

# The Burger Court Opinion Writing Database

## *Picard v. Connor*

404 U.S. 270 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



BM  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

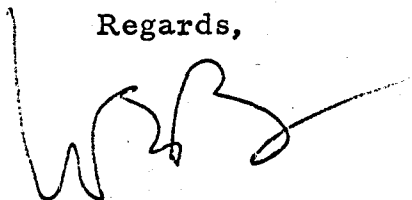
December 10, 1971

Re: No. 70-96 - Picard v. Connor

Dear Bill:

Please join me.

Regards,



Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

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U.S. DEPT. OF JUSTICE

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Justice Douglas, J.

No. 70-96

Circulated: 12/8/71  
Uncirculated:

Philip J. Picard, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
James J. Connor. } of Appeals for the First  
Circuit.

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that in this case we carry the rule of exhaustion of state remedies too far. Connor's name was added to the indictment after it was returned by the state grand jury, he being substituted for "John Doe." He raised in his brief before the Supreme Judicial Court of Massachusetts his claim that such a substitution violated that due process required by the Fourteenth Amendment "in that he was put to trial without having been indicted by a Grand Jury." He did not refer to the Equal Protection Clause which is also a part of the Fourteenth Amendment. But that is a nicety irrelevant to the maintenance of healthy state-federal relations on which the Court makes the present decision turn. The concept of due process is broad and expansive. We have held that the denial of equal protection, viz. invidious discrimination, may be "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U. S. 497, 499.

Yet apart from that, a due process point is plainly raised where an accused claims that no grand jury found "probable cause" to indict him, that their only finding concerned someone unknown at the time.

3 4 1

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-96

149/71

Philip J. Picard, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
James J. Connor. } of Appeals for the First  
Circuit.

[December —, 1971]

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<sup>1</sup> The Court properly says that respondent tendered the validity of the *Gedzuim* case to the Supreme Judicial Court of Massachusetts. That, however, was in his first assignment of error. But in his third and fourth assignments of error he alleged that he was prosecuted "in violation of his conditional right to due process in that he was put to trial without having been indicted by a Grand Jury."

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U.S. DEPT. OF JUSTICE

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 70-96

Circulated: \_\_\_\_\_

Circulated: 12/11/71

Philip J. Picard, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
James J. Connor. } of Appeals for the First  
Circuit.

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

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<sup>1</sup> The Court properly says that respondent tendered the validity of the *Gedzuim* case to the Supreme Judicial Court of Massachusetts. That, however, was in his first assignment of error. But in his third and fourth assignments of error he alleged that he was prosecuted "in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury."

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Sutherland

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 70-96

Recirculated: 12-13

Philip J. Picard, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
James J. Connor. } of Appeals for the First  
Circuit.

[December —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-96

Philip J. Picard, Petitioner,  
v.  
James J. Connor. } On Writ of Certiorari to  
the United States Court  
of Appeals for the First  
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[December —, 1971]

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REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

No. 70-96

Circulated: 12/3/71

Philip J. Picard, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
James J. Connor. } of Appeals for the First  
Circuit.

[December —, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Court of Appeals for the First Circuit, reversing the District Court's dismissal of respondent's petition for a writ of federal habeas corpus,<sup>1</sup> held that "the procedure by which [respondent] was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws." 434 F. 2d 673, 674 (1970). The Court of Appeals acknowledged that respondent had not attacked his conviction on the equal protection ground, either in the state courts or in his federal habeas petition:

"[Respondent] did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that [respondent] had not exhausted his state remedy . . . ."

The Court of Appeals rejected that contention and held that respondent has exhausted available state judicial

<sup>1</sup> 308 F. Supp. 843 (Mass. 1970).



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Please jury me  
pp 3, 4

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_  
Recirculated: 12/9/71

No. 70-96

Philip J. Picard, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
James J. Connor. } of Appeals for the First  
Circuit.

[December —, 1971]

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<sup>1</sup> 308 F. Supp. 843 (Mass. 1970).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

December 6, 1971

70-96 - Picard v. Connor

Dear Bill,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

P.S.  
✓

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 6, 1971

Re: No. 70-96 - Picard v. Connor

Dear Bill:

Please join me.

Sincerely,

*Byron*

Mr. Justice Brennan

Copies to Conference

Wm Douglas  
Oct 71  
70-96

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 10, 1971

Re: No. 70-96 - Picard v. Connor

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT MANUSCRIPTS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 7, 1971

Re: No. 70-96 - Picard v. Connor

Dear Bill:

Please join me.

Sincerely,

*HCB*

Mr. Justice Brennan

cc: The Conference