The Burger Court Opinion Writing Database

Marshall v. Lonberger

459 U.S. 422 (1983)

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

November 4, 1982

Re: 81-420 Marshall v. Lonberger

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

'82 NOV -5 A10:33

SUPREME COURT, U.S.
JUSTICE

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

CHAMBERS OF
JUSTICE WM J. BRENNAN, JR.

January 6, 1983

RE: No. 81-420 R.C. Marshall v. Lonberger

Dear John:

I think there is much merit in Harry's approach. Do you think you can make use of it?

Sincerely,

Bill

Justice Stevens

Copies to:

Justice Marshall
Justice Blackmun

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: JAN 22 [illegible]

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

JUSTICE BRENNAN, dissenting.

I join JUSTICE STEVENS' dissent. I write separately only to emphasize that more is subject to question in the Court's opinion than its penultimate sentence. See *ante*, at 15 and n. 6.

I

The bulk of the Court's opinion is devoted not to defending *Spencer* v. *Texas*, 384 U. S. 554 (1967), but rather to establishing that this case is not governed on all fours by *Burgett* v. *Texas*, 389 U. S. 109 (1967). *Burgett* held, notwithstanding *Spencer*, that it was inherently prejudicial to admit an unconstitutional, uncounseled prior conviction against a defendant at a trial on a new offense, regardless of the purpose for which it had been introduced or of any limiting instructions given to the jury. 389 U. S., at 115.[1]

[1] Whether or not *Spencer* may still be read as broadly as it was written, the two cases are reconcilable. *Spencer* took a balancing approach to interpreting the requirements of the Fourteenth Amendment's Due Process clause, and held only that the risk of prejudice alone from admitting a valid prior conviction—provided the jury was given proper limiting instructions—did not necessarily outweigh the legitimate benefits the State might derive from the procedures that required admitting the conviction. See 385 U. S., at 562–563. *Spencer* expressly distinguished situations in which admission of the prior conviction, in addition to exposing the defendant to a risk of prejudice, might compromise a specific federal right. *Id.*, at 564–565. *Burgett* recognized that admitting *unconstitutional* prior con-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1983

RE: 81-420 Marshall v. Lonberger

Dear John:

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: FEB 15 19[illegible]

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1983]

JUSTICE BRENNAN, dissenting.

I join JUSTICE STEVENS' dissent. I write separately only to emphasize that more is subject to question in the Court's opinion than its penultimate sentence. See *ante*, at 15 and n. 6.

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: FEB 18 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I join JUSTICE STEVENS' dissent. I write separately only to emphasize that more is subject to question in the Court's opinion than its penultimate sentence. See *ante*, at 15 and n. 6.

I

The bulk of the Court's opinion is devoted not to defending *Spencer* v. *Texas*, 384 U. S. 554 (1967), but rather to establishing that this case is not governed on all fours by *Burgett* v. *Texas*, 389 U. S. 109 (1967). *Burgett* held, notwithstanding *Spencer*, that it was inherently prejudicial to admit an unconstitutional, uncounseled prior conviction against a defendant at a trial on a new offense, regardless of the purpose for which it had been introduced or of any limiting instructions given to the jury. 389 U. S., at 115.[1]

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 4, 1982

Re: 81-420 - Marshall v. Lonberger

Dear Bill,

I agree.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 29, 1982

Re: No. 81-420 - Marshall v. Lonberger

Dear Bill:

I await the dissent.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 13, 1983

Re: No. 81-420 - Marshall v. Lonberger

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 15, 1983

Re: No. 81-420 - Marshall v. Lonberger

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1982

Re: No. 81-420 - Marshall v. Lonberger

Dear Bill:

You have written a very persuasive opinion in this case. For now, however, I shall wait to see what John has to say.

I was confused by the reference to "Ohio" in the 10th line on page 6. Should this not be "Illinois"?

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 6, 1983

Re: No. 81-420 - Marshall v. Lonberger

Dear John:

The enclosed represents my present reaction to your vigorous dissent. I am sending copies of this to Bill Brennan and Thurgood but, for now, shall not circulate it generally.

Sincerely,

Harry

Justice Stevens

cc: Justice Brennan
Justice Marshall

No. 81-420 - Marshall v. Lonberger

JUSTICE BLACKMUN, dissenting.

I would affirm the judgment of the United States Court of Appeals for the Sixth Circuit. I agree with much that JUSTICE STEVENS has said in his ringing dissent, but for now, I stop short of overruling Spencer v. Texas, 385 U.S. 554 (1967).

It is enough for me in this case to note the utter absence of a legitimate state interest once the prosecution refused to enter into the stipulation for the admission of the Illinois indictment. That refusal revealed that the prosecution believed the indictment had prejudicial value and it rendered nonexistent any otherwise legitimate interest the State might have had in introducing the indictment.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JAN 7 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

JUSTICE BLACKMUN, dissenting.

I would affirm the judgment of the United States Court of Appeals for the Sixth Circuit. I agree with much that JUSTICE STEVENS has said in his ringing dissent, but for now, I stop short of overruling *Spencer* v. *Texas*, 385 U. S. 554 (1967).

It is enough for me in this case to note the utter absence of a legitimate state interest once the prosecution refused to enter into the stipulation for the admission of the Illinois indictment. That refusal revealed that the prosecution believed the indictment had prejudicial value and it rendered nonexistent any otherwise legitimate interest the State might have had in introducing the indictment.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1983

Re: No. 81-420 - Marshall v. Lonberger

Dear John:

Please join me in your dissenting opinion.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Revised

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JAN 27 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

JUSTICE BLACKMUN, dissenting.

I join JUSTICE STEVENS' dissenting opinion, for I, too, would affirm the judgment of the United States Court of Appeals for the Sixth Circuit. It is enough for me in this case to note the utter absence of a legitimate state interest once the prosecution refused to accept respondent's proffered stipulation. That refusal revealed that the prosecution believed the indictment had prejudicial value, and it rendered nonexistent any otherwise legitimate interest the State might have had in introducing the indictment.

November 4, 1982

81-420 Marshall v. Lonberger

Dear Bill:

In addition to relying on a Henderson presumption that respondent knew what he was charged with, I would be happier if you added a footnote to the effect that Lonberger's profession of ignorance was inherently incredible. I think a reviewing court was entitled to look at all of the facts and circumstances. A rational person simply cannot believe that both of Lonberger's lawyers - one characterized as a highly experienced criminal lawyer - failed to tell their client what the indictment charged. Moreover, as you point out, Lonberger was present at the guilty plea hearing, and presumably he was present when the indictment was read. The fellow, as the old-fashioned saying goes, is a "double barreled liar".

There are a couple of minor points I've asked my clerk to mention to your clerk. Neither is too important.

Sincerely,

Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 4, 1982

81-420 Marshall v. Lonberger

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 29, 1982

Re: No. 81-420 Marshall v. Lonberger

Dear Chief:

By this letter, copies of which are being sent to Byron, Lewis, and Sandra, I explain to those who voted to "reverse" at Conference why the proposed opinion is written the way it is. In my dissent from denial of certiorari in this case last Term, I indicated my belief that if a line were drawn between Burgett v. Texas, 389 U.S. 109, and Spencer v. Texas, 385 U.S. 554, this case should fall on the "Spencer" side of that line. My Conference notes show that you, Chief, Byron, and Lewis each indicated agreement with that point of view. When I came to write the opinion, it was clear to me (as it had not been at the time I wrote the dissent from denial of certiorari) that to reach this result Burgett would have to be all but overruled. Since I did not sense a willingness to go that far from the Conference discussion, I reviewed the Conference notes and have drafted the opinion on the basis of Sumner v. Mata, 449 U.S. 539, and Henderson v. Morgan, 426 U.S. 637. As I reviewed the Conference notes, I felt that you, Byron, and perhaps to a lesser extent Lewis also supported this approach. I also thought from my notes that Sandra preferred it to the Burgett-Spencer distinction. At any rate, that is the tack which I have tried to take.

Sincerely,

WER

The Chief Justice

cc: Justice White
Justice Powell
Justice O'Connor

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: OCT 2 3 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[October ——, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

The issue here is whether the Due Process Clause of the Fourteenth Amendment requires the vacation of respondent's Ohio murder conviction. The United States Court of Appeals for the Sixth Circuit, which granted respondent's petition for a writ of habeas corpus, 635 F. 2d 1189, and —— F. 2d ——, held that it did. The Court of Appeals held that respondent's plea of guilty to a previous Illinois felony charge, offered and admitted into evidence at his Ohio murder trial, was invalid under *Boykin* v. *Alabama*, 395 U. S. 238 (1969). It went on to hold that the admission into evidence of the Illinois conviction at the Ohio trial rendered respondent's ensuing conviction in that proceeding unconstitutional under this Court's decision in *Burgett* v. *Texas*, 389 U. S. 109 (1967). The state claims that the Court of Appeals exceeded its authority, under our holding in *Sumner* v. *Mata*, 449 U. S. 539 (1981), in concluding that the prior Illinois conviction was invalid. It also contends that even if the Court of Appeals were warranted in so concluding, the admission of that conviction at the Ohio murder trial did not render the Ohio conviction constitutionally infirm. We granted certiorari to consider, *inter alia*, the interrelationship between *Boykin* v. *Alabama*, *supra*, and *Henderson* v. *Morgan*, 426 U. S. 637

pp. 1, 7, 12, 14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[November ——, 1982]

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pp. 6, 9, 11, 12

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

DEC 1 1982

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[November ——, 1982]

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JAN 10 1983

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: JAN 12 1983

Recirculated: _____

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

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STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

JAN 18 1983

Recirculated: _____

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

JAN 19 1983

Recirculated: _____

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 29, 1982

Re: 81-420 - Marshall v. Lonberger

Dear Bill:

In due course I shall circulate a dissent.

Respectfully,

JPS

Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: [illegible]

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

JUSTICE STEVENS, dissenting.

Criminal prosecution involves two determinations: whether the defendant is guilty or innocent, and what the appropriate punishment should be if he is guilty. In most cases, these determinations are made in two stages. At the first stage, strict rules of procedure govern the order in which evidence is offered, the quality of the evidence that may be admitted, and the burden of proof that is required to establish the defendant's guilt. At the second stage, however, the rules are relaxed; a wide range of evidence concerning the defendant's character may be received by the sentencing authority even though it is entirely extraneous to the particular offense that has just been proven.

This case involves the unfairness that may result from an attempt to merge the two stages. At issue is a highly prejudicial item of evidence: an Illinois indictment charging that in 1968 the respondent had "intentionally and knowingly attempted to kill Dorothy Maxwell with a knife without lawful justification." Everyone agrees that this evidence could not be used to prove the respondent's guilt in this case, which concerned a 1975 murder in Ohio.[1] On the other hand, if the

[1] The common law has long deemed it unfair to argue that, because a

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 6, 1983

Re: 81-420 - Marshall v. Lonberger

Dear Harry:

Many thanks for sending me a copy of your proposed dissent. Your pointed reference to "the utter absence of a legitimate state interest" adds powerful support to the position of the dissent and, I believe, performs a more useful function than reaching the ultimate question of whether Spencer should be overruled. In putting my own opinion together, I felt that logic compelled me to go that far, but your narrower position is certainly sound. In all events, I am most gratified by your bottom line.

Respectfully,

John

Justice Blackmun

cc: Justice Brennan
Justice Marshall

P.S. I have just received Bill's note. As I have indicated, however, although I agree completely that there is a great deal of merit in your approach--and would surely adopt it if there were five votes in support of it--at least until I see what Bill Rehnquist says in reply, I am inclined to leave my dissent in its present form.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

JUSTICE STEVENS, with whom Justice Marshall joins, dissenting.

Criminal prosecution involves two determinations: whether the defendant is guilty or innocent, and what the appropriate punishment should be if he is guilty. In most cases, these determinations are made in two stages. At the first stage, strict rules of procedure govern the order in which evidence is offered, the quality of the evidence that may be admitted, and the burden of proof that is required to establish the defendant's guilt. At the second stage, however, the rules are relaxed; a wide range of evidence concerning the defendant's character may be received by the sentencing authority even though it is entirely extraneous to the particular offense that has just been proven.

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[1] The common law has long deemed it unfair to argue that, because a

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

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

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

P. 1

From: **Justice Stevens**

Circulated: _____

JAN 25 '83

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-420

R. C. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* ROBERT LONBERGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1983]

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

Criminal prosecution involves two determinations: whether the defendant is guilty or innocent, and what the appropriate punishment should be if he is guilty. In most cases, these determinations are made in two stages. At the first stage, strict rules of procedure govern the order in which evidence is offered, the quality of the evidence that may be admitted, and the burden of proof that is required to establish the defendant's guilt. At the second stage, however, the rules are relaxed; a wide range of evidence concerning the defendant's character may be received by the sentencing authority even though it is entirely extraneous to the particular offense that has just been proven.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 2, 1982

No. 81-420 Marshall v. Lonberger

Dear Bill,

Please join me in your opinion.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 11, 1983

No. 81-420 Marshall v. Lonberger

Dear Bill,

I am concerned about a portion of your new footnote 6. The implication may be that states could change the accepted rule that evidence of prior convictions cannot be introduced to prove guilt without due process problems.

I would prefer to eliminate the following two sentences in footnote 6:

> "In short, the common law, like our decision in Spencer, implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification. The requirements of the Due Process Clause are no more rigorous than this."

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference