v. NEW YORK STATE OFFICE OF COURT ADMINISTRATION ET AL.*, 484 U. S. 1015; and

No. 87-5801. *ARUNGA v. JOHNSON ET AL.*, 484 U. S. 1015. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

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Dismissals Under Rule 53

No. 87-660. *PETERS ET AL. v. CITY OF SHREVEPORT*. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 818 F. 2d 1148.

No. 87-985. *FINA OIL & CHEMICAL Co. ET AL. v. EL PASO NATURAL GAS Co.* Sup. Ct. Tex. Certiorari dismissed as to petitioner Sun Exploration & Production Co. under this Court's Rule 53.

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Appeal Dismissed

No. 87-317. *BEMIS PENTECOSTAL CHURCH ET AL. v. TENNESSEE ET AL.* Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 731 S. W. 2d 897.

Certiorari Granted—Vacated and Remanded

No. 86-1008. *IMMIGRATION AND NATURALIZATION SERVICE v. FAZELIHKOMABAD*. C. A. 9th Cir. Certiorari granted, judg-

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ment vacated, and case remanded for further consideration in light of *INS v. Abudu*, ante, p. 94. Reported below: 794 F. 2d 1470.

No. 86-1049. *CITY OF LITTLE ROCK, ARKANSAS v. WILLIAMS*. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *St. Louis v. Praprotnik*, ante, p. 112. Reported below: 802 F. 2d 296.

No. 87-852. *UNION OIL COMPANY OF CALIFORNIA v. SIERRA CLUB*. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U. S. 49 (1987). Reported below: 813 F. 2d 1480.

Miscellaneous Orders

No. — — —. *MURRAY v. UNITED STATES*. Motion to direct the Clerk to file the petition for writ of certiorari from the Judicial Council for the Ninth Circuit denied.

No. 94, Orig. *SOUTH CAROLINA v. BAKER, SECRETARY OF THE TREASURY*. Motion for clarification of the order entered December 7, 1987 [484 U. S. 973], granted. One-half of the total fee application filed November 4, 1987, is to be paid by the United States. One-fourth of the total fee application is to be paid by the State of South Carolina. One-fourth of the total fee application is to be paid by the National Governors' Association. [For earlier order herein, see, *e. g.*, 484 U. S. 973.]

No. 105, Orig. *KANSAS v. COLORADO*. Joint motion for approval of expenses incurred by Special Master Wade H. McCree, Jr., deceased, granted, and the allocation set forth in the motion is approved. [For earlier order herein, see, *e. g.*, 484 U. S. 910.]

No. 108, Orig. *NEBRASKA v. WYOMING ET AL.* Motion of Basin Electric to file a response to plaintiff's motion to amend petition granted. Motion of plaintiff to amend petition for an order enforcing decree and for injunctive relief denied. [For earlier order herein, see, *e. g.*, 484 U. S. 1040.]

No. 86-492. *BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE v. UNITED TECHNOLOGIES CORP.* C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Parties may file supplemental briefs on reargument, provided the briefs do not exceed 20 pages. *Amici curiae* may file supplemental briefs on reargument, provided the briefs do not exceed 10 pages. Such

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briefs shall be served and filed on or before close of business Wednesday, April 13, 1988.

No. 86-495. *K MART CORP. v. CARTIER, INC., ET AL.*;

No. 86-624. *47TH STREET PHOTO, INC. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.*; and

No. 86-625. *UNITED STATES ET AL. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.* C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Cases restored to calendar for reargument on the merits.

No. 86-2037. *LANDERS v. NATIONAL RAILROAD PASSENGER CORPORATION ET AL.* C. A. 1st Cir. [Certiorari granted, 484 U. S. 962.] Motion of respondents to reconsider order denying motion for divided argument [484 U. S. 1055] denied.

No. 87-578. *BANK OF NOVA SCOTIA v. UNITED STATES*; and

No. 87-602. *KILPATRICK ET AL. v. UNITED STATES.* C. A. 10th Cir. [Certiorari granted, 484 U. S. 1003.] Motion of petitioners for leave to file portion of joint appendix under seal granted.

No. 87-5468. *JOHNSON v. MISSISSIPPI.* Sup. Ct. Miss. [Certiorari granted, 484 U. S. 1003.] Motion of Committee on Civil Rights of the Association of the Bar of the City of New York for leave to file a brief as *amicus curiae* granted.

No. 87-6248. *WILSON-THOMAS v. SMALL BUSINESS ADMINISTRATION.* C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 28, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

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

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

No. 87-5888. *IN RE ROY.* Petition for writ of habeas corpus denied.

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Probable Jurisdiction Noted

No. 87-1160. DUQUESNE LIGHT CO. ET AL. *v.* BARASCH ET AL. Appeal from Sup. Ct. Pa. Probable jurisdiction noted. Reported below: 516 Pa. 142, 532 A. 2d 325.

Certiorari Granted

No. 86-1088. CITY OF CANTON, OHIO *v.* HARRIS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 798 F. 2d 1414.

No. 87-996. COIT INDEPENDENCE JOINT VENTURE *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F. A. C. A. 5th Cir. Certiorari granted. Reported below: 829 F. 2d 563.

No. 87-1031. REED *v.* UNITED TRANSPORTATION UNION ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 828 F. 2d 1066.

No. 87-1168. COMMISSIONER OF INTERNAL REVENUE *v.* CLARK ET UX. C. A. 4th Cir. Certiorari granted. Reported below: 828 F. 2d 221.

No. 87-121. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 804 F. 2d 1526 and 816 F. 2d 1493.

No. 87-470. FORT WAYNE BOOKS, INC. *v.* INDIANA ET AL. Sup. Ct. Ind.; and

No. 87-614. SAPPENFIELD ET AL. *v.* INDIANA. Ct. App. Ind. Motions of PHE, Inc., Video Software Dealers Association, and American Booksellers Association, Inc., et al. for leave to file briefs as *amici curiae* in No. 87-470 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 87-470, 504 N. E. 2d 559; No. 87-614, 505 N. E. 2d 504.

No. 87-1167. PRICE WATERHOUSE *v.* HOPKINS. C. A. D. C. Cir. Certiorari granted. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 263 U. S. App. D. C. 321, 825 F. 2d 458.

No. 87-5259. TEAGUE *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Motion of peti-

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tioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 820 F. 2d 832.

No. 87-5677. HARRIS *v.* REED, WARDEN, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 822 F. 2d 684.

Certiorari Denied

No. 86-1803. BLATTY *v.* NEW YORK TIMES CO. ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 42 Cal. 3d 1033, 728 P. 2d 1177.

No. 86-6710. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 788 F. 2d 1561.

No. 87-679. MCSURELY *v.* HUTCHISON. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 1002.

No. 87-690. PETRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 54.

No. 87-695. TURNER, EXECUTRIX OF THE ESTATE OF TURNER *v.* CITY OF ATLANTA. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 306, 357 S. E. 2d 802.

No. 87-710. SWAN ET AL. *v.* RUBEN ET AL.; and

No. 87-735. WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION ET AL. *v.* RUBEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 977.

No. 87-784. PORTER *v.* UNITED STATES; and

No. 87-1334. BELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 821 F. 2d 968.

No. 87-845. GOWDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87-872. TIMES-PICAYUNE PUBLISHING CORP. ET AL. *v.* EDWARDS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 111.

No. 87-873. UNION DE TRANSPORTS AERIENS *v.* BECKMAN. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 174, 828 F. 2d 24.

No. 87-876. KITCHENS ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 1337.

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No. 87-947. OKUN BROTHERS SHOE STORE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 102.

No. 87-950. RED LAKE BAND OF CHIPPEWA INDIANS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 380.

No. 87-958. PENNSYLVANIA ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 392.

No. 87-961. BEGAY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 302.

No. 87-966. ISMAILI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 828 F. 2d 153.

No. 87-972. SCHARRER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 773.

No. 87-1026. STOKES *v.* UNIVERSITY OF TENNESSEE AT MARTIN. Ct. App. Tenn. Certiorari denied. Reported below: 737 S. W. 2d 545.

No. 87-1053. PERLMUTTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 1430.

No. 87-1164. TERPSTRA *v.* FORD MOTOR CREDIT Co. Ct. App. Ind. Certiorari denied. Reported below: 495 N. E. 2d 561.

No. 87-1177. BURLINGTON NORTHERN JOINT PROTECTIVE BOARD, BROTHERHOOD RAILWAY CARMEN DIVISION, TRANSPORTATION COMMUNICATIONS UNION *v.* BURLINGTON NORTHERN RAILROAD Co. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 810.

No. 87-1178. TRIPLE-A BASEBALL CLUB ASSOCIATES ET AL. *v.* NORTHEASTERN BASEBALL, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 214.

No. 87-1182. RASCHICK *v.* PRUDENT SUPPLY, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 1497.

No. 87-1185. UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST *v.* DISTRICT 29, UNITED MINE WORKERS

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OF AMERICA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 280.

No. 87-1186. DUNCAN, CARROLL COUNTY COMMISSIONER, ET AL. *v.* CITY OF CARROLLTON, GEORGIA, BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1547.

No. 87-1198. CROWN CORK & SEAL CO., INC. *v.* MCNASBY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 47.

No. 87-1202. HUTTER NORTHERN TRUST ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 87-1225. CHERRY HILL TOWNSHIP *v.* CAMDEN COUNTY BOARD OF TAXATION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-1231. PENDERGRASS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1024.

No. 87-1232. ROSE *v.* LONG ISLAND RAILROAD PENSION PLAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 910.

No. 87-1237. YEE *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 771.

No. 87-1238. LUND *v.* NORWEST BANK MINNEAPOLIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 825 F. 2d 1249.

No. 87-1272. PEEPLES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1120.

No. 87-1273. WISLOCKI-GOIN *v.* MEARS, JUDGE, LAKE COUNTY SUPERIOR COURT, JUVENILE DIVISION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1374.

No. 87-1289. MCMAHON *v.* FRANKLIN MINT CO. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 283.

No. 87-1300. BRUSGULIS *v.* JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

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No. 87-1307. *PORTO v. ARMCO, INC., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 825 F. 2d 1274.

No. 87-1330. *POTTER ET AL. v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1049.

No. 87-5752. *E. R. E. v. DISTRICT OF COLUMBIA.* Ct. App. D. C. Certiorari denied. Reported below: 523 A. 2d 998.

No. 87-5806. *CALBAS v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 887.

No. 87-5979. *ABRAHAM v. DEFELICE.* C. A. 2d Cir. Certiorari denied.

No. 87-6022. *FORET ET AL. v. TOWN OF GRAND ISLE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 827 F. 2d 767.

No. 87-6037. *MARTINEZ-DIAZ v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 1128.

No. 87-6038. *AVERY v. WISCONSIN.* Sup. Ct. Wis. Certiorari denied. Reported below: 141 Wis. 2d 985, 416 N. W. 2d 297.

No. 87-6054. *BADIA v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 827 F. 2d 1458.

No. 87-6214. *MURPHY v. SISCO ET AL.* C. A. 10th Cir. Certiorari denied.

No. 87-6217. *LEGRONE v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. Reported below: 742 S. W. 2d 659.

No. 87-6220. *WILLIAMS v. CALIFORNIA.* Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6224. *ROGERS v. CARVER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION.* C. A. 1st Cir. Certiorari denied. Reported below: 833 F. 2d 379.

No. 87-6228. *MANTER v. TOWN OF FAYETTE, MAINE.* Sup. Jud. Ct. Me. Certiorari denied. Reported below: 528 A. 2d 887.

No. 87-6230. *BURRELL v. IOWA.* Sup. Ct. Iowa. Certiorari denied. Reported below: 412 N. W. 2d 556.

No. 87-6240. *THOMAS v. NEWSOME ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 773.

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No. 87-6242. *BEAUFORD v. FATHER FLANAGAN'S BOYS' HOME*. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 768.

No. 87-6247. *HAAS v. WILCOX ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1128.

No. 87-6263. *FIED v. WASHINGTON*. Sup. Ct. Wash. Certiorari denied. Reported below: 108 Wash. 2d 662, 740 P. 2d 848.

No. 87-6268. *SPRINGER, AKA MCNEAL v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 781.

No. 87-6270. *CARTER v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 408.

No. 87-6275. *BIRDSSELL v. LEACH ET AL.* C. A. 8th Cir. Certiorari denied.

No. 87-6293. *SMOLARSKI v. OWENS, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 307.

No. 87-6296. *WICKER v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 740 S. W. 2d 779.

No. 87-6298. *ECONOMOU ET UX. v. SECURITIES AND EXCHANGE COMMISSION*. C. A. 2d Cir. Certiorari denied. Reported below: 830 F. 2d 431.

No. 87-6308. *EAKINS v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 87-6323. *MOLINE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 190.

No. 87-6324. *HARRY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 479.

No. 87-6327. *TIMMONDS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87-6337. *PARKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 834 F. 2d 408.

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No. 87-6345. *IRVING v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87-6347. *AYERS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6352. *CORDOBA v. NEW MEXICO*. Ct. App. N. M. Certiorari denied.

No. 87-6366. *LUNA v. NEW MEXICO ET AL.* C. A. 10th Cir. Certiorari denied.

No. 86-2070. *KAMEN v. NORDBERG, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (KEMPER FINANCIAL SERVICES, INC., ET AL., REAL PARTIES IN INTEREST)*. C. A. 7th Cir. Certiorari denied.

JUSTICE WHITE, dissenting.

The issue here is when mandamus relief will be available to a party who claims that the District Court wrongly deprived him of the right to a jury trial. Petitioner is a shareholder in a mutual fund and brought a derivative suit against the two companies that administer the fund, alleging breach of fiduciary duty under § 36(b) of the Investment Company Act of 1940, 15 U. S. C. § 80a-35(b). The District Court granted defendants' motion to strike petitioner's demand for a jury trial on this claim, and petitioner sought mandamus from the Court of Appeals to compel the District Court to honor his demand for a jury trial. The Seventh Circuit denied relief in an order (No. 87-1455, Apr. 13, 1987), citing its prior decision in *First National Bank of Waukesha v. Warren*, 796 F. 2d 999 (1986).

In *Warren*, the Seventh Circuit held that mandamus will lie to enforce a party's demand for a jury trial only when, first, the party's right to a jury trial is clear and indisputable and, second, the party has no other adequate means to attain the relief he desires. *Id.*, at 1006. The second point is especially critical because it will prevent interlocutory review of many requests for a writ of mandamus to direct the granting of a jury trial, as in many cases the petitioning party can seek this same relief on appeal from the ultimate resolution of the case in the trial court. This decision conflicts with the decisions of other Courts of Appeals, which hold that mandamus relief is available to review an order denying a claimed right of trial by jury, and that a proper petition

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for mandamus in these circumstances obliges the Court of Appeals to address the merits of the claimed right to a jury trial. *In re Union Nacional de Trabajadores*, 502 F. 2d 113, 115-116 (CA1 1974), vacated on other grounds, 527 F. 2d 602 (1975); *Lee Pharmaceuticals v. Mishler*, 526 F. 2d 1115, 1116-1117 (CA2 1975) (*per curiam*); *Eldredge v. Gourley*, 505 F. 2d 769, 770 (CA3 1974); *General Tire & Rubber Co. v. Watkins*, 331 F. 2d 192, 194 (CA4), cert. denied, 377 U. S. 952 (1964); *Black v. Boyd*, 248 F. 2d 156, 159-161 (CA6 1957); *In re Vorpahl*, 695 F. 2d 318, 319 (CA8 1982); *Owens-Illinois, Inc. v. United States District Court*, 698 F. 2d 967, 969 (CA9 1983); *In re Zweibon*, 184 U. S. App. D. C. 167, 170-171, 565 F. 2d 742, 745-746 (1977) (*per curiam*). It may also be inconsistent with this Court's prior decisions in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U. S. 469 (1962), which emphasize the responsibility of the Courts of Appeals to grant mandamus relief where it is necessary to protect the constitutional right to trial by jury. I would grant certiorari to resolve the split among the Circuits on this issue.

No. 87-160. GRANT, SUPERINTENDENT, CORRECTIONS CAMP PROGRAM *v.* CASPER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 817 F. 2d 756.

No. 87-1227. KEMP, WARDEN *v.* DIX. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 832 F. 2d 546.

No. 87-220. CITY OF SANTA BARBARA *v.* HALL ET UX. C. A. 9th Cir. Motion of Golden State Mobilehome Owners League, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 833 F. 2d 1270.

No. 87-730. UNITED STATES *v.* MEYER ET AL. C. A. D. C. Cir. Motions of respondents Judith Hand, Mary Daily, Robert Coleman, Susan Blake, and Mindy Washington for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 258 U. S. App. D. C. 263, 810 F. 2d 1242.

No. 87-731. GLOBE NEWSPAPER CO. ET AL. *v.* KING. Sup. Jud. Ct. Mass. Motion of American Newspaper Publishers Association et al. for leave to file a brief as *amici curiae* granted.

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Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 400 Mass. 705, 512 N. E. 2d 241.

No. 87-894. SLYPER ET AL. *v.* MEESE, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 170, 827 F. 2d 821.

JUSTICE WHITE, dissenting.

This case presents the issue whether the decision of the United States Information Agency (USIA) to recommend against waiver of the requirement that a foreign doctor in this country for graduate medical training return to his or her foreign residence for two years prior to applying for permanent residence status here is subject to judicial review for abuse of discretion. See 8 U. S. C. § 1182(e) (1982 ed., Supp. IV). A waiver from the 2-year foreign residence requirement can be obtained on "hardship" grounds, one condition for which is that the Director of the USIA make a favorable recommendation concerning the waiver. The Court of Appeals held that because neither the relevant statute nor implementing regulation provided a standard against which to assess the Director's exercise of discretion, the decision was one committed to the agency's discretion by law and accordingly not reviewable under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2). 264 U. S. App. D. C. 170, 172-173, 827 F. 2d 821, 823-824 (1987). In so holding, the court reached the same conclusion as the Second and Ninth Circuits, *Dina v. Attorney General*, 793 F. 2d 473, 476 (CA2 1986) (*per curiam*); *Abdelhamid v. Ilchert*, 774 F. 2d 1447, 1449-1450 (CA9 1985), and rejected the contrary conclusion of the Third Circuit, *Chong v. Director, USIA*, 821 F. 2d 171, 176 (1987). I would grant certiorari to resolve the conflict among the Circuits over this question of federal law.

No. 87-975. SCROGGY ET AL. *v.* SUMMERS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 825 F. 2d 411.

No. 87-994. GENERAL MOTORS CORP. ET AL. *v.* BENNETT ET AL. C. A. 9th Cir. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE STEVENS and JUSTICE KENNEDY took no part in the consideration or decision of this motion and this petition. Reported below: 815 F. 2d 1305.

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No. 87-1151. *LEDERLE LABORATORIES, A DIVISION OF AMERICAN CYANAMID CO. v. TONER ET AL.* C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 828 F. 2d 510.

No. 87-1166. *MENDEZ v. MENDEZ*. Dist. Ct. App. Fla., 3d Dist. Motion of Watchtower Bible & Tract Society of New York, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 527 So. 2d 820.

No. 87-5803. *LEKAS v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 155 Ill. App. 3d 391, 508 N. E. 2d 221.

JUSTICE WHITE, dissenting.

This petition presents a constitutional issue over which the state courts are divided: whether the confrontation of a detainee with new evidence or another's confession is a sufficient intervening event to purge the taint of an allegedly unlawful arrest. The Appellate Court of Illinois held that it was, notwithstanding the facts that the confession here occurred during a period of continued detention following a warrantless nighttime arrest, assumed not to be supported by probable cause, and 12 hours of intermittent custodial interrogation. In contrast, the courts of three other States have reached the opposite conclusion, holding that newly discovered evidence or the confession of a codefendant is an insufficient intervening circumstance to prevent the in-custody confession from being fruit of the illegal arrest. *State v. Winegar*, 147 Ariz. 440, 711 P. 2d 579 (1985); *Commonwealth v. Barnett*, 471 Pa. 34, 369 A. 2d 1180 (1977); *Gregg v. State*, 667 S. W. 2d 125 (Tex. Crim. App. 1984), overruled on other grounds by *Russell v. State*, 717 S. W. 2d 7 (Tex. Crim. App. 1986). This Court has recognized that release from custody or presentation before a neutral magistrate can purge the taint of an illegal arrest, *Wong Sun v. United States*, 371 U. S. 471, 491 (1963); *Johnson v. Louisiana*, 406 U. S. 356, 365 (1972), but we have not held that merely confronting the illegally and continuously detained defendant with new evidence severs the link between the custodial confession and the Fourth Amendment violation. Here, there was apparently no exigency preventing the police from presenting the defendant to a magistrate during the 12-hour period over which they intermittently questioned him. The conflict created by this decision

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over the scope of the Fourth Amendment's protection against illegal arrests and the use of the fruits therefrom presents an important question of constitutional law, see *Taylor v. Alabama*, 457 U. S. 687 (1982); *Brown v. Illinois*, 422 U. S. 590 (1975), and I would grant certiorari.

No. 87-5971. *ROBERTS v. FLORIDA*. Sup. Ct. Fla.;

No. 87-5984. *NOLAN v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Mecklenburg County, N. C.;

No. 87-6223. *KOON v. FLORIDA*. Sup. Ct. Fla.;

No. 87-6236. *ALDERMAN v. GEORGIA*. Sup. Ct. Ga.; and

No. 87-6266. *FORD v. GEORGIA*. Sup. Ct. Ga. Certiorari denied. Reported below: No. 87-5971, 510 So. 2d 885; No. 87-6223, 513 So. 2d 1253; No. 87-6266, 257 Ga. 461, 360 S. E. 2d 258.

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. 87-6173. *DARDEN v. DUGGER*, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 287.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

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

I would grant the petition for certiorari and summarily reverse the judgment below primarily for the reasons stated in the dissent in *Darden v. Wainwright*, 477 U. S. 168, 188 (1986). I was not persuaded then, and I am not persuaded now, that petitioner Willie Jasper Darden received a fair trial in the Florida courts. A person should not be condemned to die and be executed under any system of justice in this country without a fair trial.

No. 87-6256. *ERICKSON ET AL. v. ALLTECH ASSOCIATES, INC.* App. Ct. Ill., 1st Dist. Motion of petitioner Hogan for leave to

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proceed *in forma pauperis* denied. Petitioner Hogan is allowed until March 28, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court. Petition for writ of certiorari as to petitioner Erickson denied.

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

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

Rehearing Denied

No. 86-6867. *LOWENFIELD v. PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.*, 484 U. S. 231;

No. 87-5587. *MURPHY v. AETNA LIFE & CASUALTY ET AL.*, 484 U. S. 961;

No. 87-5839. *DANIELS v. SECRETARY OF HEALTH AND HUMAN SERVICES*, 484 U. S. 1016;

No. 87-5904. *TRAPANI v. CBS RECORDS, INC., ET AL.*, 484 U. S. 1036; and

No. 87-6056. *WHITE v. DEPARTMENT OF JUSTICE*, 484 U. S. 1046. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

No. 87-732. *WHEELER ET AL. v. COMMISSIONER OF HIGHWAYS OF KENTUCKY*, 484 U. S. 1007. Petition for rehearing and/or other relief denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 87-5879 (A-631). *FRAZIER v. RAILROAD RETIREMENT BOARD*, 484 U. S. 1029. Application to suspend the effect of the order denying certiorari, addressed to JUSTICE KENNEDY and referred to the Court, denied. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this application and petition.

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Dismissal Under Rule 53

No. 87-1229. *S. G. ADAMS PRINTING & STATIONERY CO. v. MAY CENTERS, INC.* App. Ct. Ill., 5th Dist. Certiorari dis-

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missed under this Court's Rule 53. Reported below: 153 Ill. App. 3d 1018, 506 N. E. 2d 691.

MARCH 14, 1988

Certiorari Denied

No. 87-6596 (A-696). *FELDE v. BUTLER, WARDEN*. Sup. Ct. La. 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: 520 So. 2d 758.

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 of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

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Miscellaneous Order

No. A-693. *DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. v. JOHNSON*. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the Northern District of Florida, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

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

Larry Joe Johnson was scheduled to be executed on March 9, 1988. The State informs us that it was served with a petition for a writ of habeas corpus at about 5:45 p.m. on March 7, 1988. That petition raised an issue, under *Caldwell v. Mississippi*, 472 U. S. 320 (1985), in which Johnson claims that the sentencing jury was improperly informed that its role in the sentencing decision was merely advisory. Noting that issues similar or identical to Johnson's *Caldwell* claim are pending before the United States Court of Appeals for the Eleventh Circuit and before this Court, the United States District Court for the Northern District of Florida granted an indefinite stay of execution. The United States Court of Appeals for the Eleventh Circuit denied the State's mo-

tion to vacate the stay. The State then applied to the Circuit Justice for the Eleventh Circuit for a vacation of the stay, and the application was referred to the full Court. Johnson did not file any response, and this Court has voted to deny the application. I respectfully dissent.

The State argues that Johnson has abused the writ of habeas corpus by raising his *Caldwell* claim at this time. The State avers that Johnson had raised the same claim, along with others, in a previous petition for federal habeas, which was filed before this Court's decision in *Caldwell*. The claim was rejected on procedural grounds at that time, and it was not among the issues on which Johnson appealed to the Eleventh Circuit. Our decision in *Caldwell* was announced while the appeal was pending in the Eleventh Circuit, and Johnson apparently did not bring it to the attention of that court. Concluding that the claim was abandoned, the State now urges that Johnson's effort to renew the claim at this time constitutes an abuse of the writ.

In my view, the State is clearly correct to argue that the writ of habeas corpus is abused when a claim is raised in one petition, abandoned on appeal, and then raised again in a successive petition. If Johnson's *Caldwell* claim falls into this category, then the District Court would seem to have abused its discretion by granting an indefinite stay of execution on the ground that *Caldwell* issues are present in other cases pending before the Eleventh Circuit and before this Court.

Without ruling out the possibility that extraordinary circumstances might justify a stay of execution in this case, I note that no such circumstances have been called to our attention. The District Court did not address the argument that the State has made to this Court. The State explains this in the following way. In an effort to facilitate the District Court's consideration of any habeas petition that Johnson might file, it lodged an anticipatory response with that court. That response did not address Johnson's *Caldwell* claim because the State considered that claim abandoned. After Johnson filed his petition on March 7, the State prepared a supplemental response, which it expected to offer to the court at a hearing that was scheduled for the next morning at 10 o'clock. Counsel for the State arrived at 9:30, but "was informed that the hearing was cancelled and that the [District] Court had entered a stay without allowing the State to be heard." The State's attorney filed its written supplemental response with

the Clerk of the District Court, and subsequently filed a motion to vacate the stay with the Eleventh Circuit.

Arguing before the Eleventh Circuit, Johnson gave two reasons for concluding that the District Court had considered and rejected the State's abuse-of-the-writ argument. First, Johnson had anticipated and answered the argument in his petition. Second, the stay of execution was not actually entered until 10:31 a.m. on March 8, by which time the District Court would have had an opportunity to review the State's supplemental response to the petition. Johnson also argued to the Eleventh Circuit that entry of the stay of execution was not an abuse of discretion because he did not "consciously" abandon the *Caldwell* claim he raised on his first petition for federal habeas. Rather, he suggested, in failing to appeal the rejection of that claim his attorneys merely "conceded defeat on the merits."

On March 11, 1988, the Eleventh Circuit denied the State's motion to vacate the stay of execution. No reasons were given, and the only allusion to the State's arguments was the following sentence: "Such denial is without prejudice to [the State's] right to present in district court its argument that petitioner's *Caldwell* claim is barred because of failure to exhaust, procedural default or otherwise."

The standard under which we consider motions to vacate stays of execution is deferential, and properly so. Only when the lower courts have clearly abused their discretion in granting a stay should we take the extraordinary step of overturning such a decision. In the present case, however, there is no evident legal basis whatsoever for a stay. The State has presented an apparently meritorious argument that Johnson's attempt to raise a *Caldwell* claim at this time is an abuse of the writ, and Johnson's suggestion that his previous abandonment of the claim was a "concession of defeat on the merits," rather than a "conscious abandonment" seems altogether specious. If the District Court refused to consider the State's apparently meritorious argument, that was certainly an abuse of discretion. If the District Court considered the argument but deemed it too insubstantial to require any comment, that too must be considered an abuse of discretion unless and until we are informed of reasons that would justify the implicit rejection of the State's position. The Eleventh Circuit articulated no such reasons, and in fact appeared to indicate that it knew of none.

The Eleventh Circuit seems to have thought that the proper course was to leave the stay in effect, but to indicate that the State was free to return to the District Court and repeat the argument it had sought to present earlier. I disagree. When a stay of execution has been granted without an apparent legal basis, and the court of appeals cannot articulate a reason for leaving the stay in effect, the proper course is to vacate the stay. Because neither the District Court nor the Court of Appeals has articulated an adequate legal basis for entering a stay in this case, I would grant the State's application to vacate. Johnson would, of course, remain free to return to the District Court and seek a stay based on adequate legal grounds, if there are any.

A majority of this Court has previously expressed its disapproval of the litigation tactics that seem to have been employed in this case:

"This is another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus relief have been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ." *Woodard v. Hutchins*, 464 U. S. 377, 377-378 (1984) (Powell, J., joined by Burger, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring).

While the details of this case are somewhat different, we are faced once again with a last-minute effort to obtain a stay of execution on the basis of a claim that appears to be procedurally barred. Allowing this stay to remain in effect creates incentives that will almost surely lead to similar problems in the future:

"If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, *Barefoot v. Estelle*'s statement that stays of execution are not automatic in capital cases, 463 U. S. [880, 895 (1983)], would effectively be overruled." *Wainwright v. Booker*, 473 U. S. 935, 936, n. 3 (1985) (Powell, J., concurring).

Accordingly, I respectfully dissent from the Court's denial of the State's application in this case.

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Certiorari Denied

No. 87-6606 (A-699). *DARDEN v. DUGGER*, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN dissent for the reasons stated in JUSTICE BLACKMUN'S dissent from the denial of the petition for writ of certiorari in *Darden v. Dugger*, ante, p. 943.

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 of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

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Dismissal Under Rule 53

No. 87-1079. *PALUMBO ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari dismissed as to petitioner Robert T. Porter under this Court's Rule 53. Reported below: 829 F. 2d 39.

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Appeals Dismissed

No. 87-1074. *FIRST UNION NATIONAL BANK OF FLORIDA ET AL. v. FLORIDA DEPARTMENT OF REVENUE ET AL.* Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 513 So. 2d 114.

No. 87-1120. *POUDRE VALLEY RURAL ELECTRIC ASSN., INC. v. CITY OF GREELEY, COLORADO, ET AL.* Appeal from Sup. Ct. Colo. dismissed for want of properly presented federal question. Reported below: 744 P. 2d 739.

No. 87-1173. *ADIRONDACK CHAIR CO., INC. v. COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK*. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 129 App. Div. 2d 1012, 513 N. Y. S. 2d 903.

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No. 87-1174. *STERLING BANCORP v. NEW YORK CITY DEPARTMENT OF FINANCE ET AL.* Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 128 App. Div. 2d 1026, 512 N. Y. S. 2d 609.

No. 87-1195. *WILLIAMS v. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD OF MINNESOTA.* Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 414 N. W. 2d 394.

No. 87-1275. *REPLAN DEVELOPMENT, INC., ET AL. v. DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK ET AL.* Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 70 N. Y. 2d 451, 517 N. E. 2d 200.

No. 87-1367. *BOMHARDT v. MARYLAND.* Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 71 Md. App. 609, 526 A. 2d 983.

No. 87-1266. *BELL v. BELL.* Appeal from Ct. App. Cal., 6th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-1320. *ROSENBAUM v. ROSENBAUM.* Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6227. *PRENZLER v. McLAUGHLIN, SECRETARY OF LABOR.* Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6259. *MOHIUDDIN v. CALIFORNIA.* Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6285. *EDWARDS ET AL. v. FISHER 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. Reported below: 831 F. 2d 1059.

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Certiorari Granted—Reversed and Remanded. (See No. 87-133, ante, p. 265.)

Certiorari Granted—Vacated and Remanded

No. 86-1503. *SAMAYOA ET AL. v. CHICAGO BOARD OF EDUCATION ET AL.* C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 798 F. 2d 1046.

Miscellaneous Orders

No. — — ——. *NATIVE VILLAGE OF TANAMA v. ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES.* Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-632. *WINSLOW ET AL. v. WILLIAMS ET AL.* Sup. Ct. Colo. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A-668 (87-6491). *PAVLICO v. UNITED STATES.* C. A. 4th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D-656. *IN RE DISBARMENT OF FRIEDMAN.* Disbarment entered. [For earlier order herein, see 484 U. S. 893.]

No. D-657. *IN RE DISBARMENT OF ROSENTHAL.* Disbarment entered. [For earlier order herein, see 484 U. S. 893.]

No. D-662. *IN RE DISBARMENT OF VAVRIK.* Disbarment entered. [For earlier order herein, see 484 U. S. 941.]

No. D-664. *IN RE DISBARMENT OF WITTMACK.* Disbarment entered. [For earlier order herein, see 484 U. S. 973.]

No. D-665. *IN RE DISBARMENT OF ENRICO.* Disbarment entered. [For earlier order herein, see 484 U. S. 973.]

No. D-667. *IN RE DISBARMENT OF SMITH.* It is ordered that Francis X. Smith, of Long Island City, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-672. *IN RE DISBARMENT OF COOPER.* Edward Samuel Cooper, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be

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stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January, 25, 1988 [484 U. S. 1040], is hereby discharged.

No. D-675. *IN RE DISBARMENT OF PRICE*. It is ordered that Richard Douglas Price, Jr., of Peoria, 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-676. *IN RE DISBARMENT OF SERVER*. It is ordered that Richard E. Server, of Danville, 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-677. *IN RE DISBARMENT OF BELMONT*. It is ordered that Gordon L. Belmont, of Homewood, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-678. *IN RE DISBARMENT OF FLUME*. It is ordered that Richard August Flume, Jr., of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-679. *IN RE DISBARMENT OF KOTSOS*. It is ordered that Petros A. Kotsos, of Glenview, 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-680. *IN RE DISBARMENT OF MALONE*. It is ordered that E. Clayton Malone, of Livingston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-681. *IN RE DISBARMENT OF FELDMAN*. It is ordered that Jeffrey Stuart Feldman, of Livingston, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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No. D-682. *IN RE DISBARMENT OF BRISCOE*. It is ordered that John F. Briscoe, of Lakewood, N. J., 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-683. *IN RE DISBARMENT OF KERN*. It is ordered that Walter M. D. Kern, Jr., of Ridgewood, N. J., 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. 65, Orig. *TEXAS v. NEW MEXICO*. Motion of the Special Master for allowance of interim fees and disbursements granted. JUSTICE STEVENS took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 484 U. S. 973.]

JUSTICE BLACKMUN, dissenting.

Charles J. Meyers, formerly the dean of Stanford Law School and now a partner in the Denver branch of Gibson, Dunn & Crutcher, a large Los Angeles law firm, on July 2, 1984, was appointed by this Court, see 468 U. S. 1202, to succeed the Honorable Jean S. Breitenstein, Senior Judge of the United States Court of Appeals for the Tenth Circuit and since deceased, as Special Master in this litigation between Texas and New Mexico.

In December 1985, the successor Master filed an application for interim fees of \$33,511 and for reimbursement of expenses of \$702.09, a total of \$34,213.09. That request was granted by the Court over three dissenting votes. See 475 U. S. 1004 (1986). Chief Justice Burger, writing for the dissenters, complained about Master Meyers' omission of "any information concerning the experience levels of the four attorneys for whose services he seeks to charge"; about the absence of any statement that the four even were members of the Bar; and about the lack of information as to hourly rates charged. *Ibid.* The Chief Justice cited his corresponding dissent to the allowance of compensation requested by this same applicant as Master in *Louisiana v. Mississippi*, 466 U. S. 921 (1984). He repeated his earlier observation that a Special Master's charges, when allowed by the Court, "represent our assurance to the parties that the charges are reasonable and proper," and that this is so even where "the parties do not oppose the application." 475 U. S., at 1004. The Chief Justice also

noted: "I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this." He stated: "The contending litigants have a right to expect this Court to exercise its independent judgment on fees rather than requiring each or both of them to challenge the amounts." *Id.*, at 1005.

In September 1986, this Special Master once again moved for interim fees, this time for an amount totaling \$69,608.50. The Court granted that motion as well. 479 U. S. 806 (1986).

The present application for more interim fees and for reimbursement of expenses was filed January 11, 1988. Master Meyers now requests \$69,661.25 in fees and \$2,544.37 for expenses, a total of \$72,205.62. He says that these amounts are those incurred since the interim allowance of \$69,608.50 in late 1986.

The applicant attaches a computer printout to his motion. He asserts that nearly all the work during this period was performed either by him or by Diana Poole, "who has replaced Steven Crafton as my law clerk on this matter"; that clerk Crafton left the Denver office of the firm in August 1986; and that Ms. Poole assumed her duties in July 1987 and, revealingly, "expended considerable effort in the early months mastering the background of the case before commencing research on the issues arising in devising a decree."

The Master points out once again that he is a partner in his law firm and is head of its "Natural Resources Group"; that he received his law degree from the University of Texas and his master's and doctoral degrees from Columbia University; and that he has taught at Texas, Columbia, and Stanford, and was dean of Stanford Law School for five years. He states that Ms. Poole received her law degree in 1983 from the University of Minnesota, where she was an editor of the Law Review, and that she now is an associate (nonpartner) lawyer in his firm's Denver office. She worked for one year as a law clerk for Judge Myron H. Bright of the United States Court of Appeals for the Eighth Circuit, and "has been in private practice for over three years."

The Master requests compensation for his time at a "weighted average" of \$275.12 per hour. He requests compensation at a "weighted average" of \$181.30 per hour for the time of Ms. Poole. He says that he spent 85.25 hours on the case; that Ms. Poole spent 246.25 hours; and that small additional amounts of time were ex-

pended by former clerk Crafton and by one L. A. O'Neill, who, for all we know, may have been a paralegal and not a lawyer.

It seems apparent—indeed the Master so concedes when he describes the nature of the “early months” of her work on the case—that a substantial amount of Ms. Poole’s time was self-education as to the issues and was duplicative background work already performed by former clerk Crafton who had left the Denver office. The consequences of Crafton’s departure hardly are to be charged to these litigants. It also is difficult for me to accept the fact that in Denver, Colorado, this partner’s time is now worth \$290 an hour, having been increased from \$265 on November 1, 1987, and that the time of Ms. Poole is now worth \$200 an hour, having been elevated from \$170 beginning November 1, 1987. Ms. Poole, after all, was only four years out of law school and only three years in practice. I cannot agree that so recent a law school graduate, no matter how inherently bright she may be, of such limited experience can be said to be worth that amount in a case the retired Chief Justice described as possessing a “public service aspect.”

This Court does have a duty to the public and to the parties when it approves a Master’s request for fees. The fact that the two States which are the parties to this litigation have not lodged specific objections to the fees is of no great relevance. The States, after all, are parties and are consigned in their continuing litigation to this same Master.

I would reduce the request for interim fees from the asserted amount of \$69,661.25 to \$50,000 to reflect both a reasonable amount of time necessarily expended and realistic charges. I would also reduce the request for reimbursement for expenses by \$240, an amount described as having been paid for secretarial overtime. There is no explanation proffered by Master Meyers as to why this overtime was necessary. He can and should be more specific in his accounting to this Court.

I add that it seems to me that “establishment” law firms are doing themselves and the public a disservice by asserting fees of this magnitude so persistently over dissents from the Court. Public dissatisfaction with lawyers is not unknown; neither is public distrust of lawyers. A fee application of this kind tends to build that dissatisfaction and that distrust.

It is enlightening, incidentally, to compare with this application the fees recently charged by two very distinguished lawyers who

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served this Court as Special Masters on other similar assignments. See *South Carolina v. Baker*, 484 U. S. 973 (1987), and *Kansas v. Colorado*, *ante*, p. 931.

I dissent.

No. 86-495. *K MART CORP. v. CARTIER, INC., ET AL.*;

No. 86-624. *47TH STREET PHOTO, INC. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.*; and

No. 86-625. *UNITED STATES ET AL. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.* C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motion of Yamaha International Corp. et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 87-283. *BUDINICH v. BECTON DICKINSON & Co.* C. A. 10th Cir. [Certiorari granted, 484 U. S. 895.] Motion of petitioner to direct the Clerk to file reply brief out of time denied.

No. 87-578. *BANK OF NOVA SCOTIA v. UNITED STATES*; and

No. 87-602. *KILPATRICK ET AL. v. UNITED STATES.* C. A. 10th Cir. [Certiorari granted, 484 U. S. 1003.] Motion of petitioners for divided argument denied.

No. 87-620. *KRUPKIN ET AL. v. DOW CHEMICAL CO. ET AL.* C. A. 2d Cir. Motion of respondents to expedite consideration of the petition for writ of certiorari denied.

No. 87-821. *PITTSTON COAL GROUP ET AL. v. SEBBEN ET AL.*; and

No. 87-827. *MCLAUGHLIN, SECRETARY OF LABOR, ET AL. v. SEBBEN ET AL.* C. A. 8th Cir. [Certiorari granted, 484 U. S. 1058.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-1152. *PUBLIC UTILITIES COMMISSION OF HAWAII ET AL. v. HAWAIIAN TELEPHONE Co.* C. A. 9th Cir.; and

No. 87-1302. *GUSHIKEN ET AL. v. FUJIKAWA.* C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87-1277. *LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION v. NELSON.* C. A. 8th Cir. [Certiorari granted, *ante*, p. 904.] Motion for appointment of counsel granted, and it is ordered that John Wesley Hall, Jr., Esq., of Little Rock, Ark., be appointed to serve as counsel for respondent in this case.

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No. 87-1279. MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL. C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motions of Burton D. Linne et al. and Lawrence E. Walsh, Independent Counsel, for leave to file briefs as *amici curiae* granted. JUSTICE KENNEDY took no part in the consideration or decision of these motions.

No. 87-5468. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss. [Certiorari granted, 484 U. S. 1003.] Motion of Mississippi Public Defenders' Association for leave to file a brief as *amicus curiae* granted.

No. 87-6116. PENSON *v.* OHIO. Ct. App. Ohio, Montgomery County. [Certiorari granted, 484 U. S. 1059.] Motion for appointment of counsel granted, and it is ordered that Gregory L. Ayers, Esq., of Columbus, Ohio, be appointed to serve as counsel for petitioner in this case.

No. 87-6320. MACKAY *v.* MERCEDES BENZ OF NORTH AMERICA ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 11, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

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

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

No. 87-1316. IN RE COOPER, DBA LARRY N. COOPER THE PROPRIETORSHIP. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87-717. FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA *v.* DURHAM ET AL. Appeal from Sup. Ct. N. J.; and

No. 87-937. ATTORNEY GENERAL OF NEW JERSEY *v.* FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA ET AL. Sup. Ct. N. J. Probable jurisdiction noted in No. 87-717. Certiorari granted in No. 87-937. Cases consolidated and a total of one hour

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allotted for oral argument. Reported below: 108 N. J. 277, 528 A. 2d 1288.

No. 87-1245. TEXAS MONTHLY, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL. Appeal from Ct. App. Tex., 3d Dist. Motions of Magazine Publishers of America, Inc., and American Booksellers Association, Inc., for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Reported below: 731 S. W. 2d 160.

Certiorari Granted. (See also No. 87-937, *supra*.)

No. 87-56. OWENS ET AL. *v.* OKURE. C. A. 2d Cir. *Certiorari* granted. Reported below: 816 F. 2d 45.

No. 87-154. DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, ET AL. *v.* WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 7th Cir. *Certiorari* granted. Reported below: 812 F. 2d 298.

No. 87-163. UNITED STATES ARMY CORPS OF ENGINEERS ET AL. *v.* AMERON, INC., ET AL. C. A. 3d Cir. *Certiorari* granted. Reported below: 809 F. 2d 979.

No. 87-271. HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC. *v.* BRIECK. C. A. 3d Cir. *Certiorari* granted. Reported below: 822 F. 2d 52.

No. 87-1043. UNITED STATES *v.* RON PAIR ENTERPRISES, INC. C. A. 6th Cir. *Certiorari* granted. Reported below: 828 F. 2d 367.

No. 87-1241. PENNSYLVANIA *v.* UNION GAS CO. C. A. 3d Cir. *Certiorari* granted. Reported below: 832 F. 2d 1343.

No. 87-1252. H. J. INC. ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. *Certiorari* granted. Reported below: 829 F. 2d 648.

No. 86-1940. SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* LYNN. C. A. 9th Cir. *Certiorari* granted. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 804 F. 2d 1472.

No. 87-548. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS. C. A. 8th Cir. *Certio-*

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rari granted limited to Question 1 presented by the petition. Reported below: 819 F. 2d 839.

Certiorari Denied. (See also Nos. 87-1266, 87-1320, 87-6227, 87-6259, and 87-6285, *supra*.)

No. 87-113. HERCEG ET AL. *v.* HUSTLER MAGAZINE, INC. C. A. 5th Cir. *Certiorari* denied. Reported below: 814 F. 2d 1017.

No. 87-303. DOCUTEL/OLIVETTI CORP. ET AL. *v.* FINKEL; and
No. 87-494. FINKEL *v.* DOCUTEL/OLIVETTI CORP. ET AL. C. A. 5th Cir. *Certiorari* denied. Reported below: 817 F. 2d 356.

No. 87-603. MIERA ET AL. *v.* GARCIA, A MINOR, BY HER NEXT FRIENDS, GARCIA ET AL. C. A. 10th Cir. *Certiorari* denied. Reported below: 817 F. 2d 650.

No. 87-628. BRANCH *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. *Certiorari* denied. Reported below: 262 U. S. App. D. C. 310, 824 F. 2d 37.

No. 87-671. CONNECTICUT ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. *Certiorari* denied. Reported below: 262 U. S. App. D. C. 244, 823 F. 2d 1554.

No. 87-835. ROBINSON HUMPHREY/AMERICAN EXPRESS, INC., ET AL. *v.* SANDERS ET AL.;

No. 87-836. PAINEWEBBER GROUP, INC. *v.* PARKER, AS CUSTODIAN FOR PARKER, ET AL.; and

No. 87-932. J. C. BRADFORD & CO. *v.* KIRKPATRICK ET AL. C. A. 11th Cir. *Certiorari* denied. Reported below: 827 F. 2d 718.

No. 87-860. WOODS ET AL. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 5th Cir. *Certiorari* denied. Reported below: 826 F. 2d 1400.

No. 87-902. BETHEL BAPTIST CHURCH ET AL. *v.* UNITED STATES. C. A. 3d Cir. *Certiorari* denied. Reported below: 822 F. 2d 1334.

No. 87-911. CONTINENTAL GROUP, INC., ET AL. *v.* MCLENDON ET AL. C. A. 3d Cir. *Certiorari* denied.

No. 87-930. JAMES D. *v.* CALIFORNIA. Sup. Ct. Cal. *Certiorari* denied. Reported below: 43 Cal. 3d 903, 741 P. 2d 161.

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No. 87-967. *PRICE ET AL. v. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 823 F. 2d 1114.

No. 87-982. *HOLLEY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 331.

No. 87-986. *BREIER v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 212.

No. 87-1018. *WOLF v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1499.

No. 87-1039. *JUARBE ANGUEIRA v. ARIAS, DIRECTOR OF THE PUBLIC BUILDING AUTHORITY.* C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 11.

No. 87-1048. *LEMAIRE ET AL. v. UNITED STATES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 387.

No. 87-1079. *PALUMBO v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

No. 87-1084. *RAMEY v. GENERAL ACCOUNTING OFFICE.* C. A. D. C. Cir. Certiorari denied.

No. 87-1093. *BOERENVEEN v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1130.

No. 87-1142. *ILLINOIS DEPARTMENT OF REVENUE ET AL. v. ANDRAS ET AL.* App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 37, 506 N. E. 2d 439.

No. 87-1154. *WILSON v. TENNESSEE.* Ct. Crim. App. Tenn. Certiorari denied.

No. 87-1184. *CURRY ET AL. v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 879.

No. 87-1193. *MIAMI HERALD PUBLISHING Co. v. GRIDLEY, CIRCUIT JUDGE OF FLORIDA, ORANGE COUNTY, ET AL.* Sup. Ct. Fla. Certiorari denied. Reported below: 510 So. 2d 884.

No. 87-1197. *DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS v. THOMPSON.* Sup. Ct. Fla. Certiorari denied. Reported below: 515 So. 2d 173.

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No. 87-1199. ABACUS MORTGAGE INVESTMENT CO. *v.* SUTTON PLACE DEVELOPMENT CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 637.

No. 87-1203. HORNSBY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 517 So. 2d 631.

No. 87-1205. FLEISHER *v.* CITY OF SIGNAL HILL, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1491.

No. 87-1209. BROWN ET AL. *v.* ALABAMA ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 514 So. 2d 836.

No. 87-1215. E & T REALTY ET AL. *v.* STRICKLAND ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1107.

No. 87-1216. ARTHUR YOUNG & CO. *v.* BURULL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 788.

No. 87-1218. ADAMS ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 174, 828 F. 2d 24.

No. 87-1220. ROCKLAND INDUSTRIES, INC. *v.* CHUMBLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1119.

No. 87-1223. GER-SHEP, INC. *v.* UNITED STATES; KLP, INC. *v.* UNITED STATES; MCMINN'S ASPHALT CO., INC. *v.* UNITED STATES; MCMINN'S ASPHALT PRODUCTS, INC. *v.* UNITED STATES; SCHELL *v.* UNITED STATES; and SWEIGART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 308.

No. 87-1228. PENNWALT CORP. *v.* DURAND-WAYLAND, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 931.

No. 87-1230. PRICE, ADMINISTRATOR OF THE ESTATE OF PRICE *v.* SCOTT, EXECUTRIX OF THE ESTATE OF SCOTT. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1239. BLOOR ET AL. *v.* MONTGOMERY COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 70 Md. App. 733.

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No. 87-1248. *RONEK ET AL. v. GALLATIN COUNTY, MONTANA*. Sup. Ct. Mont. Certiorari denied. Reported below: 227 Mont. 514, 740 P. 2d 1115.

No. 87-1250. *BICOY v. HAWAII*. Sup. Ct. Haw. Certiorari denied.

No. 87-1253. *CANSLER v. GROVE MANUFACTURING CO. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1507.

No. 87-1254. *KILGROE v. ARABIAN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 413.

No. 87-1257. *SOBONY v. TILBERRY*. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 87-1258. *PLATIS v. E. F. HUTTON & CO., INC.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 13.

No. 87-1259. *KING v. GLOBE NEWSPAPER CO. ET AL.* Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 400 Mass. 705, 512 N. E. 2d 241.

No. 87-1264. *HILBUN v. GOLDBERG*. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 881.

No. 87-1265. *UMANSKY ET AL. v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 284.

No. 87-1267. *MABEY v. OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF A. H. ROBINS CO., INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 832 F. 2d 299.

No. 87-1271. *INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, PACIFIC MARITIME REGION, ET AL. v. ANDREWS, COMMISSIONER OF ADMINISTRATION OF ALASKA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 843.

No. 87-1282. *TEAGUE ET AL., DBA GOLDEN CABLE CO. v. B. E. & K. COMMUNICATIONS, INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 1058.

No. 87-1286. *ALLEN-SHERMAN-HOFF CO., INC., ET AL. v. CALLOWHILL ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 269.

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No. 87-1290. *MCCORKLE v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 736.

No. 87-1297. *ABLE, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BY HIS GUARDIAN AD LITEM, DAY v. UPJOHN CO., INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1330.

No. 87-1322. *ROLLESTON v. ELDRIDGE, JUDGE, FULTON SUPERIOR COURT OF GEORGIA*. C. A. 11th Cir. Certiorari denied.

No. 87-1328. *TOCCO v. ARIZONA*. Ct. App. Ariz. Certiorari denied.

No. 87-1329. *BROWNING v. CHEVRON U. S. A. INC. ET AL.* C. A. 10th Cir. Certiorari denied.

No. 87-1335. *BRAVERMAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 1126.

No. 87-1396. *PERRY v. UNITED STATES PAROLE COMMISSION ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 811.

No. 87-1399. *WADE v. UNITED STATES DEPARTMENT OF JUSTICE*. C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 872.

No. 87-5425. *ROBERTS v. ROBERTS*. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 151 Ill. App. 3d 65, 503 N. E. 2d 363.

No. 87-5686. *HUDSON v. JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION*. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 59.

No. 87-5713. *SIMPSON v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 320 N. C. 313, 357 S. E. 2d 332.

No. 87-5787. *STUART v. OREGON*. Ct. App. Ore. Certiorari denied. Reported below: 86 Ore. App. 538, 739 P. 2d 74.

No. 87-5815. *SNYDER v. KANSAS*. Ct. App. Kan. Certiorari denied. Reported below: 12 Kan. App. 2d lxxi, 761 P. 2d 1278.

No. 87-5819. *WARD v. MCNAMARA, FORMER DIRECTOR, DIVISION OF PRISONS, NORTH CAROLINA DEPARTMENT OF CORREC-*

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TIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 37.

No. 87-5826. PARHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 194.

No. 87-5833. WILLIAMS *v.* WELDON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 826 F. 2d 1018.

No. 87-5880. MCCLINE *v.* KEENEY, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 40.

No. 87-5915. SLAUGHTER *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 87-5921. BETTISTEA ET AL. *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 428 Mich. 917.

No. 87-5972. OSPINA *v.* UNITED STATES; and

No. 87-6011. RAMOS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 429.

No. 87-5980. BURTON *v.* OHIO STATE ADULT PAROLE AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 193.

No. 87-5983. WATSON *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 300.

No. 87-5987. GATES *v.* SAN QUENTIN WARDEN. C. A. 9th Cir. Certiorari denied.

No. 87-5990. RAY *v.* UNITED STATES; and

No. 87-6162. MAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 399.

No. 87-5999. COZAD *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 158 Ill. App. 3d 664, 511 N. E. 2d 211.

No. 87-6010. TINSLEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6028. DRYDEN *v.* MUSTAIN ET AL. C. A. 10th Cir. Certiorari denied.

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No. 87-6062. *STINCER v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied.

No. 87-6074. *ROBINSON v. AMTRAK RAILROAD CORPORATION ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6092. *RODRIGUEZ v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 162.

No. 87-6110. *SHIFLET v. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 815 F. 2d 457.

No. 87-6115. *CARLIN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 307.

No. 87-6139. *HUNTER v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON*. C. A. 9th Cir. Certiorari denied.

No. 87-6216. *MARRERO v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 1468.

No. 87-6231. *CASELL v. MOUNT JOY MENNONITE CHURCH ET AL.* Sup. Ct. Pa. Certiorari denied. Reported below: 516 Pa. 638, 533 A. 2d 710.

No. 87-6232. *CASELL v. CHARLES*. Sup. Ct. Pa. Certiorari denied. Reported below: 517 Pa. 597, 535 A. 2d 1056.

No. 87-6241. *DRAPER v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1119.

No. 87-6243. *DEERING v. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6244. *DEERING v. GEORGIA ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6250. *PUSHARD v. RUSSELL*. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 1.

No. 87-6251. *MCNEIL v. LOWNEY ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1368.

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No. 87-6253. *VIGIL v. ABOUREZK ET AL.* Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 87-6255. *JAMES v. LYNAGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS.* C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1024.

No. 87-6262. *MCCARTHY v. LOPES, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 87-6264. *AFIFI v. HODEL, SECRETARY OF THE INTERIOR.* C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 34.

No. 87-6265. *STRICKLER v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 308.

No. 87-6272. *LEMBECK v. ASHCROFT ET AL.* C. A. 8th Cir. Certiorari denied.

No. 87-6273. *FELDERS v. DUCKWORTH ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6274. *LOFTIS v. LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87-6278. *D'AMARIO v. RHODE ISLAND.* Sup. Ct. R. I. Certiorari denied.

No. 87-6283. *KIDD v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87-6292. *SMITH v. NORRELL ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87-6294. *TOWNES v. TEST, ASSISTANT COMMONWEALTH ATTORNEY, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87-6297. *STARKS v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 87-6299. *PEARL v. APEL ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 300.

No. 87-6300. *TATUM v. ARMONTROUT, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied.

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No. 87-6301. *ZUSCHLAG v. TRETTIS ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6304. *YANCEY v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 827 F. 2d 83.

No. 87-6307. *HENDERSON v. INTERNAL REVENUE SERVICE.* C. A. 1st Cir. Certiorari denied.

No. 87-6310. *DOOLEY v. DUCKWORTH.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 445.

No. 87-6312. *BRICKHOUSE v. LONG ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6314. *HUGHES v. GRANT ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87-6316. *HUSSMANN v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6318. *REUMAYR v. SCOTT, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 87-6319. *WILLIAMS v. ARTHUR ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6321. *BREWER v. CALIFORNIA.* Sup. Ct. Cal. Certiorari denied.

No. 87-6330. *LITTLE v. FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON.* C. A. 3d Cir. Certiorari denied.

No. 87-6332. *FLORES v. CALIFORNIA.* Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 87-6334. *GRATTON v. LECUREUX, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 87-6336. *PETERS v. TROWELL ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1005.

No. 87-6339. *WILLIAMS v. ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

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C. A. 3d Cir. Certiorari denied.

No. 87-6342. GILES *v.* WING ET AL. C. A. 11th Cir. Certiorari denied.

No. 87-6346. BALAWAJDER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 87-6349. JONES *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 87-6358. YOUNG *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87-6364. KERTESZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 880.

No. 87-6370. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 124.

No. 87-6376. MARIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 289.

No. 87-6377. GARCIA-NIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6378. REIGH ET AL. *v.* SCHLEIGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1334.

No. 87-6380. MATIAS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 356.

No. 87-6385. PENDLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 41.

No. 87-6390. GALLAGHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87-6394. AURIEMMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1019.

No. 87-6399. ESPINOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 604.

No. 87-6400. CROOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 479.

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No. 87-6408. *ROGERS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1574.

No. 87-6412. *JACKSON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 835 F. 2d 1195.

No. 87-6413. *GIRALDO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 289.

No. 87-6428. *SANTIAGO v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 828 F. 2d 866.

No. 87-6429. *QUINTERO-GONZALEZ v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 280.

No. 87-6432. *SMITH v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6435. *KAESTEL v. SARGENT, WARDEN*. C. A. 8th Cir. Certiorari denied.

No. 87-6440. *SAMEL v. LECUREUX, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 87-6451. *BARTLE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 646.

No. 87-6454. *GREEN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 87-6457. *TUMERMAN v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 133 App. Div. 2d 714, 519 N. Y. S. 2d 880.

No. 87-6463. *AKBAR v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1006.

No. 87-789. *GONZALES v. SECRETARY OF THE AIR FORCE ET AL.* C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 824 F. 2d 392.

No. 87-1208. *OBERG ET AL. v. AETNA CASUALTY & SURETY CO. ET AL.* C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 828 F. 2d 1023.

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No. 87-915. GUY F. ATKINSON COMPANY OF CALIFORNIA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 814 F. 2d 1388.

No. 87-1236. NASSER ET AL. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 823 F. 2d 1553.

No. 87-1280. LUNGLEY *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 827 F. 2d 772.

No. 87-6185. BRIGHT *v.* SHIMODA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 819 F. 2d 227.

No. 87-942. SPEER *v.* OTTAWAY NEWSPAPERS, INC. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 828 F. 2d 475.

No. 87-1014. FOLTZ *v.* BLACKBURN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 828 F. 2d 1177.

No. 87-1155. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION *v.* MARRERO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 823 F. 2d 1468.

No. 87-1226. KEMP, WARDEN *v.* BOWEN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 832 F. 2d 546.

No. 87-1102. SCHLEIGH ET AL. *v.* REIGH ET AL. C. A. 4th Cir. Motion of respondents Esther Reigh and Ivery Mae Simpkins to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 829 F. 2d 1334.

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No. 87-1276. *H-CHH ASSOCIATES ET AL., DBA PLAZA PASADENA v. CITIZENS FOR REPRESENTATIVE GOVERNMENT, DBA PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, ET AL.* Ct. App. Cal., 2d App. Dist. Motions of Pacific Legal Foundation and International Council of Shopping Centers, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841.

No. 87-1304. *ROSEE v. COMMODITY FUTURES TRADING COMMISSION ET AL.* C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 830 F. 2d 196.

No. 87-1308. *BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. v. GRANO ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 60, 832 F. 2d 1298.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case presents the difficult issue whether attorney's fees may be awarded under 42 U. S. C. § 1988 when the defendant has involuntarily acquiesced in the plaintiff's demands—due to a preliminary injunction, for example—but the case is later mooted prior to completion of the appeal process. For the reasons given in my dissent from denial of certiorari in *Kay v. David Douglas School District*, 484 U. S. 1032 (1988), I would grant certiorari in this case.

No. 87-6284. *CASTRO v. OKLAHOMA.* Ct. Crim. App. Okla.;

No. 87-6295. *TOWNES v. VIRGINIA.* Sup. Ct. Va.; and

No. 87-6368. *SMITH v. FLORIDA.* Sup. Ct. Fla. Certiorari denied. Reported below: No. 87-6284, 745 P. 2d 394; No. 87-6295, 234 Va. 307, 362 S. E. 2d 650; No. 87-6368, 515 So. 2d 182.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 87-6058. *SPENCER v. UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*, 484 U. S. 1071. Petition for rehearing denied.

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No. 84-1801. *INUPIAT COMMUNITY OF THE ARCTIC SLOPE ET AL. v. UNITED STATES ET AL.*, 474 U. S. 820. Motion for leave to file petition for rehearing denied. JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this petition.

- No. 86-595. *UNITED STATES v. FAUSTO*, 484 U. S. 439;
No. 87-809. *BULLARD v. NORTHCUTT ET AL.*, 484 U. S. 1010;
No. 87-922. *IN RE BROWN*, 484 U. S. 1041;
No. 87-1005. *IN RE ARLT ET UX.*, 484 U. S. 1041;
No. 87-5527. *RADEMAKER v. TEACHERS COLLEGE, COLUMBIA UNIVERSITY*, 484 U. S. 932;
No. 87-5699. *JONES v. BUTLER, WARDEN*, 484 U. S. 1047;
No. 87-5821. *JESTER v. OHIO*, 484 U. S. 1047;
No. 87-5847. *LYONS v. DEPARTMENT OF THE ARMY ET AL.*, 484 U. S. 1029;
No. 87-5901. *RONSON v. COMMISSIONER OF CORRECTION OF NEW YORK ET AL.*, 484 U. S. 1029;
No. 87-5968. *MORALES v. OHIO*, 484 U. S. 1047;
No. 87-5985. *ZUERN v. OHIO*, 484 U. S. 1047;
No. 87-6002. *BYRD v. OHIO*, 484 U. S. 1037; and
No. 87-6016. *TAYLOR v. HENRY VOGT MACHINE CO.*, 484 U. S. 1046. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

No. 87-5298. *FINESTONE v. UNITED STATES*, 484 U. S. 948. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

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Appeals Dismissed

No. 87-1298. *BEPPLER v. TOWNSHIP OF WASHINGTON ET AL.* Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6407. *DANIELSON v. ILLINOIS*. Appeal from App. Ct. Ill., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 153 Ill. App. 3d 1163, 517 N. E. 2d 353.

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Certiorari Granted—Vacated and Remanded

No. 86-1151. FRINK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Commissioner v. Bollinger*, ante, p. 340. Reported below: 798 F. 2d 106.

No. 86-1152. GEORGE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Commissioner v. Bollinger*, ante, p. 340. Reported below: 803 F. 2d 144.

Miscellaneous Orders. (See also No. 65, Orig., ante, at 394.)

No. D-658. IN RE DISBARMENT OF ROBINSON. Disbarment entered. [For earlier order herein, see 484 U. S. 893.]

No. D-660. IN RE DISBARMENT OF SCHULER. Disbarment entered. [For earlier order herein, see 484 U. S. 940.]

No. D-666. IN RE DISBARMENT OF KEEHAN. Disbarment entered. [For earlier order herein, see 484 U. S. 999.]

No. D-669. IN RE DISBARMENT OF WADE. Disbarment entered. [For earlier order herein, see 484 U. S. 1039.]

No. D-684. IN RE DISBARMENT OF SCHULTZ. It is ordered that Marc G. Schultz, of North Woodmere, 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-685. IN RE DISBARMENT OF STRAUSS. It is ordered that Stephen N. Strauss, of Selden, 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-686. IN RE DISBARMENT OF WARREN. It is ordered that David Warren, of Irvine, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-687. IN RE DISBARMENT OF NAHOOM. It is ordered that Kerry J. Nahoom, Sr., of Winter Park, Fla., be suspended

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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-688. *IN RE DISBARMENT OF MAGEDMAN*. It is ordered that Nelson Samuel Magedman, of Canoga Park, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-689. *IN RE DISBARMENT OF TRILLING*. It is ordered that Michael P. Trilling, of Gaithersburg, 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-690. *IN RE DISBARMENT OF DORSEY*. It is ordered that Thomas Joseph Dorsey, of Miami, 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. 86-492. *BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE v. UNITED TECHNOLOGIES CORP.* C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of Joan Tozer for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86-957. *LILJEBERG v. HEALTH SERVICES ACQUISITION CORP.* C. A. 5th Cir. [Certiorari granted, 480 U. S. 915.] Case restored to calendar for reargument on April 25, 1988.

No. 87-519. *MAYNARD, WARDEN, ET AL. v. CARTWRIGHT*. C. A. 10th Cir. [Certiorari granted, 484 U. S. 1003.] Motion of Roger Dale Hayes for leave to file a brief as *amicus curiae* granted.

No. 87-5677. *HARRIS v. REED, WARDEN, ET AL.* C. A. 7th Cir. [Certiorari granted, *ante*, p. 934.] Motion for appointment of counsel granted, and it is ordered that Kimball R. Anderson, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 87-6343. *HENSLEE v. SYKES, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES.* Sup. Ct. Ohio. Motion of peti-

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tioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

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

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

No. 87-6382. RANDOLPH *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

No. 87-6397. GUINN *v.* GUINN. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

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

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

No. 87-6536. IN RE CORLEY. Petition for writ of habeas corpus denied.

No. 87-1296. IN RE EXXON CORP. ET AL.; and

No. 87-6359. IN RE SPRADLEY. Petitions for writs of mandamus denied.

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Probable Jurisdiction Postponed

No. 87-1318. VOLT INFORMATION SCIENCES, INC. *v.* BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY. Appeal from Ct. App. Cal., 6th App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Certiorari Granted

No. 87-1303. ALLEGHENY PITTSBURGH COAL CO. *v.* COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA; and

No. 87-1310. EAST KENTUCKY ENERGY CORP. ET AL. *v.* COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: — W. Va. —, 360 S. E. 2d 560.

No. 87-6325. PERRY *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 832 F. 2d 837.

Certiorari Denied. (See also Nos. 87-1298 and 87-6407, *supra*.)

No. 87-892. ARRANT *v.* ALABAMA ET AL. Ct. Crim. App. Ala. Certiorari denied. Reported below: 511 So. 2d 271.

No. 87-1000. WATTAWA *v.* WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES-PROBATION. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 21.

No. 87-1038. CITY OF AURORA, BY AND THROUGH ITS MAYOR AND CITY COUNCIL, ET AL. *v.* NEPHEW ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 830 F. 2d 1547.

No. 87-1062. FARAH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 513 So. 2d 146.

No. 87-1070. FOREIGN CREDIT INSURANCE ASSN. *v.* NU-AIR MANUFACTURING CO. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 987.

No. 87-1092. ONE 1984 LINCOLN MARK VII TWO-DOOR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 532.

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No. 87-1159. *CNA FINANCIAL CORP. ET AL. v. McLAUGHLIN, SECRETARY OF LABOR, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 265 U. S. App. D. C. 248, 830 F. 2d 1132.

No. 87-1192. *INSCOE v. ACTON CORP. ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 265 U. S. App. D. C. 304, 830 F. 2d 1188.

No. 87-1246. *ARIZONA v. FELD ET AL.* Ct. App. Ariz. Certiorari denied. Reported below: 155 Ariz. 88, 745 P. 2d 146.

No. 87-1260. *JOHNSON v. McLAUGHLIN, SECRETARY OF LABOR.* C. A. D. C. Cir. Certiorari denied. Reported below: 260 U. S. App. D. C. 358, 819 F. 2d 318.

No. 87-1268. *WORTH v. SELCHOW & RIGHTER CO. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 569.

No. 87-1299. *COLONY SQUARE CO. v. PRUDENTIAL INSURANCE COMPANY OF AMERICA.* C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 272.

No. 87-1301. *HOLLAND v. DISTRICT COURT, COUNTY OF DOUGLAS, COLORADO, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 831 F. 2d 940.

No. 87-1313. *DAYTON POWER & LIGHT CO, v. OHIO CIVIL RIGHTS COMMISSION ET AL.* Sup. Ct. Ohio. Certiorari denied. Reported below: 33 Ohio St. 3d 73, 514 N. E. 2d 1132.

No. 87-1315. *DEASY, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEASY v. HILL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 38.

No. 87-1319. *ESPOSITO v. NEW YORK TIMES CO. ET AL.* (three cases). C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 110 (first case); 834 F. 2d 1152 (second case); 837 F. 2d 599 (third case).

No. 87-1326. *DYDYN v. CONNECTICUT DEPARTMENT OF LIQUOR CONTROL.* App. Ct. Conn. Certiorari denied. Reported below: 12 Conn. App. 455, 531 A. 2d 170.

No. 87-1333. *DENT, INDIVIDUALLY AND ON BEHALF OF DENT, A MINOR v. CITY OF DALLAS ET AL.* Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 729 S. W. 2d 114.

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No. 87-1371. *RIVERA v. TEXAS*. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 730 S. W. 2d 824.

No. 87-1395. *LEADY ET VIR v. UNITED STATES ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-1402. *CLODFELTER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1442. *AUDI v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 835 F. 2d 943.

No. 87-5843. *PROSDOCIMO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1057.

No. 87-5917. *SIMDRAM v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6094. *MCCOY v. CREST*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 36.

No. 87-6108. *JAMES v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 87-6118. *BEST v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 422, 526 A. 2d 75.

No. 87-6145. *TURNER v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 478.

No. 87-6164. *CALICCHIO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1130.

No. 87-6209. *BROWN v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 518 A. 2d 415.

No. 87-6277. *BEATTIE v. UNITED STATES*. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 198.

No. 87-6326. *VEALE ET AL. v. EGGERT*. Sup. Ct. N. H. Certiorari denied.

No. 87-6328. *SCOTT v. GARRAGHTY, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 17.

No. 87-6333. *ROBERTS v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Certiorari denied.

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No. 87-6348. *CRAWFORD v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 87-6350. *BILAL v. MONTGOMERY WARD & Co.* C. A. 8th Cir. Certiorari denied.

No. 87-6351. *BESPALCHENKO v. GERMAN FEDERAL GOVERNMENT ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 87-6362. *HOLT v. CASTANEDA*. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 2d 123.

No. 87-6369. *MALFATTO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 753.

No. 87-6373. *CALO v. McMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION*. C. A. 6th Cir. Certiorari denied.

No. 87-6374. *WOODLIFF v. LYLES, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1006.

No. 87-6375. *WILLIAMS v. SNOW, CHAIRMAN, BOARD OF PAR-
DONS AND PAROLES, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6387. *SMITH v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87-6388. *WHITTINGTON v. CUNNAGIN, LAUREL COUNTY ATTORNEY, ON BEHALF OF ENGLERT, ET AL.* Sup. Ct. Ky. Certiorari denied. Reported below: 737 S. W. 2d 676.

No. 87-6392. *DIGGS v. OWENS, SUPERINTENDENT, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 439.

No. 87-6398. *LIPSEY v. FEDERAL DEPOSIT INSURANCE CORPORATION ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 1162, 515 N. E. 2d 1066.

No. 87-6401. *LOVE v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1266.

No. 87-6402. *GENTILE v. MONTEFIORE HOSPITAL, INC., ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 286.

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No. 87-6403. *LAY v. FORD ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1345.

No. 87-6404. *SMITH v. BRIGHAM*. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 534 A. 2d 1293.

No. 87-6409. *MASTERS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 87-6411. *BEAM v. FOLTZ, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 832 F. 2d 1401.

No. 87-6442. *THOMAS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 774.

No. 87-6445. *DEVEAUX v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied.

No. 87-6452. *ESTRADA v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 285.

No. 87-6465. *AGOSTINO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 915.

No. 87-6467. *STAMPS v. PARKE, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 1269.

No. 87-6470. *COLON v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 27.

No. 87-6474. *GRAVATT v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 87-6483. *SELTENRICH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87-6488. *HILL v. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS*. C. A. 5th Cir. Certiorari denied.

No. 87-6506. *MITTLEIDER, AKA WYMAN v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 835 F. 2d 769.

No. 87-6510. *NIGRO v. BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 462.

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No. 87-482. EASTER SEAL SOCIETY FOR CRIPPLED CHILDREN & ADULTS OF LOUISIANA, INC. *v.* PLAYBOY ENTERPRISES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 815 F. 2d 323.

No. 87-849. ALABAMA BOARD OF PARDONS AND PAROLES ET AL. *v.* ELLARD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 824 F. 2d 937.

No. 87-1176. DON'S PORTA SIGNS, INC., ET AL. *v.* CITY OF CLEARWATER, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1051.

JUSTICE WHITE, dissenting.

This case presents the question whether the standard of review articulated in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment.

The Federal District Court held in this case that a municipal regulation effectively banning portable signs violated the First Amendment. The court found that the regulation did not directly advance respondent's concededly substantial interest in esthetics and that this interest could be served equally well by less intrusive measures. See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y.*, 447 U. S. 557 (1980). The Court of Appeals for the Eleventh Circuit reversed. 829 F. 2d 1051 (1987). The appellate court interpreted our decision in *Bose* as mandating an independent examination of the whole record in all cases involving First Amendment claims. 829 F. 2d, at 1053-1054, n. 9. Accordingly, the court concluded that it was not bound by the "clearly erroneous" standard in reviewing whether the regulation directly advanced respondent's esthetic goals and was more extensive than necessary. The Eleventh Circuit's view that an independent examination of the record must be undertaken when a trial court has found a First Amendment violation, as well as when a trial court has rejected a First Amendment claim, is shared by the Fifth Circuit. See *Lindsay v. San Antonio*, 821 F. 2d 1103, 1107 (1987), cert. denied, 484 U. S. 1010 (1988).

Two other Circuits have concluded, however, that *de novo* review is required only where the trial court has rejected a First

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Amendment claim. See *Daily Herald Co. v. Munro*, 838 F. 2d 380, 383 (CA9 1988); *Planned Parenthood Assn./Chicago Area v. Chicago Transit Authority*, 767 F. 2d 1225, 1228-1229 (CA7 1985). These Circuits have reasoned that no special solicitude need be accorded "the government's claim that it has been wrongly prevented from restricting speech." *Id.*, at 1229. Hence, if a trial court has held that the government unconstitutionally restricted speech, these Circuits will review the trial court's findings of fact only for clear error.

I would grant certiorari to resolve this conflict among the Federal Courts of Appeals as to the standard of review to be applied to trial courts' findings of fact in cases holding that the First Amendment has been violated.

No. 87-1340. *CITY OF PHILADELPHIA v. DISTRICT COUNCIL 33, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, BY STOUT, AS TRUSTEE AD LITEM, ET AL.* Sup. Ct. Pa. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 517 Pa. 620, 538 A. 2d 874.

No. 87-6079. *FREEMAN v. RIDEOUT*. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 808 F. 2d 949.

No. 87-6113. *BOOKER v. MISSISSIPPI*. Sup. Ct. Miss.;

No. 87-6286. *HARRISON v. GEORGIA*. Sup. Ct. Ga.;

No. 87-6340. *COHEN v. GEORGIA*. Sup. Ct. Ga.; and

No. 87-6360. *CLARK v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: No. 87-6113, 511 So. 2d 1329; No. 87-6286, 257 Ga. 528, 361 S. E. 2d 149; No. 87-6340, 257 Ga. 544, 361 S. E. 2d 373; No. 87-6360, 834 F. 2d 1561.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 87-6072. *MARTIN v. PENNSYLVANIA BOARD OF LAW EXAMINERS ET AL.*, 484 U. S. 1071. Petition for rehearing denied.

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No. 86-5963. *TAYLOR v. ILLINOIS*, 484 U. S. 400. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

MARCH 29, 1988

Miscellaneous Order

No. A-741 (87-6700). *SELVAGE v. LYNAUGH, 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, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR would deny the application for stay and the petition for writ of certiorari.

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Dismissal Under Rule 53

No. 87-1042. *ZERINGUE ET AL. v. LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT*. Ct. App. La., 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 505 So. 2d 1152.

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Appeals Dismissed

No. 87-609. *SHELL OIL CO. v. DIRECTOR OF REVENUE OF MISSOURI*. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 732 S. W. 2d 178.

No. 87-1212. *GREENE ET AL. v. MIRABEL, DEPUTY COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, ET AL.* Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 129 App. Div. 2d 1018, 513 N. Y. S. 2d 905.

No. 87-1345. *LEAVELLE v. CALIFORNIA*. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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No. 87-1357. *ANGEL ET UX. v. FROEHLICH, JUDGE, SAN DIEGO NORTH COUNTY SUPERIOR COURT, ET AL.* Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 838 F. 2d 473.

No. 87-6417. *REISZNER v. REISZNER.* Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 512 So. 2d 1186.

No. 87-1471. *FRANKLIN v. OFFICE OF PERSONNEL MANAGEMENT.* Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN, JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SCALIA would affirm the judgment. Reported below: 824 F. 2d 979.

No. 87-6438. *MANter v. TOWN OF FAYETTE, MAINE.* Appeal from Sup. Jud. Ct. Me. dismissed for want of properly presented federal question. Reported below: 528 A. 2d 887.

Miscellaneous Orders

No. — — ——. *EVANS v. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.* Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. D-691. *IN RE DISBARMENT OF NEWHOUSE.* It is ordered that Richard Glenn Newhouse, of Fort Lauderdale, 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-692. *IN RE DISBARMENT OF KALK.* It is ordered that Joseph Kalk, of Beachwood, 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-693. *IN RE DISBARMENT OF GOLDMAN.* It is ordered that Ronald Laurence Goldman, of Marina Del Rey, Cal., be suspended from the practice of law in this Court and that a rule issue,

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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-694. *IN RE DISBARMENT OF SMITH*. It is ordered that Moreland G. Smith, Jr., of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-695. *IN RE DISBARMENT OF BALTIMORE*. It is ordered that Richard L. Baltimore, Jr., 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-696. *IN RE DISBARMENT OF HUST*. It is ordered that William J. Hust, III, 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-697. *IN RE DISBARMENT OF REDDAN*. It is ordered that John D. Reddan, of West Hempstead, 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-698. *IN RE DISBARMENT OF MCCOY*. It is ordered that Joseph R. McCoy, III, of Seaford, 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. 87-352. *SUN OIL CO. v. WORTMAN ET AL.* Sup. Ct. Kan. [Certiorari granted, 484 U. S. 912.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 87-498. *BERKOVITZ ET AL. v. UNITED STATES*. C. A. 3d Cir. [Certiorari granted, 484 U. S. 1003.] Motion of Lederle Laboratories for leave to file a brief as *amicus curiae* granted.

No. 87-1279. *MORRISON, INDEPENDENT COUNSEL v. OLSON ET AL.* C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of Lawrence E. Walsh, Independent Counsel, for leave to participate in oral argument as *amicus curiae*, for divided

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argument, and for additional time for oral argument denied. Motion of Michael K. Deaver for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Joint motion for additional time for oral argument, for divided argument, and for *amici curiae* to participate in oral argument granted in part and denied in part. An additional 30 minutes is allotted for oral argument to be divided as follows: appellant, 30 minutes; the United States Senate as *amicus curiae*, 15 minutes; one counsel for appellees, 30 minutes; and the Solicitor General as *amicus curiae*, 15 minutes. JUSTICE KENNEDY took no part in the consideration or decision of these motions.

No. 87-1337. BOERSMA, PERSONAL REPRESENTATIVE OF THE ESTATES OF BOERSMA ET AL. *v.* KARNES, NEBRASKA STATE TAX COMMISSIONER, ET AL. Appeal from Sup. Ct. Neb.; and

No. 87-1350. O. N. E. SHIPPING, LTD. *v.* FLOTA MERCANTE GRANCOLOMBIANA, S. A., ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87-1389. IN RE THOMAS. Petition for writ of habeas corpus and/or petition for writ of certiorari denied.

No. 87-6420. IN RE McDONALD. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 87-1022. BOARD OF ESTIMATE OF CITY OF NEW YORK ET AL. *v.* MORRIS ET AL.; and

No. 87-1112. PONTERIO *v.* MORRIS ET AL. Appeals from C. A. 2d Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 831 F. 2d 384.

Certiorari Granted

No. 87-1054. FIRESTONE TIRE & RUBBER CO. ET AL. *v.* BRUCH ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 828 F. 2d 134.

No. 87-1055. CHAN ET AL. *v.* KOREAN AIR LINES, LTD. C. A. D. C. Cir. Certiorari granted. Reported below: 265 U. S. App. D. C. 39, 829 F. 2d 1171.

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No. 87-1095. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* BROYLES ET AL. C. A. 4th Cir. Motion of respondents Charlie Broyles and Lisa Kay Colley for leave to proceed *in forma pauperis* granted. Certiorari granted, case consolidated with No. 87-821, *Pittston Coal Group et al. v. Sebben et al.* [certiorari granted, 484 U. S. 1058], and No. 87-827, *McLaughlin, Secretary of Labor, et al. v. Sebben et al.* [certiorari granted, 484 U. S. 1058], and a total of one hour allotted for oral argument. Reported below: 824 F. 2d 327.

Certiorari Denied. (See also Nos. 87-1345, 87-1357, 87-6417, 87-1471, and 87-1389, *supra*.)

No. 87-781. ATKINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 202.

No. 87-943. CITY OF ST. LOUIS *v.* JAMISON. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 1280.

No. 87-985. FINA OIL & CHEMICAL CO. ET AL. *v.* EL PASO NATURAL GAS CO. Sup. Ct. Tex. Certiorari denied.

No. 87-992. MCNEIL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 261 U. S. App. D. C. 162, 820 F. 2d 1341.

No. 87-1015. MONAHAN ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 1st Cir. Certiorari denied. Reported below: 832 F. 2d 688.

No. 87-1049. AIR FLORIDA SYSTEM, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 9th Cir. Certiorari denied. Reported below: 822 F. 2d 833.

No. 87-1069. ARCOREN *v.* PETERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 671.

No. 87-1077. MILLANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 533.

No. 87-1139. GAGLIARDI *v.* ZIEGLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1055.

No. 87-1140. PURCELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 470.

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No. 87-1157. ALASKA FEDERATION OF NATIVES ET AL. *v.* ALASKA FISH & WILDLIFE FEDERATION & OUTDOOR COUNCIL, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 933.

No. 87-1169. BEAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 297.

No. 87-1191. MESSERLIAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 778.

No. 87-1219. G. & T. TERMINAL PACKAGING CO., INC., ET AL. *v.* CONSOLIDATED RAIL CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 830 F. 2d 1230.

No. 87-1261. HONIG, SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF CALIFORNIA, ET AL. *v.* BENNETT, SECRETARY OF EDUCATION. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 875.

No. 87-1336. BENNETT *v.* INTERNATIONAL BANK OF MIAMI, N. A. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 513 So. 2d 1294.

No. 87-1348. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 330.

No. 87-1351. UBEROI *v.* UNIVERSITY OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 87-1353. KING ET UX. *v.* RELIANCE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-1355. HAYES *v.* COOK, JUDGE, EDMONSON CIRCUIT COURT, EDMONSON COUNTY, KENTUCKY, ET AL. Sup. Ct. Ky. Certiorari denied.

No. 87-1356. HARKRIDER, EXECUTOR OF THE ESTATE OF CORY, ET AL. *v.* LAFAYETTE BANK & TRUST CO. ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 512 N. E. 2d 155.

No. 87-1378. EVANS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 528, 534 A. 2d 1159.

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No. 87-1385. *RAMPP ET UX. v. LUZERNE COUNTY ASSESSMENT AND VALUATION BOARD*. Pa. Commw. Ct. Certiorari denied.

No. 87-1388. *ATONIO ET AL. v. WARDS COVE PACKING CO., INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 439.

No. 87-1397. *PYRO MINING CO. v. SMITH*. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 1081.

No. 87-1407. *CITY OF PHILADELPHIA ET AL. v. DISABLED IN ACTION OF PENNSYLVANIA ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 1113.

No. 87-1411. *NEW ENGLAND INSURANCE CO. v. INTERNATIONAL BANK OF MIAMI, N. A.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 514 So. 2d 390.

No. 87-1429. *SOUTHWESTERN BELL TELEPHONE CO. v. ARKANSAS PUBLIC SERVICE COMMISSION ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 824 F. 2d 672.

No. 87-1436. *SAMPSON v. WEIDELL ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1090.

No. 87-1443. *LONSDALE ET UX. v. CAGLE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 755.

No. 87-1470. *COLE ET UX. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1128.

No. 87-1475. *ANCHOR ESTATES, INC., ET AL. v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 871.

No. 87-5962. *BRYANT v. MARSH, SECRETARY OF THE ARMY*. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 406.

No. 87-6075. *CONARD v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1121.

No. 87-6080. *BURR v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 354, 514 N. E. 2d 1363.

No. 87-6186. *SANTISTEVAN v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. Certiorari denied.

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No. 87-6194. *ALEVRAS v. EDMISTON, SUPERINTENDENT, SOUTHERN STATE CORRECTIONAL FACILITY, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6237. *COFIELD v. BURFORD ET AL.; and COFIELD v. HUGHES ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 87-6341. *CHIPPS v. UNITED STATES DEPARTMENT OF EDUCATION ET AL.* C. A. 3d Cir. Certiorari denied.

No. 87-6344. *JONES v. OITKER ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 480.

No. 87-6357. *BENJAMIN v. UNITED STATES POSTAL SERVICE.* C. A. Fed. Cir. Certiorari denied. Reported below: 831 F. 2d 305.

No. 87-6396. *ENGELHARTSON v. DEPARTMENT OF AGRICULTURE.* C. A. Fed. Cir. Certiorari denied. Reported below: 835 F. 2d 870.

No. 87-6414. *ROMERO v. COLORADO.* Sup. Ct. Colo. Certiorari denied. Reported below: 745 P. 2d 1003.

No. 87-6415. *CULBERT v. YOUNG.* C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 624.

No. 87-6419. *MARSHALL v. MARSHALL.* Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. XXXI.

No. 87-6424. *HANNIVIG v. REAGAN, PRESIDENT OF THE UNITED STATES.* C. A. 3d Cir. Certiorari denied.

No. 87-6427. *PETERS v. MCCUTCHEON ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 547.

No. 87-6461. *PULEIO v. VOSE, DEPUTY COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION.* C. A. 1st Cir. Certiorari denied. Reported below: 830 F. 2d 1197.

No. 87-6466. *SHORT v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1343.

No. 87-6469. *ARMILLO v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 834 F. 2d 132.

No. 87-6477. *WILLIAMS v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

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No. 87-6496. *PARKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 2d 1418.

No. 87-6500. *KISTNER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 834 F. 2d 132.

No. 87-6507. *SHEA v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 463.

No. 87-6514. *GONZALEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87-6524. *WILLIAMS v. BURLINGTON NORTHERN INC.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 100.

No. 87-6529. *BORING ET AL. v. KOZAKIEWICZ, WARDEN, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 468.

No. 87-6530. *BROWNE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 760.

No. 87-6531. *BRICE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 547.

No. 87-6542. *BOWEN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 1348.

No. 87-6543. *ESCH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 832 F. 2d 531.

No. 87-6545. *TOBIAS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 2d 449.

No. 87-6547. *MOORE v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6550. *RICHARDS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87-6551. *OLSOBY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 836 F. 2d 439.

No. 87-6552. *SHAW v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 1117.

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No. 87-6563. *WARD v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1014.

No. 87-6572. *CEDAR v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1014.

No. 87-993. *MISSOURI v. CARPENTER*. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 736 S. W. 2d 406.

No. 87-1010. *TAYLOR v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 821 F. 2d 1428.

JUSTICE WHITE, dissenting.

Petitioner's husband was left comatose when he was disconnected from his ventilator while in a military hospital. She brought suit against the Government under the Federal Tort Claims Act for personal injury as a result of negligence, and won a judgment of \$500,000 for emotional distress and loss of consortium. In a postjudgment motion, the Government argued for the first time that Cal. Civ. Code Ann. § 3333.2 (West Supp. 1988) limits non-economic damages to \$250,000 in this case. The District Court rejected this claim, which it noted had not been raised before or during the trial. The Ninth Circuit reversed, holding that the Government had not waived the application of the state statute by failing to plead it, and therefore the damages recovered by petitioner must be limited to \$250,000. 821 F. 2d 1428 (1987).

Under the accepted interpretation of Rule 8(c) of the Federal Rules of Civil Procedure, any matter "constituting an avoidance or affirmative defense" to the matters raised in the plaintiff's complaint must be pleaded in a timely manner or it is deemed to be waived. As a matter of California law, the state statute at issue in this case is understood to be an affirmative defense. The Ninth Circuit held, however, that this determination is not binding on a federal court because the proper characterization of the statute in this case, which was brought in federal court, is a matter of federal procedural law. The court ruled that this statute is a mere limitation of liability, rather than an avoidance or an affirmative defense. This conclusion conflicts with the decisions of two other Courts of Appeals. In *Ingraham v. United States*, 808 F. 2d 1075, 1078-1079 (1987), the Fifth Circuit held that an identical statutory limitation on damages recoverable in the State of Texas is an affirmative defense that is waived under the Fed-

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eral Rules by failure to plead it in a timely manner. And in *Jakobsen v. Massachusetts Port Authority*, 520 F. 2d 810, 813 (1975), the First Circuit held that a statutory limitation on liability is an affirmative defense under Rule 8(c). Both courts also ruled that any such statute is deemed to be waived when the application of the statute is not raised during the trial but instead is raised for the first time after the trial, on appeal. I would grant certiorari to resolve this conflict among the Courts of Appeals.

No. 87-1032 (A-489). *TEXAS v. LONG*. Ct. Crim. App. Tex. Application for continuance of stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied. Certiorari denied. Reported below: 742 S. W. 2d 302.

No. 87-1213. *BAJA CONTRACTORS, INC., ET AL. v. CITY OF CHICAGO ET AL.* C. A. 7th Cir. Motion of respondents to disqualify counsel for petitioners denied. Certiorari denied. Reported below: 830 F. 2d 667.

No. 87-1343. *SHIMODA, ADMINISTRATOR, OAHU COMMUNITY CORRECTIONAL CENTER, ET AL. v. AKAO ET AL.* C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 832 F. 2d 119.

No. 87-1347. *ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. v. PARA-PROFESSIONAL LAW CLINIC ET AL.* C. A. 3d Cir. Motion of respondents Jabbar, Williams, and Clifton for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 835 F. 2d 285.

No. 87-1354. *CBS INC. ET AL. v. BROWN & WILLIAMSON TOBACCO CORP.* C. A. 7th Cir. Motion of Capital Cities/ABC, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 827 F. 2d 1119.

No. 87-1430. *LOU v. BELZBERG ET AL.* C. A. 9th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 834 F. 2d 730.

No. 87-5920. *BOGGS v. BAIR, WARDEN*. Sup. Ct. Va.;

No. 87-6367. *HILL v. FLORIDA*. Sup. Ct. Fla.;

No. 87-6416. *SANDLES v. MISSOURI*. Sup. Ct. Mo.; and

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No. 87-6458. *JOHNSON v. TENNESSEE*. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 87-6367, 515 So. 2d 176; No. 87-6416, 740 S. W. 2d 169; No. 87-6458, 743 S. W. 2d 154.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 87-5891. *SLATER ET UX. v. DELAWARE TRUST CO. ET AL.*, 484 U. S. 1069;

No. 87-6021. *DEAN v. GEORGIA DEPARTMENT OF TRANSPORTATION ET AL.*, 484 U. S. 1070; and

No. 87-6081. *EMBREY v. UNITED STATES*, 484 U. S. 1072. Petitions for rehearing denied.

No. 87-5757. *CAMPOS v. LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL.*, 484 U. S. 1014; and

No. 87-5918. *TERRY v. MORGAN ET AL.*, 484 U. S. 1030. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

APRIL 5, 1988

Dismissal Under Rule 53

No. 87-1146. *PRATT & WHITNEY CANADA INC. v. RAINEY ET AL.* C. A. 11th Cir. [Certiorari granted, *ante*, p. 904.] Writ of certiorari dismissed under this Court's Rule 53.

APRIL 6, 1988

Miscellaneous Order

No. 87-1615. *TEXACO INC. v. PENNZOIL Co.* Ct. App. Tex., 1st Dist. Motion of Thomas R. Berner et al. for leave to intervene denied.

APRIL 7, 1988

Dismissal Under Rule 53

No. 87-1615. *TEXACO INC. v. PENNZOIL Co.* Ct. App. Tex., 1st Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 729 S. W. 2d 768.

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APRIL 11, 1988

Dismissal Under Rule 53

No. 87-1285. UDOLF *v.* PLAN AND ZONING COMMISSION OF THE TOWN OF WEST HARTFORD ET AL. Appeal from Super. Ct. Conn., Hartford/New Britain Jud. Dist., dismissed under this Court's Rule 53.

APRIL 13, 1988

Miscellaneous Order

No. A-792 (87-6780). LOWENFIELD *v.* BUTLER, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner Leslie Lowenfield has been sentenced to death. The law of the State that is about to execute him entitles him to "rais[e] at any time" the issue of his "mental incapacity to proceed" with the execution. La. Code Crim. Proc. Ann., Art. 642 (West 1981). See *State v. Perry*, 502 So. 2d 543, 564 (La. 1986). If there is a "reasonable ground to doubt" petitioner's sanity, the court "shall order a mental examination," La. Code Crim. Proc. Ann., Art. 643 (West 1981), and may permit "no further steps" in his punishment until he "is found to have the mental capacity to proceed," Art. 642. In any event, state law affords petitioner the right to pre-execution review by a sanity commission if he can "show by a preponderance of evidence that he lacks the present capacity to undergo execution." *Perry, supra*, at 564.

Petitioner moved for review by a sanity commission, presenting evidence that he is currently insane. The evidence consisted of a sworn affidavit by Dr. Marc L. Zimmerman, a duly licensed clinical psychologist who interviewed and tested petitioner for five hours on March 26, 1988, and concluded that "it is highly probable that Mr. Lowenfield is suffering from paranoid schizophrenia. . . . A study has found that 85% of persons who obtain the same profile as Mr. Lowenfield . . . are diagnosed as paranoid schizophrenics." App. to Pet. for Cert. 2 (citation omitted). Dr. Zimmerman continued: "As a paranoid schizophrenic, Mr. Lowenfield's capacity to understand the death penalty would be impaired. Indeed, my

clinical interview with Mr. Lowenfield indicated that *he is currently unable to understand the death penalty.*" *Id.*, at 3 (emphasis added). The State presented no evidence either to refute Dr. Zimmerman's conclusions or to question his credentials. In the face of that unrefuted evidence, the Louisiana trial court, and then the Louisiana Supreme Court, denied the motion without explanation.

Petitioner thereafter filed an application for habeas relief with the District Court. The District Court denied on the basis of an "extended conversation" with Dr. Zimmerman. Civ. Action No. 88-1549, p. 3 (ED La., Apr. 12, 1988). From that conversation, which the District Court conducted without any notice to petitioner's counsel and apparently before petitioner's application was filed, the District Court concluded that, contrary to Dr. Zimmerman's affidavit, "petitioner has the capacity to understand the realities of the pending execution. Petitioner, though [a] paranoid schizophrenic, is apparently able to understand that the execution is going forward in accordance with law." *Ibid.* A divided panel of the Court of Appeals affirmed in an opinion that reached this chambers a mere 15 minutes before the scheduled execution. 843 F. 2d 183 (CA5 1988).

Every court that has considered petitioner's insanity claim has made a mockery of this Court's precedent and of the most fundamental principles of ordered justice. In *Ford v. Wainwright*, 477 U. S. 399, 409-410 (1986), we held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." In the course of the opinion, we characterized any such execution as "'savage and inhuman,'" *id.*, at 406 (citation omitted); "'a miserable spectacle, both against Law, and of extream inhumanity and cruelty,'" *id.*, at 407 (citation omitted); "'cruel and inhumane,'" *id.*, at 408, n. 1 (citation omitted); and "abhorren[t]," *id.*, at 409.

A majority of this Court did not agree on the precise procedures that the Constitution requires when the question is raised of a prisoner's sanity for execution. A majority did, however, hold that due process demands a hearing at least once the prisoner has made some "threshold showing" that he has become insane since his trial. *Id.*, at 417 (opinion of MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); *id.*, at 426 (Powell, J., concurring in part and concurring in judgment). Justice Powell, pro-

viding a fifth vote for that proposition, stated that "[t]he State . . . may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." *Ibid.* (footnote omitted). See also *id.*, at 429-430 (O'CONNOR, J., joined by WHITE, J., concurring in result in part and dissenting in part) (where state law prohibits execution of the insane, the State must provide a hearing).

The Louisiana Legislature has set the requisite "threshold showing" at that level of evidence that would constitute a "reasonable ground to doubt" the prisoner's sanity. La. Code Crim. Proc. Ann., Art. 643 (West 1981). It is beyond me why Dr. Zimmerman's unrefuted affidavit did not meet that threshold. For that matter, I am at a loss to explain why the affidavit, which was the sole evidence before the courts, did not establish petitioner's insanity by a preponderance of the evidence, entitling petitioner not merely to a hearing but to the relief he seeks. Neither state court furnished any explanation. In fact, neither court so much as articulated the standard it was applying. For all we know, the state courts defaulted entirely on their obligation to consider petitioner's claim. The Louisiana courts, by declining to provide any explanation for their denial of relief, as a practical matter have required petitioner to meet not "a substantial threshold showing of insanity" but an insurmountable one. The effect extends far beyond this case, for the state courts have challenged all death-row inmates to a harrowing game of Russian roulette, in which each must take a wild guess at the "threshold" or suffer the consequences. Where, as here, there is no way to discern whether the state courts' "fact-finding procedure . . . was not adequate for reaching reasonably correct results," *Townsend v. Sain*, 372 U. S. 293, 316 (1963), their bare denial of relief is entitled to no presumption of correctness. See 28 U. S. C. § 2254(d).

Even more outrageous was the injustice perpetrated by the federal courts to which petitioner resorted upon the state courts' default of their constitutional responsibilities. The District Court expressly adopted Dr. Zimmerman's conclusion that petitioner was a "paranoid schizophrenic." Civ. Action No. 88-1549, *supra*, at 3. That conclusion should have compelled the District Court, at the very least, to "receive evidence and argument from [petitioner's] counsel" on whether petitioner is "aware that his death is

approaching" and "perceives the connection between his crime and his punishment." *Ford, supra*, at 427, 422 (opinion of Powell, J.). Instead, the District Court excluded counsel entirely and conducted its own *ex parte* investigation in which it managed to extract from Dr. Zimmerman a concession ("Petitioner . . . is apparently able to understand that the execution is going forward in accordance with law," Civ. Action No. 88-1549, *supra*, at 3) that contradicted his sworn affidavit dated three days earlier ("[H]e is currently unable to understand the death penalty," App. to Pet. for Cert. 3). The District Court's consideration of petitioner's insanity claim fell far short of the *de novo* review that it was obliged to provide upon the state courts' default. See *Ford*, 477 U. S., at 418. Instead, its review was functionally equivalent to the "policy of excluding all advocacy on the part of the condemned," which we have held unconstitutional. *Id.*, at 412-413 (citations omitted).

Worse yet, petitioner alleges—and the State does not deny—that the District Court conducted its *ex parte* investigation before it even had jurisdiction over the case; as Judge Johnson, dissenting from the Court of Appeals' judgment, observed, "the district court failed to make any finding on the record." 843 F. 2d, at 188. "Procedural shortcuts are always dangerous. Greater—surely not lesser—care should be taken to avoid the risk of error when its consequences are irreversible." *Autry v. Estelle*, 464 U. S. 1, 6 (1983) (footnote omitted).

The Court of Appeals, for its part, compounded the District Court's abuse by ignoring it entirely and proceeding to address the sufficiency of Dr. Zimmerman's affidavit as an original matter, without a proper District Court predicate. Even that determination hopelessly conflated the principles articulated in *Ford*. From Justice Powell's observation that the "State . . . may require a substantial threshold showing of insanity merely to trigger the hearing process," *Ford, supra*, at 426 (emphasis added), the Court of Appeals supposed that the State *must* do so, see 843 F. 2d, at 187 ("[P]etitioner has not made a substantial threshold showing"), and overlooked the State's decision to require merely a showing of a "reasonable ground to doubt" in order to trigger further examination.

The abuses and mistakes in every court that has considered this case are no doubt attributable, at least in part, to the haste with which they proceeded:

1. On the afternoon of April 11, petitioner filed in Louisiana state court a petition for postconviction relief raising the claims that are now before us.

2. Later that afternoon the state trial court denied relief.

3. At 6 p.m. (eastern daylight time) the next day, April 12, the Louisiana Supreme Court denied relief and petitioner applied to the District Court for a writ of habeas corpus. 843 F. 2d, at 184-185.

4. At 8:30 p.m. the District Court denied petitioner's application. *Id.*, at 185.

5. At 12:10 a.m. that same night the Court of Appeals affirmed.

6. At 12:45 a.m. (15 minutes before the scheduled execution) the Court of Appeals' opinions were circulated to this Court.

7. At 1:05 a.m., with petitioner already strapped in the electric chair, this Court denied his application for a stay of execution.

8. At 1:25 a.m. petitioner was pronounced dead. N. Y. Times, Apr. 14, 1988, p. A28, col. 1. Time ran out before we voted on the certiorari petition that accompanied petitioner's stay application.

The haste that attended disposition of this case is reprehensible. It is hardly surprising that a case scudding through the state courts in 24 hours should yield orders devoid of law or logic—the ones in this case simply read, “DENIED”—for which the description “terse” would be charitable. If the federal courts are intent on accelerating the pace at any cost, as they were in this case, their only choice is to take procedural shortcuts and give short shrift to substance. And simple arithmetic suggests grave injustice when the Court of last resort takes 15 minutes to read and analyze 17 pages of opinions from the court below and cast a vote on life or death.

Due process means little if it requires the courts to provide an “opportunity to be heard,” *Grannis v. Ordean*, 234 U. S. 385, 394 (1914), without imposing on them a concomitant duty to listen—and, at least when a life is at stake, to listen very carefully. Pre-

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sumably, it was in recognition of the injustice that four of us (one less than the requisite five) voted to stay petitioner's execution, so as to consider his insanity claim in an atmosphere that was not itself lunatic.

Regrettably, this case is not atypical. It is the natural product of a penal system conducive to inaccurate factfinding and shoddy analysis. And I doubt that any system could be devised to cure the evil, so long as States continue to impose punishments so severe as to be irrevocable. Even were I not convinced that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment, see *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion), I would have no part of a penal system that permits a State's interest in meting out death on schedule to convert our constitutional duty to dispense justice into a license to dispense with it.

I dissent.

APRIL 14, 1988

Certiorari Denied

No. 87-6787 (A-797). *CLANTON v. MUNCY, WARDEN, ET AL.* 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. *Certiorari* denied. Reported below: 845 F. 2d 1238.

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 of execution and the petition for writ of *certiorari* and would vacate the death sentence in this case.

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Appeals Dismissed

No. 87-1366. *DUBISH v. KANSAS*. Appeal from Ct. App. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of *certiorari*, *certiorari* denied. Reported below: 12 Kan. App. 2d lii, 763 P. 2d 18.

No. 87-1400. *CLAUSELL ET UX. v. HOBART CORP.* Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating

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the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 515 So. 2d 1275.

No. 87-1457. HURLEY ET AL. *v.* WEST AMERICAN INSURANCE CO. OF OHIO CASUALTY GROUP ET AL. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6485. BOLES *v.* ELLIS ET AL. Appeal from D. C. M. D. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-1392. FIRST AMERICAN NATIONAL BANK OF KNOXVILLE *v.* TAYLOR, COMMISSIONER OF REVENUE FOR THE STATE OF TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 751 S. W. 2d 417.

No. 87-1435. BLUME *v.* GREGERSEN, CHIEF, BUREAU OF OCCUPATIONAL LICENSES, DEPARTMENT OF SELF-GOVERNING AGENCIES OF IDAHO, ET AL. Appeal from Ct. App. Idaho dismissed for want of substantial federal question. Reported below: 113 Idaho 220, 743 P. 2d 88.

No. 87-6444. NUNLEY *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction.

Miscellaneous Orders

No. — — —. EISEN *v.* SACKMAN-GILLILAND CORP. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-738. RAPP *v.* UNITED STATES. Application for bail, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-788. HASTINGS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA *v.* COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES ET AL. C. A. 11th Cir. Application to continue the stay of mandate, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

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No. D-668. IN RE DISBARMENT OF RUBINO. Disbarment entered. [For earlier order herein, see 484 U. S. 1039.]

No. D-670. IN RE DISBARMENT OF LEWIS. Disbarment entered. [For earlier order herein, see 484 U. S. 1040.]

No. D-673. IN RE DISBARMENT OF SIMON. Disbarment entered. [For earlier order herein, see 484 U. S. 1040.]

No. D-674. IN RE DISBARMENT OF DOZORYST. Nicholas George Dozoryst II, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 25, 1988 [484 U. S. 1040], is hereby discharged.

No. D-693. IN RE DISBARMENT OF GOLDMAN. Due to mistaken identity, the order entered April 4, 1988 [*ante*, p. 984], suspending Ronald Laurence Goldman, of Marina Del Rey, Cal., from the practice of law in this Court is vacated and the rule to show cause issued on that date is discharged.

No. D-699. IN RE DISBARMENT OF HOPKINS. It is ordered that Richard J. Hopkins, of Silver Spring, 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-700. IN RE DISBARMENT OF CULMER. It is ordered that Harold Churchill Culmer, of Miami, 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-701. IN RE DISBARMENT OF MEROS. It is ordered that George Nicholas Meros, of St. Petersburg, 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-702. IN RE DISBARMENT OF SIERRA. It is ordered that Michael Sierra, of Tampa, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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No. 86-495. K MART CORP. *v.* CARTIER, INC., ET AL.;

No. 86-624. 47TH STREET PHOTO, INC. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.; and

No. 86-625. UNITED STATES ET AL. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL. C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motion of respondents for leave to file a supplemental brief on reargument granted. Motion of American Free Trade Association for leave to file a supplemental brief as *amicus curiae* on reargument denied.

No. 86-1650. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, *ante*, p. 175. Respondent invited to file a response to the petition for rehearing within 30 days.

No. 87-751. CARLUCCI, SECRETARY OF DEFENSE, ET AL. *v.* DOE. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 904.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-1043. UNITED STATES *v.* RON PAIR ENTERPRISES, INC. C. A. 6th Cir. [Certiorari granted, *ante*, p. 958.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-920. MEYER, COLORADO SECRETARY OF STATE, ET AL. *v.* GRANT ET AL. C. A. 10th Cir. [Probable jurisdiction noted, 484 U. S. 1024.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 87-999. MCQUILLEN *v.* WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL., *ante*, p. 914. Respondents are invited to file a response to the petition for rehearing within 30 days.

No. 87-1160. DUQUESNE LIGHT CO. ET AL. *v.* BARASCH ET AL. Sup. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 933.] Motion of appellants to dispense with printing the joint appendix granted.

No. 87-1193. MIAMI HERALD PUBLISHING CO. *v.* GRIDLEY, CIRCUIT JUDGE OF FLORIDA, ORANGE COUNTY, ET AL., *ante*, p. 960. Motion of respondents Paula Hawkins and W. E. Hawkins for damages denied.

No. 87-6325. PERRY *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir.

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[Certiorari granted, *ante*, p. 976.] Motion for appointment of counsel granted, and it is ordered that W. Gaston Fairey, Esq., of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 87-6453. *ECONOMOU ET UX. v. SECURITIES AND EXCHANGE COMMISSION*. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 9, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, dissenting.

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

No. 87-6459. *RYDELL v. CITY OF ATLANTIC CITY, NEW JERSEY*. Super. Ct. N. J., App. Div.; and

No. 87-6489. *HOWARD v. CITY OF FORT MYERS, FLORIDA, ET AL.* C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 9, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit petitions for writs of certiorari in compliance with Rule 33 of the Rules of this Court.

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

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

No. 87-6605. *IN RE SYME*. Petition for writ of habeas corpus denied.

No. 87-6317. *IN RE AMEN-RA, AKA TASBY*. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 87-1269. *EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. v. SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COM-*

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MITTEE ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. THE CHIEF JUSTICE took no part in the consideration or decision of this order. Reported below: 826 F. 2d 814.

No. 87-1327. COTTON PETROLEUM CORP. ET AL. *v.* NEW MEXICO ET AL. Appeal from Ct. App. N. M. Probable jurisdiction noted. The parties are also invited to brief and argue the following question: "Does the Commerce Clause require that an Indian Tribe be treated as a State for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?" Reported below: 106 N. M. 517, 745 P. 2d 1170.

No. 87-5840. MCNAMARA *v.* COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. App. Cal., 4th App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 87-1207. WILL *v.* MICHIGAN DEPARTMENT OF STATE POLICE ET AL. Sup. Ct. Mich. Certiorari granted. Reported below: 428 Mich. 540, 410 N. W. 2d 749.

No. 87-1372. ARGENTINE REPUBLIC *v.* AMERADA HESS SHIPPING CORP. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 830 F. 2d 421.

No. 87-1379. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 259 U. S. App. D. C. 426, 816 F. 2d 730, and 265 U. S. App. D. C. 365, 831 F. 2d 1124.

No. 87-963. HERNANDEZ *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari granted. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 819 F. 2d 1212.

No. 87-1104. ZANT, WARDEN *v.* MOORE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 824 F. 2d 847.

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Certiorari Denied. (See also Nos. 87-1366, 87-1400, 87-1457, and 87-6485, *supra*.)

No. 87-333. DELTA AIR LINES, INC. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY. C. A. 2d Cir. *Certiorari denied.* Reported below: 817 F. 2d 222.

No. 87-683. GALLOWAY, SHERIFF, HOLMES COUNTY, FLORIDA *v.* JOSEY. Sup. Ct. Fla. *Certiorari denied.* Reported below: 507 So. 2d 590.

No. 87-711. MUNN *v.* DUCK. C. A. 9th Cir. *Certiorari denied.* Reported below: 823 F. 2d 1296.

No. 87-854. COLANESE ET AL. *v.* NEW PRAIRIE CLASSROOM TEACHERS ASSN. Ct. App. Ind. *Certiorari denied.* Reported below: 503 N. E. 2d 638.

No. 87-976. INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 87-977. TEXAS EASTERN TRANSMISSION CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION;

No. 87-978. SHELL OFFSHORE INC. ET AL. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL.;

No. 87-979. CITY OF WILLCOX, ARIZONA, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 87-1091. SOUTHERN CALIFORNIA GAS CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. *Certiorari denied.* Reported below: 263 U. S. App. D. C. 1, 824 F. 2d 981.

No. 87-1011. ILLINOIS *v.* WHITE. Sup. Ct. Ill. *Certiorari denied.* Reported below: 117 Ill. 2d 194, 512 N. E. 2d 677.

No. 87-1130. BEATTIE ET AL., BY AND THROUGH THEIR NEXT FRIEND, BEATTIE *v.* UNITED STATES; and

No. 87-1244. GREISEN *v.* UNITED STATES. C. A. 9th Cir. *Certiorari denied.* Reported below: 831 F. 2d 916.

No. 87-1194. COSMETIC, TOILETRY & FRAGRANCE ASSN. *v.* PUBLIC CITIZEN ET AL. C. A. D. C. Cir. *Certiorari denied.* Reported below: 265 U. S. App. D. C. 349, 831 F. 2d 1108.

No. 87-1222. HOUSTON *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. *Certiorari denied.* Reported below: 823 F. 2d 896.

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No. 87-1240. GENERAL COFFEE CORP. ET AL. *v.* CITY NATIONAL BANK OF MIAMI ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 699.

No. 87-1270. WEST ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1044.

No. 87-1278. TOWN OF NORTH BONNEVILLE, WASHINGTON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1024.

No. 87-1284. TRANS WORLD AIRLINES, INC., ET AL. *v.* KRONFELD. C. A. 2d Cir. Certiorari denied. Reported below: 832 F. 2d 726.

No. 87-1288. CRESPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 267.

No. 87-1309. SCALLIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 37.

No. 87-1360. NORTHERN VIRGINIA LAW SCHOOL, INC., ET AL. *v.* SOUTHERN NEW ENGLAND SCHOOL OF LAW, INC. C. A. 1st Cir. Certiorari denied.

No. 87-1362. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 305.

No. 87-1374. COSTON *v.* PLITT THEATRES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 831 F. 2d 1321.

No. 87-1393. LISAK *v.* MERCANTILE NATIONAL BANK OF INDIANA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 668.

No. 87-1394. BLOCK DRUG CO., INC., ET AL. *v.* HODOSH ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1575.

No. 87-1398. JOHNSON *v.* HELMUS. Sup. Ct. Ohio. Certiorari denied.

No. 87-1405. GONZALES *v.* LEAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 1060.

No. 87-1406. SHIPCO 2295, INC., ET AL. *v.* AVONDALE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 925.

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No. 87-1408. *AIELLO v. MARTIN ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1015.

No. 87-1410. *BANKS v. MISSISSIPPI.* Sup. Ct. Miss. Certiorari denied. Reported below: 516 So. 2d 240.

No. 87-1417. *KLEIN INDEPENDENT SCHOOL DISTRICT ET AL. v. MATTOX, ATTORNEY GENERAL OF TEXAS.* C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 576.

No. 87-1418. *TICKLE ET AL. v. SHELBY COUNTY, TENNESSEE, ET AL.* Sup. Ct. Tenn. Certiorari denied.

No. 87-1423. *E & S DESIGN & DEVELOPMENT, LTD., ET AL. v. MONTGOMERY, DISTRICT DIRECTOR, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE.* C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 1084.

No. 87-1426. *DEVON BANK v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 1005.

No. 87-1427. *SCHROEDER v. UNITED STATES ET AL.* C. A. 10th Cir. Certiorari denied.

No. 87-1432. *A. C. ET AL. v. IOWA.* Sup. Ct. Iowa. Certiorari denied. Reported below: 415 N. W. 2d 609.

No. 87-1438. *J. K. AND SUSIE L. WADLEY RESEARCH INSTITUTE & BLOOD BANK, DBA THE BLOOD BANK AT WADLEY v. HOUSTON, JUDGE, 211TH JUDICIAL DISTRICT COURT OF DENTON COUNTY, TEXAS.* Ct. App. Tex., 2d Dist. Certiorari denied.

No. 87-1440. *SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND v. CUYAMACA MEATS, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 491.

No. 87-1444. *GENDRON ET AL. v. PAN AMERICAN WORLD AIRWAYS, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 287.

No. 87-1447. *YOUNG ET AL. v. NEW HAMPSHIRE.* Sup. Ct. N. H. Certiorari denied. Reported below: 130 N. H. 175, 536 A. 2d 1252.

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No. 87-1450. *DURAND-WAYLAND, INC. v. PENNWALT CORP.* C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 931.

No. 87-1453. *ROBERTS v. APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY (GUBLER ET AL., REAL PARTIES IN INTEREST).* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-1461. *CHECKER MOTORS CORP. v. NATIONAL PRODUCTION WORKERS UNION ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 173.

No. 87-1473. *HANSON v. TRINIDAD CORP.* C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 53.

No. 87-1474. *BROOKS v. ALABAMA.* Ct. Crim. App. Ala. Certiorari denied. Reported below: 502 So. 2d 397.

No. 87-1476. *SNEAD ET AL. v. CITY OF ALBUQUERQUE.* C. A. 10th Cir. Certiorari denied. Reported below: 841 F. 2d 1131.

No. 87-1477. *COCHRAN v. TAYLOR.* C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 900.

No. 87-1488. *SCHWARTZ v. CUOMO, GOVERNOR OF NEW YORK, ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 129 App. Div. 2d 800, 514 N. Y. S. 2d 791.

No. 87-1491. *HOWARD v. CARLUCCI, SECRETARY OF DEFENSE, ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 265 U. S. App. D. C. 304, 830 F. 2d 1188.

No. 87-1492. *SPIEGEL v. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 450, 507 N. E. 2d 58.

No. 87-1496. *RACHELLE LABORATORIES, INC. v. OSBURN, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF OSBURN.* C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 908.

No. 87-1511. *NEECE v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

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No. 87-1519. BOARD OF OPERATIVES OF THE AMERICAN CAST IRON PIPE CO. ET AL. *v.* BOARD OF MANAGEMENT OF THE AMERICAN CAST IRON PIPE CO. ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 516 So. 2d 528.

No. 87-1538. STEIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 532 A. 2d 641.

No. 87-1571. SCRAPP INVESTMENT CO., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 29.

No. 87-5957. JACKSON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied.

No. 87-6017. SHIEL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 515 A. 2d 405.

No. 87-6187. KERNEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 510 So. 2d 334.

No. 87-6211. SENJUDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 2d 1060.

No. 87-6257. ALMEIDA-BIFFI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 830.

No. 87-6282. GRAVATT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 87-6306. LYONS *v.* CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 305.

No. 87-6311. DAVIS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 141 Wis. 2d 986, 416 N. W. 2d 297.

No. 87-6329. ARMSTRONG *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 1552.

No. 87-6353. BRAILEY *v.* AUTOTHORITY, INC. Sup. Ct. Va. Certiorari denied.

No. 87-6386. ODLE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

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No. 87-6391. *HUNZIKER ET AL. v. GERMAN-AMERICAN STATE BANK*. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 1161, 519 N. E. 2d 729.

No. 87-6418. *PARIS v. STATE DIVISION OF CORRECTION ET AL.* Ct. Sp. App. Md. Certiorari denied. Reported below: 71 Md. App. 738.

No. 87-6423. *BRECHSEISEN v. MONDRAGON, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 833 F. 2d 238.

No. 87-6434. *RAY v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 812 F. 2d 675.

No. 87-6439. *NICOLAU v. MURESANU*. C. A. 2d Cir. Certiorari denied.

No. 87-6441. *STRONG v. HUCKABAY*. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1009.

No. 87-6446. *ROSBERG v. GOERES ET AL.* Sup. Ct. Neb. Certiorari denied. Reported below: 225 Neb. 811, 408 N. W. 2d 302.

No. 87-6447. *THACKER v. BUMGARNER, SUPERINTENDENT, NORTH CAROLINA SOUTHERN CORRECTIONAL CENTER*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1005.

No. 87-6448. *PERRY v. MATHEWS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 1026.

No. 87-6449. *McGOVERN v. MEKO*. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6455. *HARRIS v. IVEY ET AL.* C. A. 11th Cir. Certiorari denied.

No. 87-6456. *WRIGHT v. MINNESOTA ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 746.

No. 87-6473. *GUINN v. MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 302.

No. 87-6478. *BIGHAM v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied.

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No. 87-6479. *GRIGOROV v. NEW YORK*. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 87-6480. *LOWE v. GREEN, SUPERINTENDENT, RIVERS CORRECTIONAL INSTITUTION*. C. A. 11th Cir. Certiorari denied.

No. 87-6484. *WALLACE v. UPSHUR*. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1121.

No. 87-6494. *TYLER v. PEART ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 478.

No. 87-6498. *ELLIOTT v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87-6501. *LA RUE v. MCCARTHY ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 140.

No. 87-6503. *ENNIS v. HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1202.

No. 87-6504. *ELLIOTT v. MYERS, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 87-6505. *REED v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 836 F. 2d 551.

No. 87-6508. *YOUNG v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 60.

No. 87-6512. *MASTERS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 87-6513. *MOODY v. BOYLES*. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87-6515. *CONLEY v. ESTATE OF CONLEY*. C. A. 9th Cir. Certiorari denied.

No. 87-6516. *PRITCHETT v. BOUTWELL, ACTING WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1439.

No. 87-6517. *MONROE v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 1005.

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No. 87-6519. *RIAL v. JERISHA ET AL.* C. A. 7th Cir. Certiorari denied.

No. 87-6525. *CORDEIRO v. CONNER ET AL.* Ct. App. Ariz. Certiorari denied.

No. 87-6526. *GREEN ET AL. v. EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 546.

No. 87-6528. *BRAAN v. DISTRICT OF COLUMBIA PUBLIC DEFENDER SERVICE.* C. A. D. C. Cir. Certiorari denied.

No. 87-6532. *FIELDS v. HARRISON ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 2d 1220.

No. 87-6534. *VALENZUELA GAMEZ v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1129.

No. 87-6535. *CRAWFORD v. JABE, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 87-6537. *GAINS v. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 87-6541. *ALSTON v. MARINE MIDLAND BANK, N. A.* Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 610, 516 N. E. 2d 1223.

No. 87-6566. *WATKINS v. JONES, SUPERINTENDENT, BOSTICK CORRECTIONAL CENTER.* C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6591. *BRADBERRY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1088.

No. 87-6592. *ESTUS v. AZZARELLI.* C. A. 3d Cir. Certiorari denied.

No. 87-6595. *HERNANDEZ v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 829 F. 2d 988.

No. 87-6603. *SMITH v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87-6608. *GOLDSBOROUGH v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1207.

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No. 87-6620. HERNANDEZ-BELTRAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1094.

No. 87-6641. DALE ET UX. *v.* JANKLOW, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 481.

No. 87-6666. LAURENCO *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 466.

No. 87-6780. LOWENFIELD *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 183.

No. 87-1187. HASTINGS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA *v.* JUDICIAL CONFERENCE OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 264 U. S. App. D. C. 306, 829 F. 2d 91.

No. 87-1221. MISSISSIPPI *v.* PARKER. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 514 So. 2d 767.

No. 87-1234. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ELLEDGE. C. A. 11th Cir. Motion of William Duane Elledge to direct the Clerk to file a cross-petition for writ of certiorari out of time denied. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 823 F. 2d 1439 and 833 F. 2d 250.

No. 87-1401. CARGILL, INC. *v.* CHARTER INTERNATIONAL OIL CO. C. A. 11th Cir. Motion of petitioner for leave to submit Rule 28.1 material under seal granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 829 F. 2d 1054.

No. 87-1484. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 751 *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 833 F. 2d 165.

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No. 87-6254. CUEVAS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 87-6487. BOOKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 87-6493. POPE *v.* VIRGINIA. Sup. Ct. Va.; and
No. 87-6495. SIMMONS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: No. 87-6254, 742 S. W. 2d 331; No. 87-6487, 825 F. 2d 281; No. 87-6493, 234 Va. 114, 360 S. E. 2d 352; No. 87-6495, 814 F. 2d 504.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

Rehearing Denied

No. 87-815. CORACE *v.* UNITED STATES, 484 U. S. 1060;
No. 87-865. GREGORY LUMBER Co., INC. *v.* UNITED STATES, 484 U. S. 1061;
No. 87-1025. MORGAN *v.* OHIO, 484 U. S. 1064;
No. 87-1050. IN RE GOLDSTEIN, 484 U. S. 1057;
No. 87-1086. DAMASCUS *v.* BORGIA ET AL., 484 U. S. 1066;
No. 87-1145. POTTER *v.* WACKENHUT CORP. ET AL., *ante*, p. 902;
No. 87-1149. REAGIN *v.* TERRY ET AL., *ante*, p. 906;
No. 87-1162. CLISSURAS *v.* CITY OF NEW YORK ET AL., 484 U. S. 1053;
No. 87-5449. ANDREWS *v.* SHULSEN, WARDEN, ET AL., *ante*, p. 919;
No. 87-5454. WRENN *v.* GOULD ET AL., 484 U. S. 1067;
No. 87-5647. THOMPSON *v.* PFEIFFER ET AL., *ante*, p. 907;
No. 87-5807. JOHNSON *v.* ARMONTROUT, WARDEN, 484 U. S. 1068;
No. 87-5873. WILSON *v.* BUTLER, WARDEN, 484 U. S. 1079;
No. 87-5961. LATSHAW *v.* FELDER ET AL., 484 U. S. 1069;
No. 87-5975. HOWES *v.* UNITED STATES, 484 U. S. 1069;
No. 87-6014. SHURN *v.* ILLINOIS, 484 U. S. 1079;
No. 87-6019. STUMPF *v.* OHIO, 484 U. S. 1079;
No. 87-6050. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 484 U. S. 1071;

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- No. 87-6127. *POST v. OHIO*, 484 U. S. 1079;
No. 87-6161. *TEMPEL v. ALASKA ET AL.*, 484 U. S. 1075;
No. 87-6166. *LASHLEY ET UX. v. FIRST NATIONAL BANK OF LIVE OAK*, 484 U. S. 1075;
No. 87-6181. *OLIM v. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY*, 484 U. S. 1076;
No. 87-6201. *THOMAS v. RAFFERTY, WARDEN, ET AL.*, 484 U. S. 1076;
No. 87-6204. *MILTON v. WORLD SAVINGS & LOAN ASSN.*, *ante*, p. 908;
No. 87-6207. *MEHAR v. C & P TELEPHONE COMPANY OF MARYLAND*, 484 U. S. 1077; and
No. 87-6214. *MURPHY v. SISCO ET AL.*, *ante*, p. 937. Petitions for rehearing denied.

No. 86-1065. *O'SULLIVAN ET AL. v. UNITED STATES ET AL.*, 484 U. S. 1041. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

No. 86-5237. *CRIM v. COMMISSIONER OF INTERNAL REVENUE*, 479 U. S. 866. Motion for leave to file petition for rehearing denied. JUSTICE SCALIA and JUSTICE KENNEDY took no part in the consideration or decision of this motion.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period of June 6 through June 10, 1988, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

APRIL 20, 1988

Certiorari Denied

No. 87-6753 (A-786). *LAWSON v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Cabarrus County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. *Certiorari* denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

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

APRIL 22, 1988

Dismissals Under Rule 53

No. 87-1413. *GONDA v. FEDERAL DEPOSIT INSURANCE CORPORATION*. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 832 F. 2d 959.

No. 86-1786. *UNITED METAL PRODUCTS CORP. v. NATIONAL BANK OF DETROIT*. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 811 F. 2d 297.

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Dismissal Under Rule 53

No. 86-648. *WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 7th Cir. [Certiorari granted, 479 U. S. 1053.] Writ of certiorari dismissed under this Court's Rule 53.

Affirmed on Appeal

No. 87-1117. *CITY OF MANASSAS, VIRGINIA, ET AL. v. UNITED STATES*. Affirmed on appeal from C. A. 4th Cir. Reported below: 830 F. 2d 530.

Appeals Dismissed

No. 87-1462. *ROGERS v. CITY OF CHEYENNE*. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 747 P. 2d 1137.

No. 87-1463. *BROWN v. BROWN & ROOT U. S. A. INC. ET AL.* Appeal from C. A. 5th Cir. Motion of appellant for a free white Christian male bench denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 833 F. 2d 1009.

No. 87-1503. *SHIPPS v. STOUGHTON POLICE DEPARTMENT ET AL.* Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a

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petition for writ of certiorari, certiorari denied. Reported below: 836 F. 2d 1341.

No. 87-1539. *BRANSON v. CALIFORNIA*. Appeal from App. Dept., Super. Ct. Cal., Los Angeles County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6539. *WHITAKER v. PETERSON ET AL.* Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 827 F. 2d 773.

No. 87-6544. *WHITAKER v. PASCARELLA ET AL.* Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 829 F. 2d 41.

Certiorari Granted—Vacated and Remanded

No. 86-1986. *NORTH BROWARD HOSPITAL DISTRICT v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bethesda Hospital Assn. v. Bowen*, ante, p. 399. Reported below: 808 F. 2d 1405.

No. 87-57. *UNIVERSITY OF CINCINNATI, DBA UNIVERSITY HOSPITAL v. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES*. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bethesda Hospital Assn. v. Bowen*, ante, p. 399. Reported below: 809 F. 2d 307.

No. 87-443. *BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES v. ADAMS HOUSE HEALTH CARE ET AL.* C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bethesda Hospital Assn. v. Bowen*, ante, p. 399. Reported below: 817 F. 2d 587.

Miscellaneous Orders. (See also No. 87-107, ante, at 617.)*

No. — — —. *KING v. KAPLAN ET AL.* Motion to direct the Clerk to file a jurisdictional statement which does not comply with the Rules of this Court and for other relief denied.

*For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure, see post, p. 1045; amendments to the Federal Rules of Evidence, see post, p. 1051; and amendments to the Federal Rules of Criminal Procedure, see post, p. 1059.

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No. A-779. *ROGGIO v. UNITED STATES*. Application for release on bond, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-814 (87-1625). *FLORIDA v. LONG*. Sup. Ct. Fla. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. D-661. *IN RE DISBARMENT OF SULLIVAN*. Disbarment entered. [For earlier order herein, see 484 U. S. 941.]

No. D-671. *IN RE DISBARMENT OF CLINTON*. Disbarment entered. [For earlier order herein, see 484 U. S. 1040.]

No. D-703. *IN RE DISBARMENT OF GUSSOW*. It is ordered that Irving B. Gussow, of Fern Park, 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-704. *IN RE DISBARMENT OF PACIONE*. It is ordered that Albert P. Pacione, Jr., of Newburgh, 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-705. *IN RE DISBARMENT OF SEAMAN*. It is ordered that Roger George Seaman, 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. 86-495. *K MART CORP. v. CARTIER, INC., ET AL.*;

No. 86-624. *47TH STREET PHOTO, INC. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.*; and

No. 86-625. *UNITED STATES ET AL. v. COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.* C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motions of the Solicitor General and petitioners K mart Corp. and 47th Street Photo, Inc., for leave to file supplemental briefs on reargument granted.

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No. 87-1279. MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL. C. A. D. C. Cir. [Probable jurisdiction noted, 484 U. S. 1058.] Motion of Whitney North Seymour, Jr., Independent Counsel, for leave to file a reply brief as *amicus curiae* denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 87-5894. BENTLY *v.* UNITED STATES, 484 U. S. 1017. Motion of petitioner to direct the Clerk to file petition for rehearing out of time denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

Certiorari Granted

No. 87-1165. CALIFORNIA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 830 F. 2d 139.

No. 87-1344. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* ABBOTT ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 263 U. S. App. D. C. 186, 824 F. 2d 1166.

No. 87-1467. EXXON CO., U. S. A. *v.* BANQUE DE PARIS ET DES PAYS-BAS. C. A. 5th Cir. Certiorari granted. Reported below: 828 F. 2d 1121.

Certiorari Denied. (See also Nos. 87-1463, 87-1503, 87-1539, 87-6539, and 87-6544, *supra*.)

No. 87-380. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 1435.

No. 87-605. DEDMAN ET AL. *v.* HAWAII BOARD OF LAND AND NATURAL RESOURCES ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 69 Haw. 255, 740 P. 2d 28.

No. 87-913. LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, ET AL. *v.* CATALYTIC, INC. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 430.

No. 87-1013. HORNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87-1214. NATIONAL COTTONSEED PRODUCTS ASSN. *v.* McLAUGHLIN, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir.

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Certiorari denied. Reported below: 263 U. S. App. D. C. 345, 825 F. 2d 482.

No. 87-1235. *ABBAMONTE v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 373.

No. 87-1305. *KOONS FORD OF ANNAPOLIS, INC. v. NATIONAL LABOR RELATIONS BOARD ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87-1306. *SOUTH CENTRAL ENTERPRISES, INC., ET AL. v. FARRINGTON, TRUSTEE*. C. A. 8th Cir. Certiorari denied. Reported below: 829 F. 2d 651.

No. 87-1415. *MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION ET AL. v. CATLETT ET AL.*; and

No. 87-1416. *CATLETT ET AL. v. MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 1260.

No. 87-1455. *FLORIDA POWER & LIGHT CO. v. WESTINGHOUSE ELECTRIC CORP.* C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 239.

No. 87-1459. *IN RE ALEXANDER*. C. A. D. C. Cir. Certiorari denied. Reported below: 266 U. S. App. D. C. 120, 833 F. 2d 370.

No. 87-1464. *AGNEW ET AL. v. ALICANTO, S. A., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1202.

No. 87-1468. *PHILLIPS v. MINER*. Ct. App. La., 3d Cir. Certiorari denied.

No. 87-1480. *WINNEBAGO TRIBE OF NEBRASKA v. DEPARTMENT OF REVENUE OF IOWA ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 790.

No. 87-1482. *MASTELOTTO ET AL. v. EXXON CO., U. S. A.* C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 373.

No. 87-1486. *JURISICH v. LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES ET AL.* Ct. App. La., 4th Cir. Certiorari denied. Reported below: 508 So. 2d 588.

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No. 87-1489. *TRENTON ET AL. v. SCOTT PAPER CO. ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 832 F. 2d 806.

No. 87-1523. *MORRIS v. COMPAGNIE MARITIME DES CHARGEURS REUNIS, S. A., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 67.

No. 87-1537. *CROWLEY v. NEW HAMPSHIRE PERSONNEL COMMISSION.* Sup. Ct. N. H. Certiorari denied.

No. 87-1544. *DRESSER INDUSTRIES, INC. v. FAHY.* Sup. Ct. Mo. Certiorari denied. Reported below: 740 S. W. 2d 635.

No. 87-1570. *WARD v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1538.

No. 87-1588. *KING ET AL. v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 109.

No. 87-6053. *SHEPARD v. MARSHALL, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

No. 87-6084. *SHAW v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 714.

No. 87-6105. *ELLIS v. WEST ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1063.

No. 87-6170. *CATALDO v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 869.

No. 87-6198. *SMITH v. EADS.* C. A. 8th Cir. Certiorari denied.

No. 87-6225. *HOCHMAN ET AL. v. RAFFERTY, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 1199.

No. 87-6279. *LASTEED v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1240.

No. 87-6462. *SELTENRICH v. TITUS ET AL.* C. A. 9th Cir. Certiorari denied.

No. 87-6464. *LAWRENCE v. UNITED STATES ARMY TANK-AUTOMOTIVE COMMAND ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

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No. 87-6492. *ADAMS v. DEPARTMENT OF THE NAVY*. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1024.

No. 87-6497. *JONES v. RALSTON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 880.

No. 87-6523. *MARCH v. BREWSTER ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87-6533. *DREW v. CARROLL ET AL.* C. A. 5th Cir. Certiorari denied.

No. 87-6538. *BRECK v. ULMER ET AL.* Sup. Ct. Alaska. Certiorari denied. Reported below: 745 P. 2d 66.

No. 87-6540. *VINSON v. JOHNSON ET AL.* C. A. 5th Cir. Certiorari denied.

No. 87-6546. *MCCRAY v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 87-6548. *SEN GUPTA v. METCO, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 653.

No. 87-6555. *LEON v. DUGGER ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 1438.

No. 87-6556. *HOPKINS v. OFFICE OF PERSONNEL MANAGEMENT*. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 2d 1033.

No. 87-6557. *GRAYS v. CABANA ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 13.

No. 87-6561. *RICHARDS ET AL. v. PETERSON*. C. A. 5th Cir. Certiorari denied.

No. 87-6562. *TROVE v. CULBERTSON*. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1344.

No. 87-6564. *SISCO v. COUNTY OF LOS ANGELES ET AL.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-6565. *RHODEN v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied.

No. 87-6583. *ALLEN v. ESTELLE, WARDEN*. C. A. 9th Cir. Certiorari denied.

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No. 87-6594. *WESSELMAN v. SEABOLD, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 2d 99.

No. 87-6604. *LEWIS v. UNITED STATES*. Ct. App. D. C. Certiorari denied.

No. 87-6619. *WILLIAMS v. WATER ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 472.

No. 87-6630. *GONZALEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87-6645. *CLARK v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 468.

No. 87-6647. *JOCHIM v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 87-6652. *SOTELLO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1432.

No. 87-6669. *IBRAHIM v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 838 F. 2d 1212.

No. 87-6676. *KHAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 842 F. 2d 1295.

No. 87-6685. *CALLE-CARDENAS ET AL. v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 837 F. 2d 30.

No. 87-1017. *MONROE v. BUTLER, WARDEN*. Crim. Dist. Ct., Orleans Parish, La. Certiorari denied.

JUSTICE BRENNAN, dissenting.

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

JUSTICE MARSHALL, dissenting.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant this petition for certiorari because the state courts refused to grant petitioner appropriate relief for

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the State's violation of his rights under *Brady v. Maryland*, 373 U. S. 83 (1963). In so doing, the state courts countenanced impermissible official conduct and left the victim of this conduct without effective constitutional protection.

I

In 1980, petitioner Ronald Monroe was brought to trial in New Orleans for the murder of Lenora Collins, a neighbor. The State's case against petitioner consisted solely of eyewitness identifications by the victim's two children, both of whom were present when an assailant broke into their mother's bedroom and stabbed her. There was no physical evidence linking petitioner to the offense. The jury, apparently crediting the testimony of the two children, who at the time of the murder were aged 12 and 11, found petitioner guilty of first-degree murder and unanimously recommended the death sentence.

Six months after Monroe's conviction, Detective Joseph Gallardo of the Pontiac, Michigan, Police Department contacted a member of the New Orleans Police Department to relate information pertinent to the murder of Lenora Collins. While investigating one George Stinson's murder of his common-law wife, Detective Gallardo had received a tip suggesting that Stinson also may have murdered Collins, who was Stinson's previous wife. This tip appeared plausible because both women had died from stab wounds to the neck and chest. Two months after imparting this information, Gallardo again called the New Orleans police. This time, Gallardo told Sergeant John McKenzie about a recent interview he had conducted with Stinson's cellmate. In the interview, the cellmate had quoted Stinson as first confessing to the Michigan murder and then stating that "the same thing happened" to Collins. The cellmate also had reported that Stinson had confessed to threatening his stepchildren into identifying petitioner as their mother's killer. According to Gallardo, the Michigan case also contained a suggestion of witness intimidation.

All of this information was transmitted to the New Orleans detectives who had handled the investigation of Collins' murder. These detectives did not make any further inquiries relating to the Collins case. Neither did the detectives inform petitioner or his counsel of Gallardo's communications. Not until two years later did petitioner's counsel discover, through independent investiga-

tion, that Gallardo had made these statements to the New Orleans police.

Petitioner thereupon filed a motion in the Orleans Parish Criminal District Court seeking release or retrial. Petitioner alleged that the State had violated his constitutional rights by failing to disclose the information Gallardo had given to the New Orleans police. The Criminal District Court denied petitioner's motion without an evidentiary hearing, asserting that the new evidence was not sufficiently material to support relief. The Louisiana Supreme Court denied review. *State ex rel. Monroe v. Maggio*, 444 So. 2d 606 (1984).

Approximately two months later, the United States District Court for the Eastern District of Louisiana granted petitioner's application for habeas corpus relief. Relying in part on testimony given at an evidentiary hearing, the District Court held that the State had violated petitioner's constitutional rights under *Brady v. Maryland*, *supra*, and *United States v. Agurs*, 427 U. S. 97 (1976), by failing to disclose the information obtained from Gallardo. The District Court found that this evidence "create[d] a reasonable doubt as to Monroe's guilt that did not previously exist." App. to Pet. for Cert. 5c. The court further found that the State's responsibility to disclose such evidence continued past the point of conviction. The court explained that "it is fundamentally unfair and contrary to society's notions of justice for a prosecutor to withhold material exculpatory evidence which he acquires while the defendant is entitled to file a motion for a new trial." *Id.*, at 3c. Having found a *Brady* violation, the District Court nonetheless refused petitioner's request for an order directing immediate release or retrial. The court instead remitted the case to the state courts so that they could provide appropriate postconviction relief. Petitioner appealed from the remedial aspect of this judgment, but the United States Court of Appeals for the Fifth Circuit affirmed. *Monroe v. Blackburn*, 748 F. 2d 958 (1984). This Court denied petitioner's application for a writ of certiorari. I dissented then from the Court's failure to review the relief afforded petitioner. See *Monroe v. Blackburn*, 476 U. S. 1145 (1986).

On remand, the Orleans Parish Criminal District Court once again denied petitioner's motion for release or retrial. The state court first expressly rejected the Federal District Court's prior determination that a *Brady* violation had occurred. The state

court reasoned that *Brady* did not apply to evidence obtained by state officials after a defendant's trial: in the words of the state court, "it is impossible to accuse the prosecution of 'suppressing' this material since it did not exist at the time of trial and therefore could not have been suppressed." App. to Pet. for Cert. 2a. The court then held that the new evidence did not entitle petitioner to a new trial under state law. A new trial is required under Louisiana law whenever newly discovered evidence, if introduced at the prior trial, would probably have changed the verdict of guilty. The state court found that the new evidence in this case, which it termed an "ambiguous utterance by Stinson," would not have changed the jury verdict. *Id.*, at 3a. The Louisiana Supreme Court denied review of the Criminal District Court's decision, and petitioner again applied for certiorari.

II

The Criminal District Court's pronouncement that no *Brady* violation occurred in this case is insupportable. On application for habeas corpus relief, a Federal District Court previously had determined that the State's failure to disclose the exculpatory information received from Detective Gallardo constituted a *Brady* violation. The state court had no authority to reconsider or redecide this issue. Once a federal court has determined a federal question in a case, a state court must recognize and give effect to that determination. As this Court stated decades ago:

"[A] right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions.

"... Any other conclusion strikes down the very foundation of the doctrine of *res judicata*, and permits the state court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution and established by the judgments of the Federal courts." *Deposit Bank v. Frankfort*, 191 U. S. 499, 517, 520 (1903).

See also *Stoll v. Gottlieb*, 305 U. S. 165, 170-171 (1938); *Myers v. International Trust Co.*, 263 U. S. 64, 69, 73 (1923). I would have thought this rule too long established to require reiteration.

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By flouting it here, and ignoring the determination of the Federal District Court that state officials had committed a *Brady* violation, the state court acted beyond the scope of its authority and in disregard of settled law.

Given the finding of the Federal District Court that state officials had committed a *Brady* violation when they suppressed the evidence suggesting that George Stinson rather than petitioner had murdered Lenora Collins, the state court was required to order the release or retrial of petitioner. Until now, the invariable remedy for a prosecutor's or police officer's suppression of material exculpatory evidence has been an order directing release or retrial. The State has not pointed to a single case involving a different remedy, and I am aware of none. Still, the State argues that because the *Brady* violation at issue here occurred after petitioner's conviction, the state courts fully remedied the violation by giving petitioner an opportunity to demonstrate that the new evidence entitled him to a second trial under normal principles of state law. This approach, however, disregards one of the most fundamental aspects of this Court's *Brady* jurisprudence. This Court consistently has drawn a sharp distinction between newly discovered evidence suppressed by the State and newly discovered evidence obtained from a neutral source; the Court has reasoned that if these two categories of evidence were treated in the same manner, "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *United States v. Agurs*, *supra*, at 111. To "remedy" a postconviction *Brady* violation merely by evaluating the suppressed evidence under the state-law standard governing motions for a new trial is to violate this established principle; such a remedy treats the evidence as if it had derived from a neutral source and thereby ignores the dereliction of state officials. In so doing, this remedy removes from the State any incentive to disclose material exculpatory evidence gained after conviction and trivializes the constitutional right recognized by *Brady* and its progeny. Because I do not believe that this Court should tolerate such a dilution of the *Brady* rule, especially in the context of a capital case in which the withheld evidence is strongly exculpatory, I dissent from the denial of certiorari.

No. 87-1287. HUMPHRIES *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF

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LABOR, ET AL. C. A. 4th Cir. Motion of International Longshoremen's Association, AFL-CIO, for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 834 F. 2d 372.

No. 87-1452. WISE ET AL. *v.* ARLINGTON COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

No. 87-1472. OWENS-ILLINOIS, INC., ET AL. *v.* DANFIELD ET UX. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 829 F. 2d 1233.

No. 87-1479. CARLIN COMMUNICATIONS, INC., ET AL. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 827 F. 2d 1291.

No. 87-6087. POLIAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 823 F. 2d 371.

No. 87-6260. ROUGEAU *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87-6522. MESSER *v.* ZANT, WARDEN. C. A. 11th Cir.;
and

No. 87-6554. OLIVER *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Robeson County, N. C. Certiorari denied. Reported below: No. 87-6260, 738 S. W. 2d 651; No. 87-6522, 831 F. 2d 946.

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. 87-6570. BRENNAN *v.* CITY OF MOUNT DORA, FLORIDA, ET AL. D. C. M. D. Fla. Certiorari before judgment denied.
Rehearing Denied

No. 87-317. BEMIS PENTECOSTAL CHURCH ET AL. *v.* TENNESSEE ET AL., *ante*, p. 930. Petition for rehearing denied.

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No. 87-1166. *MENDEZ v. MENDEZ*, ante, p. 942;
No. 87-5323. *STEFFEN v. OHIO*, ante, p. 916;
No. 87-5888. *IN RE ROY*, ante, p. 932;
No. 87-6236. *ALDERMAN v. GEORGIA*, ante, p. 943;
No. 87-6266. *FORD v. GEORGIA*, ante, p. 943;
No. 87-6308. *EAKINS v. FOLTZ, WARDEN*, ante, p. 938; and
No. 87-6336. *PETERS v. TROWELL ET AL.*, ante, p. 967. Petitions for rehearing denied.

No. 87-616. *BECK ET AL. v. MANUFACTURERS HANOVER TRUST CO. ET AL.*, 484 U. S. 1005. Motion for leave to file petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

APRIL 27, 1988

Certiorari Denied

No. 87-6823 (A-817). *SMITH v. NORTH CAROLINA*. Gen. Ct. Justice, Super. Ct. Div., Halifax County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

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

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Appeals Dismissed

No. 87-1526. *CHRISTENSEN v. UTAH STATE TAX COMMISSION*. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87-6568. *SPELLMAN v. UNITED STATES ET AL.* Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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No. 87-6589. *MINGLEDOLPH v. MCKEAN ET AL.* Appeal from D. C. N. D. Ill. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 87-1414. *MARINO v. UNITED STATES.* C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mathews v. United States, ante*, p. 58. Reported below: 838 F. 2d 463.

Miscellaneous Orders

No. — — —. *HODGES v. UNITED STATES ET AL.* Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A-761 (87-1320). *ROSENBAUM v. ROSENBAUM.* Application to suspend the effect of the order entered March 21, 1988 [*ante*, p. 950], addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A-763. *MODJESKI & MASTERS v. CARTER ET AL.* Application for stay, filed with JUSTICE WHITE, and referred by him to the Court, is hereby granted, and the temporary stay entered by JUSTICE WHITE on April 15, 1988, is vacated.

The judgments of the Louisiana Court of Appeal for the Fourth Circuit and the Louisiana Civil District Court for the Parish of Orleans are stayed pending the timely docketing of an appeal by appellant in the above-entitled case. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement or further disposition of such appeal.

This order is conditioned upon the timely posting with the Louisiana Civil District Court for the Parish of Orleans of a good and sufficient bond in the amount of \$700,000 plus interest from April 15, 1988, by appellant Modjeski & Masters, covering any potential obligations under the judgment of the Louisiana Civil District Court for the Parish of Orleans. Unless and until Modjeski & Masters posts said bond, the stay is expressly conditioned on appellant's taking no action to reduce its current net worth and, in particular, not:

- (A) distributing any earnings of the firm to its partners who continue to work for the firm, except as they have been

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receiving heretofore in salary and benefits or as provided in (B) and (D) below, or

- (B) distributing any earnings of the firm to its partners for so long as the net worth of the firm is below \$700,000, or
- (C) transferring or encumbering any existing assets, funds, or existing contracts of the partnership to or on behalf of any other parties, beyond security interests or liens already in existence, except as is necessary in the ordinary course of its business, for the defense or settlement or both of the pending actions against it, or for payment to associates and employees in accordance with with existing employment contracts;

And further provided that

- (D) Profits accumulated after the payment of salaries and other expenses shall be distributed as follows:
 - (1) If the net worth of the firm is between \$700,000 and \$1.1 million, then up to 50% of accumulated profits may be distributed to the partners; the remainder will be accumulated in the partnership,
 - (2) If the net worth of the firm is above \$1.1 million, then all profits above that amount may be distributed to the partners; and
- (E) Appellant shall furnish to appellees within 30 days of the end of each quarter:
 - (1) a statement from the managing partner of Modjeski & Masters and from its certified public accountants that all provisions of this order have been complied with, and
 - (2) balance sheet and income statements for each such quarter; and
- (F) Within 120 days of the end of the calendar year, appellant shall provide annual balance and income statements to appellees; and
- (G) Appellees shall keep confidential all financial data provided under this order; and
- (H) If the net worth of Modjeski & Masters falls below \$700,000, appellees may apply to the Court for further relief; and
- (I) Appellees shall have the right to select an independent auditor to inspect any and all records of the appellant to

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ascertain whether appellant is complying with the provisions of this stay.

- (J) Should appellees find it necessary to seek additional relief to enforce the terms of this order, they shall apply to the Louisiana Civil District Court for the Parish of Orleans.

No. A-811. *MITCHELL ET AL. v. UNITED STATES*. Application for release pending appeal, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. D-706. *IN RE DISBARMENT OF PURVIS*. It is ordered that Charles M. Purvis, of Birmingham, Ala., 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. 86-1904. *ARIZONA v. YOUNGBLOOD*. Ct. App. Ariz. [Certiorari granted, *ante*, p. 903.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 87-1095. *DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR v. BROYLES ET AL.* C. A. 4th Cir. [Certiorari granted, *ante*, p. 987.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87-6618. *IN RE HARRIS*. Petition for writ of mandamus denied.

Certiorari Granted

No. 87-1064. *UNITED STATES v. STUART ET AL.* C. A. 9th Cir. Certiorari granted. Reported below: 813 F. 2d 243.

Certiorari Denied. (See also Nos. 87-1526 and 87-6568, *supra*.)

No. 87-1040. *MILLER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 830 F. 2d 1073.

No. 87-1291. *STOKWITZ v. UNITED STATES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 893.

No. 87-1317. *GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL. v. UNITED STATES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 935.

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No. 87-1352. BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS ET AL. *v.* LEGRAND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 478.

No. 87-1363. KELLY, CHIEF STATE'S ATTORNEY, ET AL. *v.* WILKINSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 832 F. 2d 1330.

No. 87-1381. MARGOLIN *v.* BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 501, 517 N. E. 2d 509.

No. 87-1390. MAKAH TRIBE ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1020.

No. 87-1421. CITY OF COLUMBUS, OHIO, ET AL. *v.* BRUNET ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1062.

No. 87-1466. AINSWORTH ET UX. *v.* SHELL OFFSHORE INC. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 548.

No. 87-1483. TENG *v.* ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87-1500. SCHUYT *v.* ROWE PRICE PRIME RESERVE FUND, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 45.

No. 87-1501. FARWEST STEEL CORP. *v.* BARGE SEA-SPAN 241, AKA BARGE CERES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 522.

No. 87-1502. GORDON *v.* GORDON. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 739 S. W. 2d 728.

No. 87-1504. LOENGARD ET AL. *v.* SANTA FE INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 87-1508. BEAN DREDGING CORP. *v.* OLSEN, COMMISSIONER OF REVENUE OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 742 S. W. 2d 259.

No. 87-1512. DORITY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 86 Ore. App. 540, 739 P. 2d 75.

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No. 87-1517. *ST. JOHNS COUNTY, FLORIDA v. LUCAS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 232.

No. 87-1524. *HONEYWELL, INC., ET AL. v. LUZADDER, EXECUTRIX OF THE ESTATE OF LUZADDER, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 834 F. 2d 355.

No. 87-1527. *CHRISTENSEN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 303.

No. 87-1528. *GEORGE V. v. STATE BAR OF CALIFORNIA.* Sup. Ct. Cal. Certiorari denied.

No. 87-1531. *CRUZ v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 158 Ill. App. 3d 1100, 525 N. E. 2d 599.

No. 87-1534. *GUFFEY v. CITY OF KIRKSVILLE, MISSOURI.* Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 740 S. W. 2d 227.

No. 87-1540. *MCKINSEY ET AL. v. DONIVAN ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 486.

No. 87-1554. *ROCKEFELLER GROUP, INC., ET AL. v. 48TH STREET STEAKHOUSE, INC.* C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 427.

No. 87-1580. *LOESCHNIG v. CHRYSLER CREDIT CORP. ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1128.

No. 87-1583. *VERMONT DEPARTMENT OF TAXES v. KEYS ET UX.* Sup. Ct. Vt. Certiorari denied. Reported below: 149 Vt. 658, 552 A. 2d 418.

No. 87-1604. *KANE v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 1207.

No. 87-1623. *SZTAN v. DEPARTMENT OF THE NAVY.* C. A. Fed. Cir. Certiorari denied. Reported below: 837 F. 2d 1097.

No. 87-1645. *KALVANS v. DEPARTMENT OF ATTORNEY GENERAL OF MICHIGAN.* Ct. App. Mich. Certiorari denied.

No. 87-1673. *ILLINOIS CENTRAL GULF RAILROAD CO. v. MISTER.* C. A. 7th Cir. Certiorari denied. Reported below: 832 F. 2d 1427.

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No. 87-6119. *BRANCH v. UTAH*. Sup. Ct. Utah. Certiorari denied. Reported below: 743 P. 2d 1187.

No. 87-6343. *HENSLEE v. SYKES, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES*. Sup. Ct. Ohio. Certiorari denied.

No. 87-6421. *FRAZIER v. SEABOLD, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87-6509. *TAYLOR v. NEW JERSEY*. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87-6567. *PARKS v. ALLSBROOK, SUPERINTENDENT, ODOM COMPLEX, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1343.

No. 87-6569. *WALLS v. ADULT PAROLE AUTHORITY OF OHIO*. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 2d 880.

No. 87-6576. *BAGLEY v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 321 N. C. 201, 362 S. E. 2d 244.

No. 87-6577. *LARACUENTE v. CONNECTICUT*. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 515, 534 A. 2d 882.

No. 87-6578. *BUSH v. PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT PITTSBURGH*. C. A. 3d Cir. Certiorari denied.

No. 87-6579. *JAMES v. ALFORD, WARDEN, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 605.

No. 87-6585. *LOSEY v. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 2d 1093.

No. 87-6586. *WALLMULLER v. CALIFORNIA*. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 87-6587. *PRYOR v. TEXAS*. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 719 S. W. 2d 628.

No. 87-6590. *MORRIS v. DOAN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

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No. 87-6599. *MOORE v. FULCOMER*, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 87-6600. *BROWN v. DIAZ ET AL.* Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. 409, 361 S. E. 2d 490.

No. 87-6614. *BENNETT v. WESTFALL*, SHERIFF OF JACKSON COUNTY, WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 1342.

No. 87-6662. *OGLESBY v. INDIANA*. Sup. Ct. Ind. Certiorari denied. Reported below: 513 N. E. 2d 638.

No. 87-6679. *GOROD v. DEMONG ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 836 F. 2d 1340.

No. 87-6694. *KOTYK v. WARD*, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 134 App. Div. 2d 967, 520 N. Y. S. 2d 890.

No. 87-725. *CUTILLO ET AL. v. CINELLI*. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 820 F. 2d 474.

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

In *Weatherford v. Bursey*, 429 U. S. 545, 558 (1977), we held that establishing a violation of a defendant's Sixth Amendment right to counsel requires a showing of "at least a realistic possibility" of prejudice to the defendant or benefit to the prosecution. See also *United States v. Morrison*, 449 U. S. 361, 365-366 (1981). This case presents the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information. The First Circuit held that where confidential defense strategy information is transmitted to the prosecution and the defendant makes a *prima facie* showing of prejudice, the burden then shifts to the prosecution to prove that there was no prejudice to the defendant from the disclosure. *Cinelli v. City of Revere*, 820 F. 2d 474, 478, 480 (1987); accord, *United States v. Mastroianni*, 749 F. 2d 900, 907-908 (CA1 1984). This position conflicts with the approach of other Circuits of requiring the

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defendant to prove prejudice. *United States v. Steele*, 727 F. 2d 580, 586-587 (CA6), cert. denied *sub nom. Scarborough v. United States*, 467 U. S. 1209 (1984); *United States v. Irwin*, 612 F. 2d 1182, 1186-1189 (CA9 1980). It also conflicts with a third position that once a defendant shows that the prosecution has improperly obtained confidential defense strategy information or has intentionally placed an informer in the defense camp then no showing of prejudice is required, for those acts constitute a *per se* violation of the Sixth Amendment. *United States v. Costanzo*, 740 F. 2d 251, 254-255 (CA3 1984), cert. denied, 472 U. S. 1017 (1985). Because of these conflicting approaches among the Circuits, I would grant certiorari.

No. 87-1274. UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL. *v.* CHEROKEE ELECTRIC COOPERATIVE. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1131.

JUSTICE WHITE, dissenting.

This case presents the question whether labor and management may be compelled to arbitrate a grievance that indisputably was filed outside the time limits provided by their collective-bargaining agreement.

The parties to this action entered into a collective-bargaining agreement that provided that "[a]ny grievance not reported within five (5) working days of first knowledge of the occurrence causing the grievance shall be deemed waived [*sic*] and non-existent." The grievance at issue here was not reported within the 5-day period. The employer therefore refused to submit the grievance to arbitration.

The union brought an action to compel arbitration in the District Court for the Northern District of Alabama. The court dismissed the action on summary judgment on the ground that the employer "did not agree to submit to arbitration grievances which on their face are untimely and to which the timeliness issue is not disputed." The court rejected the union's contention that the timeliness issue ought to have been submitted to the arbitrator. "To permit an arbitrator to arbitrate the issue of timeliness where there is no dispute over the facts bearing on the timeliness issue would be to waste the time of the arbitrator and of the parties," reasoned the court, "and if an arbitrator should erroneously find that this particular grievance was timely filed, the finding would be so manifestly arbitrary and capricious as to require a reviewing

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court to set it aside." The Court of Appeals for the Eleventh Circuit affirmed summarily. 829 F. 2d 1131 (1987).

The decision in this case conflicts with decisions of several other Federal Courts of Appeals. Those courts have construed our decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543 (1964), as requiring that the arbitrator resolve all procedural objections to arbitration so long as the subject matter of the grievance is covered by an arbitration agreement. See, e. g., *Niro v. Fearn Int'l, Inc.*, 827 F. 2d 173, 175-176 (CA7 1987); *Washington Hospital Center v. Service Employees Int'l Union, Local 722*, 241 U. S. App. D. C. 186, 189-191, 746 F. 2d 1503, 1506-1508 (1984); *Automotive, Petroleum & Allied Industries Employees Union, Local 618 v. Town & Country Ford, Inc.*, 709 F. 2d 509, 511-514 (CA8 1983).

In *Washington Hospital Center*, for example, the union failed to give notice that a grievance had been referred to arbitration within the time specified by the collective-bargaining agreement. It was nonetheless held that the arbitrability of the grievance had to be decided by the arbitrator rather than the courts. The District of Columbia Circuit reasoned that a dispute over "the significance of a default in literal compliance with a contractual procedural requirement," like a dispute over a substantive contractual provision, requires "a determination of the intention of the parties to the contract" that must be made by the arbitrator. 241 U. S. App. D. C., at 191, 746 F. 2d, at 1508 (quoting *Chauffeurs, Teamsters & Helpers, Local 765 v. Stroehmann Bros. Co.*, 625 F. 2d 1092, 1093 (CA3 1980)).

I would grant certiorari to resolve the conflict among the Courts of Appeals on this question of federal labor law.

No. 87-1341. *BROWN CO. ET AL. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 833 F. 2d 1015.

No. 87-6593. *FERGUSON v. DONALDSON*, JUDGE, SAN FRANCISCO MUNICIPAL COURT. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 829 F. 2d 40.

No. 87-1342. *ARAMBULO v. UNITED STATES*. C. A. 2d Cir. Motion of petitioner for leave to file transcript of proceeding in the

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District Court under seal granted. Certiorari denied. Reported below: 835 F. 2d 437.

No. 87-1558. OHIO *v.* MURPHY. Ct. App. Ohio, Summit County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 87-6138. MODDEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 721 S. W. 2d 859.

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 the petition for writ of certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg v. Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence. But even if I did not hold this view, I would grant the petition for certiorari and remand this case for a hearing to consider petitioner's claim that the prosecutor improperly used peremptory challenges to exclude black persons from the jury in violation of the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment forbids the prosecution's exercise of peremptory challenges against prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U. S. 79, 89 (1986). Recognizing the "crippling burden" that up to then had been placed on defendants claiming discrimination, *id.*, at 92, this Court in *Batson* dramatically altered the evidentiary burden facing defendants who claim that a prosecutor has improperly used peremptory challenges to exclude members of their racial group from a jury panel. Under *Batson*, a defendant makes a prima facie showing of purposeful discrimination in the selection of the venire by showing that he is a mem-

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MARSHALL, J., dissenting

ber of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts, along with any other relevant circumstances, raise an inference that the prosecutor used peremptory challenges to exclude venirepersons on account of their race. *Id.*, at 96. Once the defendant makes such a prima facie showing, the burden shifts to the prosecution to come forward with a race-neutral explanation for challenging the prospective jurors. *Id.*, at 97.

In this case, petitioner, a black man, was charged with murdering a white woman in the course of committing a robbery. During jury selection, the prosecution exercised three peremptory strikes to exclude black jurors from the venire. The prosecution also challenged for cause five other black venirepersons. Although petitioner complained about the exclusion of black persons from the jury, the trial court apparently never asked the prosecutor to explain the exercise of peremptory challenges to exclude black venirepersons, and no explanation was given. As a result of the prosecutor's use of peremptory challenges and exclusions for cause, only one black person was ultimately selected to serve on the jury that convicted petitioner and sentenced him to death. Although the record is sparse, in my view petitioner has made a prima facie showing under *Batson* of the discriminatory exercise of peremptory challenges.

Because petitioner has made a prima facie showing of discrimination, the burden falls on the prosecution to give a race-neutral explanation for its use of peremptory challenges. Petitioner's trial concluded before this Court decided *Batson*, so it is not surprising that the trial court failed to determine whether the prosecutor could proffer a race-neutral explanation for the challenges.* Under these circumstances, I would vacate the judgment of the Texas Court of Criminal Appeals and remand with instructions that a hearing be held to consider petitioner's claim that the prosecution's use of peremptory challenges violated his rights under the Equal Protection Clause.

*In *Griffith v. Kentucky*, 479 U. S. 314, 328 (1987), this Court ruled that the holding of *Batson v. Kentucky*, 476 U. S. 79 (1986), "is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." When *Batson* was decided, petitioner's case was still pending on direct review of his conviction and sentence.

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*Rehearing Denied*No. 87-972. *SCHARRER v. UNITED STATES*, ante, p. 935;No. 87-1237. *YEE v. SMITH ET AL.*, ante, p. 936;No. 87-1334. *BELL ET AL. v. UNITED STATES*, ante, p. 934;
andNo. 87-6351. *BESPALCHENKO v. GERMAN FEDERAL GOVERNMENT ET AL.*, ante, p. 979. Petitions for rehearing denied.

MAY 4, 1988

Miscellaneous Order

No. A-800. *FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL. v. CITY OF DALLAS ET AL.* Application for stay, filed with JUSTICE WHITE, has been referred to the Court. JUSTICE WHITE's temporary stay is hereby vacated. Application for stay is granted, and judgment of the United States Court of Appeals for the Fifth Circuit is stayed, except for its holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution, pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

MAY 10, 1988

Miscellaneous Order

No. A-858 (87-6927). *HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF SMITH v. TEXAS*. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, 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 issuance of the mandate of this Court.

MAY 13, 1988

Dismissal Under Rule 53

No. 87-1339. *USMAN v. IMMIGRATION AND NATURALIZATION SERVICE*. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 826 F. 2d 1066.