

# The Burger Court Opinion Writing Database

*Aikens v. California*

406 U.S. 813 (1972)

Paul J. Wahlbeck, George Washington University

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Forrest Maltzman, George Washington University



File  
Recd  
6/10/71

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

October Term, 1970

AIKENS *v.* CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF CALIFORNIA

JACKSON *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF GEORGIA

BRANCH *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
CRIMINAL APPEALS OF TEXAS

Nos. 5049, 5133, and 5135. Decided June —, 1971

MR. JUSTICE DOUGLAS, dissenting.

I would deny certiorari in these cases and all other cases held on our docket which present the sole issue of whether capital punishment for rape (with or without injury to the victim), burglary, or murder constitute cruel and unusual punishment under the Eighth Amendment. These cases do not present a substantial federal question.

The question whether capital punishment is cruel and unusual could have been decided but was not decided in *McGautha v. California* and *Crampton v. Ohio*. The issue was tendered but we chose not to decide it. Indeed Crampton himself presented the issue. His question Number 4 presented to this Court reads as follows:

"4. Whether the Ohio statute providing the punishment of death by electrocution for the crime of murder in the first degree, where the jury does not recommend mercy, violates the Eighth Amendment of the Constitution in imposing a cruel and unusual punishment."

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File  
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3rd DRAFT

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6-11*

4th DRAFT

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5th DRAFT

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Douglas

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*9th*

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*6/16/71*

8th DRAFT

## SUPREME COURT OF THE UNITED STATES

October Term, 1970

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Today we grant certiorari in seven capital cases, five of them presenting the issue of whether the death penalty for rape is cruel and unusual punishment under the Eighth Amendment. We also either reverse or remand some 33 other capital cases for various reasons;<sup>1</sup> and in three other cases we either dismiss or deny certiorari.<sup>2</sup> Remaining on our docket are some 101 other capital cases. Some have been here for years: 25 were filed during the 1968 Term, 47 during the 1969 Term, and 29 during the 1970 Term. To the extent they have issues worthy of review I would grant certiorari and hear oral argument; otherwise I would deny certiorari today.

None of the cases being held involves "execution by a state in a cruel manner." *Francis v. Resweber*, 329 U. S.

<sup>1</sup> Of these 25 are related to *Witherspoon v. Illinois*, 391 U. S. 510; six to *United States v. Jackson*, 390 U. S. 570; and one each to *Bruton v. United States*, 391 U. S. 123, and *Miranda v. Arizona*, 384 U. S. 436.

<sup>2</sup> The three cases involve one petitioner who has escaped, one who died (and only raised issues relating to punishment), and one Arkansas petitioner who had his sentence commuted by then Governor Winthrop Rockefeller.

*Oct 11  
Douglas*