The Burger Court Opinion Writing Database

Rose v. Mitchell

443 U.S. 545 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

January 23, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Harry:

Your memorandum of January 27 is essentially correct. My assignment to you was "purposeful" in the sense that your position was narrow and represented the "common denominator" of differing views. I, too, agree with Lewis that when neither the fairness of the grand jury nor the petit jury is questioned, it borders on something unmentionable to set a just verdict aside. However, there is something persuasive about five votes!

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1979

Dear Harry:

Re: 77-1701 Rose v. Mitchell

I join.

Regards,

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1979

Re: 77-1701 - Rose v. Mitchell

Dear Harry:

In light of your recirculation on June 20 raising and disposing of the Cassell and Stone v. Powell issues, I must reconsider my "join" of June 11. I am certain I cannot join Part II and will await Lewis' writing before coming to rest as to the remainder of the opinion.

Regards,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1979

Dear Harry:

Re: 77-1701 Rose v. Mitchell

Please show me as joining Parts I, III, and IV.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

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

January 23, 1979

Dear Byron:

You, Thurgood, John and I are in dissent in No. 77-1701 Rose v. Mitchell. Would you be willing to undertake the dissent?

Sincerely,

Bill

Mr. Justice White

cc: Mr. Justice Marshall
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1979

RE: No. 77-1701 Rose v. Mitchell

Dear Harry:

Please join me in your circulation of June 20.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 8, 1979

Re: 77-1701 - Rose v. Mitchell

Dear Harry:

I shall in due course circulate an opinion concurring in the judgment for the reasons expressed by Mr. Justice Jackson in Cassell v. Texas, 339 U.S. 282, 298.

Sincerely yours,

P.S.
I.

Mr. Justice Blackmun

Copies to the Conference

Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 9 MAY 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, v. James E. Mitchell and James Nichols, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE STEWART, concurring in the judgment.

The respondents were found guilty beyond a reasonable doubt after a fair and wholly constitutional jury trial. Why should such persons be entitled to have their convictions set aside on the ground that the grand jury that indicted them was improperly constituted? That question was asked more than 25 years ago by Mr. Justice Jackson in *Cassell* v. *Texas*, 339 U. S. 282, 298 (dissenting opinion). It has never been answered. I think the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction.

I

A grand jury proceeding "is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States* v. *Calandra*, 414 U. S. 338, 343. It is not a proceeding in which the guilt or innocence of a defendant is determined, but merely one to decide whether there is a prima-facia case against him. Any possible prejudice to the defendant resulting from an indictment returned by an invalid grand jury thus disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt.[1] In

[1] There is no constitutional requirement that a state criminal prosecution

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 15, 1979

Re: No. 77-1701, Rose v. Mitchell

Dear Harry,

This is in reference to our telephone conversation of yesterday. If you are willing to eliminate the portions of the paragraph on page 17 of your opinion that we discussed, but otherwise retain the substance of your present opinion, I would be quite willing to join it if my doing so would make it an opinion for the Court. I would add language along the lines of the enclosed draft to the separate opinion I have circulated. I would also, of course, indicate at the outset that it was a "concurring" opinion, not one simply "concurring in the judgment."

Sincerely yours,

P.S.

Mr. Justice Blackmun

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 26 JUN 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE STEWART, concurring in the judgment.

The respondents were found guilty beyond a reasonable doubt after a fair and wholly constitutional jury trial. Why should such persons be entitled to have their convictions set aside on the ground that the grand jury that indicted them was improperly constituted? That question was asked more than 25 years ago by Mr. Justice Jackson in *Cassell* v. *Texas*, 339 U. S. 282, 298 (dissenting opinion). It has never been answered.[1] I think the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction.

I

A grand jury proceeding "is an *ex parte* investigation to

[1] In proffering an answer today, the Court relies on (1) historical precedents and (2) the duty of the courts to apply the Equal Protection Clause with special vigor in the area of racial discrimination.

As to the first ground, I can only recall what Mr. Justice Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Menslee* v. *Union Planters Bank*, 335 U. S. 595, 600 (dissenting opinion). As to the second ground, I agree wholeheartedly with the Court's general view of the Equal Protection Clause, but believe, as explained in this opinion, that that constitutional guarantee protects the victims of discrimination rather than defendants who have been convicted after fair trials by lawfully constituted juries.

BRW
Please join me
in your dissent
PS

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 16 MAY 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE WHITE, dissenting.

On the basis of the evidence presented at the evidentiary hearing in state court, the District Court concluded that respondents "appear[ed]" to have made out a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. App. 99. However, upon the affidavits submitted by the State in response, the court concluded that in fact the foreman had been chosen for other than racial reasons, that he had not voted on the indictment, and thus that there had not been a violation of the Equal Protection Clause. *Id.*, at 122. The Court of Appeals agreed that a prima facie case was shown, interpreting the record testimony to the effect that the recollections of those testifying were that there had never been a black chosen as foreman of a grand jury in Tipton County, and pointing out the potential for discrimination in a system which leaves the selection of the foreman to the discretion of a single judge who has not "really given any thought to appointing" a black. 570 F. 2d 129, 134–135 (1978). The Court of Appeals disagreed, however, that this prima facie case had been rebutted by the testimony of the selecting judge that he had "no feeling against" appointing a black to be foreman, and found irrelevant that the foreman did not vote on respondents' indictments. *Id.*, at 135. Because we do not sit to redetermine the fact findings of lower courts, and because the Court of Appeals correctly enunciated

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 30 MAY 1979

1, 6

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE WHITE, with whom MR. JUSTICE STEVENS joins, dissenting.

On the basis of the evidence presented at the evidentiary hearing in state court, the District Court concluded that respondents "appear[ed]" to have made out a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. App. 99. However, upon the affidavits submitted by the State in response, the court concluded that in fact the foreman had been chosen for other than racial reasons, that he had not voted on the indictment, and thus that there had not been a violation of the Equal Protection Clause. *Id.*, at 122. The Court of Appeals agreed that a prima facie case was shown, interpreting the record testimony to the effect that the recollections of those testifying were that there had never been a black chosen as foreman of a grand jury in Tipton County, and pointing out the potential for discrimination in a system which leaves the selection of the foreman to the discretion of a single judge who has not "really given any thought to appointing" a black. App. 113. See 570 F. 2d 129, 134–135 (1978). The Court of Appeals disagreed, however, that this prima facie case had been rebutted by the testimony of the selecting judge that he had "no feeling against" appointing a black to be foreman, and found irrelevant that the foreman did not vote on respondents' indictments. *Id.*, at 135. Because we do not sit to redetermine

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1979

Re: No. 77-1701 — Rose v. Mitchell

Dear Harry:

I shall file a dissenting opinion in this case, but I agree with Parts I and II of the opinion, and you may show me in the line-up as concurring in those parts.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1979

Re: No. 77-1701 — Rose v. Mitchell

Dear Harry:

I shall file a dissenting opinion in this case, but I agree with Parts I and II of the opinion, and you may show me in the line-up as concurring in those parts.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to the Conference

To Mr. Justice Blackmun Only

Harry -- I am changing pages 1 and 6 as herein indicated. Of course, I do not know where you stand at the present time.

B.R.W.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-26-79

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, v. James E. Mitchell and James Nichols, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE WHITE, with whom MR. JUSTICE STEVENS joins, dissenting.

Although I agree with Parts I and II of the Court's opinion, I believe that a prima facie case of purposeful discrimination was made out and was not rebutted by the State. I therefore dissent from Parts III and IV and from the judgment. On the basis of the evidence presented at the evidentiary hearing in state court, the District Court concluded that respondents "appear[ed]" to have made out a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. App. 99. However, upon the affidavits submitted by the State in response, the court concluded that in fact the foreman had been chosen for other than racial reasons, that he had not voted on the indictment, and thus that there had not been a violation of the Equal Protection Clause. *Id.*, at 122. The Court of Appeals agreed that a prima facie case was shown, interpreting the record testimony to the effect that the recollections of those testifying were that there had never been a black chosen as foreman of a grand jury in Tipton County, and pointing out the potential for discrimination in a system which leaves the selection of the foreman to the discretion of a single judge who has not "really given any thought to appointing" a black. App. 113. See 570 F. 2d 129, 134–135 (1978). The Court of Appeals disagreed, however, that this prima facie case had been rebutted by the

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 31, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 25, 1979

Re: No. 77-1701 - Rose, Warden v. Mitchell

Dear Harry:

Please join me in your latest circulation.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 22, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Chief:

You have assigned to me No. 77-1701, Rose v. Mitchell. The assignment of this case to me undoubtedly is purposeful, but I write this note so that there will be no misunderstanding among the members of the Conference. My initial vote was to reverse, but solely because a cursory review indicated to me that a prima facie case was not established. If I am wrong as to this, and, on further review, am convinced that a prima facie case was proved, then my vote is to affirm. I believe this fits the pattern of the votes of the other members of the Conference, but if this is not so, the case perhaps should be reassigned.

Sincerely,

HAB

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 8, 1979

MEMORANDUM TO THE CONFERENCE:

Re: No. 77-1701 - Rose v. Mitchell

This case, like Babbitt which Bryon caught, produced scattered and varied reactions at Conference. Perhaps not all of you will agree, but I have put together a proposed opinion to the effect that a prima facie case in the selection of the jury foreman was not established at the state court hearing. There was an indication, at least, that such an approach would command a court, whereas something on the Stone v. Powell issue, or on the theory of Justice Jackson's dissent in Cassell v. Texas, or on harmless error, would not.

I, for one, can live with the analysis I propose. It may have the merit of requiring, in cases of this kind, far better proof than was submitted to the state courts in this litigation.

H.A.B.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 8 MAY 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

MR. JUSTCE BLACKMUN delivered the opinion of the Court.

In this federal habeas corpus case, respondents claim they were the victims of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment, in the selection of the foreman of the Tennessee grand jury that indicted them for murders in the first degree. As the case comes to this Court, no issue of discrimination in the selection of the venire is presented; we are concerned only with the selection of the foreman.

I

In November 1972 respondents James E. Mitchell and James Nichols, Jr., and two other men were jointly indicted by the grand jury of Tipton County, Tenn. The four were charged in two counts of first-degree murder in connection with the shooting deaths of patrons during the robbery of a place known as White's Cafe.[1] Prior to trial, respondents filed with the county court a written *pro se* motion in the nature of a plea in abatement. App. 1. They sought thereby, together with other relief, the dismissal of the indictment on the grounds that the grand jury array, and the foreman,

[1] The Constitution of Tennessee requires that any prosecution for the crimes with which respondents were charged be instituted by presentment or indictment by a grand jury. Tenn. Const., Art. I, § 14.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1979

HAB
Please join me
in your latest
circulation
HAB

MEMORANDUM TO THE CONFERENCE:

Re: No. 77-1701 - Rose, Warden v. Mitchell

The opinion I originally proposed for this (to me) difficult case has drawn only lukewarm response. Despite our review of the case at a recent conference, I still am not entirely certain where the votes lie. Many of you have indicated your leanings in general terms, and these views, as they reach me, surely are not in agreement. I thus continue to grope for the solution that would command a Court.

In an effort to move this case along, I submit a revised opinion with which I, for one, could live. This expands upon the first draft and meets the Cassell and Stone v. Powell issues head on and rejects both. This may or may not command five votes, in whole or in part. (It is possible, I think, that some could join it all, and others only Parts I, III and IV.) If it does not, I am willing to undertake still another draft in an effort to meet suggestions (not all of them the same) reflecting views from Potter, Lewis, and Bill Rehnquist. That may or may not work either. If I fail to catch a Court at all, the case should go over the Term or be reassigned.

I regret the messy form in which this is circulated, but it would take several days to get it through the Print Shop.

HAB.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 20 JUN 1979

PROPOSED DRAFT NO. 2

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE BLACKMUN proposing an opinion for the Court.

In this federal habeas corpus case, respondents claim they were the victims of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment, in the selection of the foreman of the Tennessee grand jury that indicted them for murders in the first degree. As the case comes to this Court, no issue of discrimination in the selection of the venire is presented; we are concerned only with the selection of the foreman.

I

In November 1972 respondents James E. Mitchell and James Nichols, Jr., and two other men were jointly indicted by the grand jury of Tipton County, Tenn. The four were charged in two counts of first-degree murder in connection with the shooting deaths of patrons during the robbery of a place known as White's Cafe.[1] Prior to trial, respondents filed with the county court a written *pro se* motion in the nature of a plea in abatement. App. 1. They sought thereby, together with other relief, the dismissal of the indictment on the grounds that the grand jury array, and the foreman,

[1] The Constitution of Tennessee requires that any prosecution for the crimes with which respondents were charged be instituted by presentment or indictment by a grand jury. Tenn. Const., Art. I, § 14.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1979

MEMORANDUM TO THE CONFERENCE

Re: Case Held for No. 77-1701, Rose v. Mitchell

Only one case has been held for Rose. This is No. 78-5658, Willie v. Louisiana. In that case, appellant challenges La. Code Crim. Pro. Art. 413, which provides that, in Louisiana parishes other than Orleans, the foreman of the grand jury is to be selected by the parish court. The Louisiana Supreme Court rejected appellant's claim because he had offered no proof consituting an affirmative showing of discrimination, either in this case or historically.

Appellant now argues that Art. 413 is unconstitutional on its face because it does not provide limits to control the court's discretion in selecting the foreman. Second, he argues that he was prevented from presenting evidence that no Negro had ever served as a foreman.

This Court has never held that the mere existence of a method of selection that is capable of discriminatory use alone is enough to make out a violation of the Fourteenth Amendment. The defendant must also show that there has been significant underrepresentation over a significant period of time. Appellant did not show this. There is no indication that he argued to the courts below that the trial court prevented him from proving his prima facie case. I therefore find no merit in his grand jury claim, regardless of the final form the judgment in Rose v. Mitchell will take.

Appellant also raises arguments relating to (1) the constitutionality of the state statute requiring him to prove insanity by a preponderance of the evidence; (2) the constitutionality of the La. capital offense statue in effect at the time of the offense (appellant's capital sentence was vacated by the state court); (3) the exclusion of potential jurors unalterably opposed to the death penalty; and (4) the sufficiency of the evidence. In my opinion, none of these claims warrants reivew.

I shall vote to dismiss and deny.

HAB.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 26 JUN 19

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner,
v.
James E. Mitchell and James Nichols, Jr.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE BLACKMUN proposing an opinion for the Court.

In this federal habeas corpus case, respondents claim they were the victims of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment, in the selection of the foreman of the Tennessee grand jury that indicted them for murders in the first degree. As the case comes to this Court, no issue of discrimination in the selection of the venire is presented; we are concerned only with the selection of the foreman.

I

In November 1972 respondents James E. Mitchell and James Nichols, Jr., and two other men were jointly indicted by the grand jury of Tipton County, Tenn. The four were charged in two counts of first-degree murder in connection with the shooting deaths of patrons during the robbery of a place known as White's Cafe.[1] Prior to trial, respondents filed with the county court a written *pro se* motion in the nature of a plea in abatement. App. 1. They sought thereby, together with other relief, the dismissal of the indictment on the grounds that the grand jury array, and the foreman,

[1] The Constitution of Tennessee requires that any prosecution for the crimes with which respondents were charged be instituted by presentment or indictment by a grand jury. Tenn. Const., Art. I, § 14.

STYLISTIC CHANGES
+ pp. 1, 7, 11, 14, 27

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 28 JUN 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.*

In this federal habeas corpus case, respondents claim they were the victims of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment, in the selection of the foreman of the Tennessee grand jury that indicted them for murders in the first degree. As the case comes to this Court, no issue of discrimination in the selection of the venire is presented; we are concerned only with the selection of the foreman.

I

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*MR. CHIEF JUSTICE BURGER and MR. JUSTICE REHNQUIST join only Parts I, III and IV of the opinion, and MR. JUSTICE WHITE and MR. JUSTICE STEVENS join only Parts I and II of the opinion.

[1] The Constitution of Tennessee requires that any prosecution for the crimes with which respondents were charged be instituted by presentment or indictment by a grand jury. Tenn. Const., Art. I, § 14.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 23, 1979

No. 77-1701 Rose v. Mitchell

Dear Harry:

This refers to your letter of yesterday to the Chief Justice.

My first vote, as you may recall, was to reverse on the analysis of Robert Jackson in his dissenting opinion in Cassell, as suggested by Potter. I also think that the rationale of Stone v. Powell properly could be extended to a case like this where neither the fairness of the conviction nor the guilt of the defendant is questioned. I cannot defend the rationality of a system that, in cases like this, treats both the acknowledged fairness of the trial and conceded guilt of the defendant as irrelevant.

But having lost these arguments (and perhaps I shouldn't have mentioned them again!), I move on to your view that a prima facie case of discrimination was not established. I believe a strong opinion can be written in support of this view, and I believe I could join it.

Sincerely,

L. Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

May 9, 1979

77-1701 Rose v. Mitchell

Dear Harry:

I am told through the clerk "grapevine" that your Chambers wonders whether I have overlooked my letter to you of January 23 in which I said I "believe I could join" an opinion holding that no prima facie case of discrimination was shown.

I still could join your opinion if changes were made that did not prejudice, as I view it, consideration by the Court at some future date of my view as to the applicability of the Stone v. Powell analogy where the issue arises on habeas corpus.

The second paragraph on page 7 of your opinion will be read, I am afraid, as blessing the Strauder line of cases in precisely the sitaution where I think Stone should control. For reasons stated in my letter earlier today, I think the Court should be free to consider - where it was necessary to do so and where the issue had been fully briefed and argued - whether in fact prior cases are to be extended consciously to permit this issue to be raised on habeas corpus.

I do not think the analysis of your opinion in this case depends in any sense upon the Strauder line. If you are disposed to make changes that would leave me free on this issue in the future, I would be most happy to join you.

There is one change that I would appreciate your making in any event, in the interest of complete clarity. In

the first sentence on page 5, where you refer to Stone v. Powell, I would think that a clause should be inserted following the word "that" reading substantially as follows:

> "where there has been a fair trial by a properly selected petit jury,"

If you wish to discuss any of this, I will be happy to come to your Chambers.

Sincerely,

Mr. Justice Blackmun

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1979

77-1701 Rose v. Mitchell

Dear Harry:

I will certainly concur in the judgment, but may write in support of my Stone v. Powell analogy.

Your opinion is quite persuasive to the effect that there was no prima facie case of discrimination. But I could not join portions of the opinion that accept, as applicable to review on habeas corpus, the line of cases that have followed Strauder. That case involved discriminatory selection of the petit jury as well as the grand jury. The same was true in Neal v. Delaware. Although this was not the case in Alexander v. Louisiana, that was a direct appeal - not habeas corpus. This Court has never addressed specifically the question whether grand jury discrimination is an issue that properly may be reviewed on federal habeas corpus where the defendant had a fair trial and there is no challenge of the guilty verdict.

I also want to see what Potter says about Cassell. There is a good deal to be said for Mr. Justice Jackson's dissent in that case, although I am inclined to prefer to draw the line at habeas review rather than direct appeal.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1979

77-1701 Rose v. Michell

Dear Harry:

In view of the extensive revisions, I am not sure now that I can join any part of the opinion.

I will write separately in any event, and hope to circulate before the week is out.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

June 21, 1979

77-1701 Rose v. Mitchell

Dear Harry:

In your circulation of yesterday you address what we have called the Stone v. Powell issue, and decide against its applicability.

Although I - and others - have used Stone as a shorthand reference, my basic concern was expressed in my concurring opinion in Bustamonte. It is, in a word, that federal habeas corpus has been extended beyond its historical purpose and - as I view it - beyond all reason. I am now working on an opinion that will join your judgment, and track for the most part what I wrote in Bustamonte with respect to the improper extension of federal habeas corpus. I hope to be able to circulate a typed draft by Saturday.

You mentioned today the possibility of going back to your original opinion unless your present circulation obtains a Court. Subject to some minor changes in language, I think I could join that opinion, although I would write separately to record my view with respect to habeas corpus.

Sincerely,

Mr. Justice Blackmun

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 25 JUN 1979

Recirculated: _____

LFP/ss 6/25/79

Rose v. Mitchell, No. 77-1701

MR. JUSTICE POWELL, concurring in the judgment.

I agree that respondents' convictions should not be overturned. As the Court holds, respondents failed to show a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. A more fundamental reason exists, however, for reversing the judgment of the Court of Appeals. Respondents were found guilty of murder beyond a reasonable doubt by a petit jury whose composition is not questioned, following a trial that was fair in every respect. Furthermore, respondents were given a full and fair opportunity to litigate in the state courts their claim of discrimination. In these circumstances, allowing an attack on the selection of the grand jury in this case is an abuse of federal habeas corpus.

Whenever a federal court is called upon by a state prisoner to issue a writ of habeas corpus, it is asked to do two things that should be undertaken only with restraint and respect for the way our system of justice is structured. First, as one court of general jurisdiction it is requested to entertain a collateral attack upon the final judgment of another court of general jurisdiction. Second, contrary to principles of federalism upon which our system is structured, a lower federal court is asked to review not only a state trial court's judgment, but almost invariably the judgment of the highest

changes: 1,2,4,5,7-9, n.2, n.4, n.6, n.7, n.8, n.9, n.10

LFP/ss 6/26/79

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 26 JUN 1979

Rose v. Mitchell, No. 77-1706 Recirculated: _____

Second Draft

JUSTICE POWELL, concurring in the judgment.

I agree that respondents' convictions should not be overturned. As the plurality holds, respondents failed to show a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. A more fundamental reason exists, however, for reversing the judgment of the Court of Appeals. Respondents were found guilty of murder beyond a reasonable doubt by a petit jury whose composition is not questioned, following a trial that was fair in every respect. Furthermore, respondents were given a full and fair opportunity to litigate in the state courts their claim of discrimination. In these circumstances, allowing an attack on the selection of the grand jury in this case is an abuse of federal habeas corpus.

Whenever a federal court is called upon by a state prisoner to issue a writ of habeas corpus, it is asked to do two things that should be undertaken only with restraint and respect for the way our system of justice is structured. First, as one court of general jurisdiction it is requested to entertain a collateral attack upon the final judgment of another court of

3/ In Castaneda v. Partida, we noted that among the cases in which the Court had applied this principle in circumstances involving grand jury discrimination were Bush v. Kentucky, supra; Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Hernandez v. Texas, 347 U.S. 475 (1954); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); and Alexander v. Louisiana, supra.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1-10

From: Mr. Justice Powell

Printed

1st DRAFT

Circulated: _____

Recirculated: 28 JUN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I agree that respondents' convictions should not be overturned. As the Court ~~plurality~~ holds, respondents failed to show a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. A more fundamental reason exists, however, for reversing the judgment of the Court of Appeals. Respondents were found guilty of murder beyond a reasonable doubt by a petit jury whose composition is not questioned, following a trial that was fair in every respect. Furthermore, respondents were given a full and fair opportunity to litigate in the state courts their claim of discrimination. In these circumstances, allowing an attack on the selection of the grand jury in this case is an abuse of federal habeas corpus.

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1-10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Printed
2nd DRAFT

Recirculated: 29 JUN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner,
v.
James E. Mitchell and James Nichols, Jr.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I agree that respondents' convictions should not be overturned. As the Court holds, respondents failed to show a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. A more fundamental reason exists, however, for reversing the judgment of the Court of Appeals. Respondents were found guilty of murder beyond a reasonable doubt by a petit jury whose composition is not questioned, following a trial that was fair in every respect. Furthermore, respondents were given a full and fair opportunity to litigate in the state courts their claim of discrimination. In these circumstances, allowing an attack on the selection of the grand jury in this case is an abuse of federal habeas corpus.

Whenever a federal court is called upon by a state prisoner to issue a writ of habeas corpus, it is asked to do two things that should be undertaken only with restraint and respect for the way our system of justice is structured. First, as one court of general jurisdiction it is requested to entertain a collateral attack upon the final judgment of another court of general jurisdiction. Second, contrary to principles of federalism, a lower federal court is asked to review not only a state trial court's judgment, but almost invariably the judg-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Harry:

I was touched, in the traditional meaning of that word, by the memorandum of transmittal which you attached to your proposed opinion in this case. I think not only this case and Babbitt, which was assigned to Byron, but at least half a dozen other cases coming out of the past two or three sessions of oral argument have, as you so generously put it "produced scattered and varied reactions at Conference." My Moore v. Sims is another example, where there was a majority for reversal, but the majority in support of a particular line of reasoning was not nearly as solid as that for the result.

I am sure you will be beset from both sides of the spectrum in this case, and I would like very much to join your opinion. I can do so on the assumption that you genuinely do reserve the question of whether Justice Jackson's dissent in Cassell v. Texas, 339 U.S. 282, 298 (1950), ought not in the future to be made the law of the land. I anticipate joining Potter's separate writing to that effect, because that was certainly the position I took at Conference, but I think the way your opinion is written I can join it also. It does seem to me that a change of language on page 8 of the present opinion would be desirable from my point of view in order to make it clear that the reservation as to the Jackson position in Cassell is not purely a formality. That change is in the

first sentence of the first full paragraph of page 8 which now reads:

> "In view of our conclusion as to the absence of a prima facie case, we need not now decide whether discrimination in the selection of only the foreman would require a reversal of an ensuing conviction."

It seems to me the necessary implication of that sentence is that if there were discrimination which affected the selection of the entire membership of the grand jury, that would require a reversal of "an ensuing conviction". Since the Jackson dissent was to the contrary, I would have difficulty joining the opinion with that sentence reading as it does now. I have no similar difficulty with the citation of cases on page 7, from Neal v. Delaware to Castaneda v. Partida, since they are presently the law and I read your treatment of them as being purely descriptive. But I wonder if you would consider revising the first sentence in the first full paragraph of page 8 to read something along these lines:

> "In view of our conclusion as to the absence of a prima facie case, we need not now decide whether discrimination in the selection of only the foreman would require the same result as would discrimination which affected the selection of the entire grand jury."

I would then feel that I could join your opinion, feeling that the dissenting position in Cassell had been guinely left open, and that I was not really in fact, if not in form, only concurring in the result if I concurred in your opinion but also joined Potter's writing in support of the Jackson dissent.

I have not gone back over the briefs in this case, but I recall noting just before argument that the state had placed

no reliance on 28 U.S.C. § 2254(d)(A), providing that a

> "determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
>
> "(1) That the merits of the factual dispute were not resolved in the State court hearing . . ."

You may recall that you, Lewis, Byron, and the Chief joined me in a summary reversal which I wrote out in Lavalee v. Delle Rose, 410 U.S. 690 (1973), in which we held that a federal habeas court was not entitled under this section to simply re-try de novo a constitutional question of fact if the state courts had made a finding with respect to it. I would think that a simple footnote reference to the fact that the state places no reliance on this section -- which I believe is a correct statement of the posture of the case -- would alert state attorneys general in the future, where cases as shaky as the one which respondents made out here are presented to a federal habeas court, that they have a right to insist on a higher standard of proof as to the constitutional fact than if no state court had ever made a written finding on the question. I realize that in this case the Tennessee trial court denied the plea in abatement by order, but the Tennessee Court of Criminal Appeals did, as you note on page 3, state that the "facts here do not demonstrate a systematic exclusion of Negroes upon racial grounds."

This latter suggestion, respecting a reference to 28 U.S.C. § 2254(d) in your opinion, is by no means a condition of my

joining it; I simply had the feeling that the dominant theme of that section was very much in accord with the language you used in the paragraph beginning on page 17 of your opinion. Some change in the language of the first sentence in the first full paragraph on page 8, however, I think is almost a prerequisite to convincing at least myself that I can conscientiously join a concurrence supporting the Jackson position in Cassell and still join your opinion -- both of which I hope to be able to do.

Sincerely,

WEB

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1979

Re: No. 77-1701 Rose, Warden v. Mitchell

Dear Harry:

I would have preferred to see the Stone v. Powell and Cassell v. Texas points left open in your proposed opinion for the Court, and if Lewis or Potter writes separately with respect to them I will very likely join them. But I think, as you suggest in your letter of transmittal of June 20th, it is possible to do that and still join all but Part II of your draft of June 20th. I therefore join Parts I, III, and IV, and the judgment.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Harry:

In my letter to you of yesterday, stating that I could join all except Part II of your opinion, I had assumed that your Part III would muster five votes, including yours and mine, for the proposition that a prima facie case had not been made out. From subsequent circulations I assume that this is not now possible. While I reserved the right to join either Lewis or Potter on Stone v. Powell or Cassell grounds, respectively, and did not join your Part II, John's circulation of yesterday gives me added pause. If he were to write to the effect that it is inappropriate to re-examine the Cassell issue at this time, I would prefer that disposition to your Part II; I would thus be left in the position of first preferring what I understand to be Potter's view, adopting Justice Jackson's dissent in Cassell; second, agreeing with John that it is inappropriate to re-examine the Cassell issue at this time; and, finally, joining only a plurality to conclude that the issue must be reached, but a prima facie case had not been made out. I am willing to do as much as the next person to try to form a Court opinion, but I feel I would be stretched to the breaking point here. I hope you will be good enough to allow me a day or two to reconsider my letter of yesterday.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 25, 1979

Re: No. 77-1701 Rose v. Mitchell

Dear Harry:

Upon the further deliberation which you were good enough to indulge me in at the end of last week, I had decided that I cannot join your present circulating draft in this case. If you could modify those parts of the opinion (mostly Part II) dealing with the Stone v. Powell and Cassell points, so as to reserve them, I could certainly join the remainder of the opinion.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 26 JUN 1979

Recirculated: _____

No. 77-1701 Rose v. Mitchell

MR. JUSTICE REHNQUIST, concurring.

I fully agree with, and have joined, the separate opinions of my Brothers Stewart and Powell concurring in the judgment in this case. For the separate reasons they state, neither of them would reach the merits of the claim of grand jury discrimination which the Court decides. Since, however, a majority of the Court rejects these views, I join Parts I, III, and IV of the Court's opinion.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 26, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Potter:

Please join me in your opinion concurring in the judgment in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 26, 1979

Re: No. 77-1701 - Rose v.Mitchell

Dear Lewis:

Please join me in your opinion concurring in the judgment in this case.

Sincerely,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 26, 1979

Re: No. 77-1701 - Rose v. Mitchell

Dear Harry:

As you will see from the enclosed concurrence which I have written, I join Lewis' separate opinion, Potter's separate opinion, but also join Parts I, III, and IV of your opinion for the Court.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Circulated: 28 JUN 1979

Recirculated: _____

Jim Rose, Warden, Petitioner,
v.
James E. Mitchell and James Nichols, Jr.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE REHNQUIST, concurring in part.

I fully agree with, and have joined, the separate opinions of my Brothers STEWART and POWELL concurring in the judgment in this case. For the separate reasons they state, neither of them would reach the merits of the claim of grand jury discrimination which the Court decides. Since, however, a majority of the Court rejects these views, I join Parts I, III, and IV of the Court's opinion.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 16, 1979

Re: 77-1701 - Rose v. Mitchell

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 20, 1979

Re: 77-1701 - Rose v. Mitchell

Dear Harry:

In response to your most recent circulation, I am still unable to join Part III in which you hold that respondents failed to make a prima facie case. However, I could join Part II-B rejecting the argument that Stone v. Powell should be extended, and with minor qualifications could also join Part II-A rejecting Justice Jackson's position in dissent in Cassell.

My qualification is that I am not really sure that I would reach the same conclusion if the question were now open. I rely primarily on a combination of stare decisis considerations plus the absence of any compelling reason for rejecting a settled course of decision. There is at least enough merit in the arguments set forth in your opinion to convince me that it is inappropriate to re-examine the issue at this time. I may therefore add a paragraph or two expressing this reservation.

Second, I have two flyspecks to question: On page 12 you state that the Equal Protection Clause "banned all purposeful discrimination by the state on the basis of race." I am not quite sure that is accurate, particularly after Bakke. And, on page 14 you refer to the exclusion of Negroes, "or any other group." Perhaps you should limit it because it is certainly permissible, for example, to exclude children.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

77-1701 - Rose v. Mitchell

From: Mr. Justice Stevens

Circulated: JUN 25 79

Recirculated: _____

MR. JUSTICE STEVENS, dissenting.

MR. JUSTICE STEWART'S opinion prompts me to explain that by joining Part II of the Court's opinion I do not necessarily indicate that I would have rejected the arguments set forth in Mr. Justice Jackson's dissenting opinion in Cassell v. Texas, 339 U.S. 282, 298, if I had been a Member of the Court when the issue was first addressed. But there is surely enough force to MR. JUSTICE BLACKMUN'S reasoning to require adherence to a course of decision that has been consistently followed by this Court since 1880.

The doctrine of stare decisis is not a straightjacket that forecloses re-examination of outmoded rules. The doctrine does, however, provide busy judges with a valid reason for refusing to remeasure a delicate balance that has tipped in the same direction every time the conflicting interests have been weighed.

The stare decisis considerations that weigh heavily in my decision to join Part II of the Court's opinion also support MR. JUSTICE WHITE'S opinion dissenting from Part III. Accordingly, I join his dissent.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 26, 1979

Re: 77-1701 - Rose v. Mitchell

Dear Harry:

Confirming my oral statement, I join Parts I and II of your opinion.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1701

Jim Rose, Warden, Petitioner, *v.* James E. Mitchell and James Nichols, Jr. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE STEVENS, dissenting.

MR. JUSTICE STEWART's opinion prompts me to explain that by joining Part II of the Court's opinion I do not necessarily indicate that I would have rejected the arguments set forth in Mr. Justice Jackson's dissenting opinion in *Cassell* v. *Texas*, 339 U. S. 282, 298, if I had been a Member of the Court when the issue was first addressed. But there is surely enough force to MR. JUSTICE BLACKMUN's reasoning to require adherence to a course of decision that has been consistently followed by this Court since 1880.

The doctrine of *stare decisis* is not a straitjacket that forecloses re-examination of outmoded rules. The doctrine does, however, provide busy judges with a valid reason for refusing to remeasure a delicate balance that has tipped in the same direction every time the conflicting interests have been weighed.

The *stare decisis* considerations that weigh heavily in my decision to join Part II of the Court's opinion also support MR. JUSTICE WHITE's opinion dissenting from Part III. Accordingly, I join his dissent.