

The Burger Court Opinion Writing Database

Vasquez v. Hillery

474 U.S. 254 (1986)

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

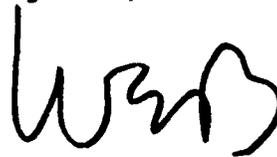
October 19, 1985

RE: No. 84-836, Vasquez v. Hillery

Dear Bill,

Will you take on a dissent in this case?

Regards,

A handwritten signature in black ink, appearing to be 'WRB', written in a cursive style.

Justice Rehnquist

Copies to: Justice Powell
Justice O'Connor

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

CHAMBERS OF
THE CHIEF JUSTICE

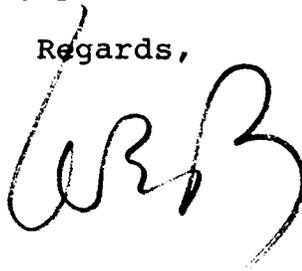
December 18, 1985

Re: No. 84-836 - Vasquez v. Hillery

Dear Lewis:

Please show me joining your dissent.

Regards,

A handwritten signature in black ink, appearing to be 'W.P.', written over the typed word 'Regards,'.

Justice Powell

Copies to the Conference

82 DEC 18 6:53:38

U.S. SUPREME COURT
LIBRARY

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

84-836

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 18, 1985

Dear Chief,

Thurgood has agreed to try his hand at an opinion for the Court in No. 84-836, Vasquez v. Hillery, and Harry has agreed to take on No. 84-732, Cleavinger v. Saxner.

Sincerely,

The Chief Justice

cc: Justice Marshall

Justice Blackmun

(12)

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 8, 1985

No. 84-836

Vasquez v. Hillery

Dear Thurgood:

I agree and am happy to join.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

November 27, 1985

Re: No. 84-836, Vasquez v. Hillery

Dear Lewis:

I have just read your strong dissenting opinion in this case. I note that you seem consistently to refer to the opinion in Rose v. Mitchell as a "plurality" opinion. See, for example, the fifth line on page 4 of your opinion, the next to the last line on page 5, the next to the last line on page 6, etc.

May I respectfully suggest that Rose v. Mitchell was not a plurality opinion. This is evident from the line-up at the end of the headnote and from the description at the top of every page of the opinion. It is true that there were different majorities for various parts of the opinion, but I think there was a majority for every part.

Sincerely,

WJB

Justice Powell

13

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 12, 1985

Re: 84-836 - Vasquez v. Hillery

Dear Thurgood,

I agree.

Sincerely yours,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 5, 1985

84-836 - Vasquez v. Hillery

Dear Thurgood,

Your first full paragraph on page 9 troubles me. Had it been in your initial draft, I would have excluded it from my join, and I do now. It does not appear to be a necessary part of your opinion, with or without the dissent.

Sincerely yours,



Justice Marshall

Copies to the Conference

84-836-6122

700
200

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 13, 1985

84-836 - Vasquez v. Hillery

Dear Thurgood,

I would appreciate your showing in a footnote that I do not join the first paragraph on page 9 of your opinion in this case.

Sincerely yours,



Justice Marshall

Copies to the Conference

63 21

71

Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Marshall**

Circulated: **NOV 7 1985**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
 BOOKER T. HILLERY, JR.

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

[November —, 1985]

JUSTICE MARSHALL delivered the opinion of the Court.

The Warden of San Quentin State Prison asks this Court to retire a doctrine of equal protection jurisprudence first announced in 1880. The time has come, he urges, for us to abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded.

I

In 1962, the grand jury of Kings County, California indicted respondent, Booker T. Hillery, for a brutal murder. Before trial in superior court, respondent moved to quash the indictment on the ground that it had been issued by a grand jury from which Negroes had been systematically excluded. A hearing on respondent's motion was held by Judge Meredith Wingrove, who was the sole superior court judge in the county and had personally selected all grand juries, including the one that indicted respondent, for the previous seven years. Absolving himself of any discriminatory intent, Judge Wingrove refused to quash the indictment.¹ Respondent was subsequently convicted of first-degree murder.

¹Three thorough and well-reasoned opinions of the District Court discuss in detail the evidence adduced at the hearing, as well as other aspects of the case. See *Hillery v. Pulley*, 563 F. Supp. 1228 (ED Cal. 1983); *Hillery v. Pulley*, 533 F. Supp. 1189 (ED Cal. 1982); *Hillery v. Sumner*,

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 11, 1985

Vasquez v. Hillery, No. 84-836

Dear Lewis:

As I understand it, your principal disagreement lies not so much with the longstanding remedy for discrimination in the grand jury as with its application in this case. Even were I to accept your characterization of Hillery's conduct, I could not agree that it would be wise decisionmaking on our part to overrule solid precedent merely to reach a particular result in one extraordinary case.

I believe the record belies your suggestion that Hillery was somehow derelict in bringing his federal claim. Hillery first raised his claim in 1962 before his trial began. Thereafter, he raised it at each step of appellate review, until the California Supreme Court affirmed his conviction in 1965, explicitly rejecting the claim of discrimination. This Court denied certiorari in 1967. At the same time that it affirmed the conviction, the California Supreme Court reversed Hillery's death sentence on other grounds and remanded for a second sentencing proceeding. After resentencing, Hillery was free to appeal only his sentence, which he did, and that sentence was affirmed in 1968. Immediately thereafter, this Court issued its decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), which served as the basis for the reversal of Hillery's second death sentence in 1969 and a remand for a third sentencing proceeding. The third death sentence was then appealed and reduced, on constitutional grounds, by the California Supreme Court in 1974.

For the entire 9 years that had elapsed between the conviction and the petition for state habeas, therefore, a

period upon which you seem to place great emphasis, Hillery was engaged in constant litigation of his sentence in the state courts. Because the California Supreme Court had rejected the discrimination claim on direct review in 1965, Hillery was not free to raise it in conjunction with these challenges. It would be truly odd if we were to hold that he should have waived his opportunities for review of his sentence (and in the meantime quite possibly be executed), in order to launch an immediate collateral attack on the conviction. Moreover, it would be inappropriate for us to require a state prisoner to initiate litigation in federal court while his case is the subject of ongoing review in the state courts.

As soon as he received his life sentence in 1974, Hillery filed for state habeas on the grand jury claim, which took 4 years to be resolved against him. We have never before sought to penalize a prisoner for having filed for state habeas before seeking federal habeas. Within a month after final denial of state collateral relief, Hillery petitioned for federal habeas. Much of the collateral relief was sought pro se. In light of this history, I cannot imagine at what stage you believe Hillery forfeited his right to federal relief.

I would also like to respond to your concern that our opinion "will encourage convicted persons with long sentences to defer seeking habeas relief until retrial becomes difficult or impossible." Although it is hard for me to believe that any prisoner would voluntarily sit in jail for years, knowing he has a meritorious claim that could result in his freedom, I am willing to concede the possibility in theory. But there is simply no indication that this is such a case. If we are to consider creating a new rule of law to account for such a practice, I suggest that we should wait until we are confronted with an instance of the deleterious conduct you foresee.

Finally, despite many recent attempts to restrict the scope of federal habeas by statute, Congress has yet to impose any time limit on the filing of habeas petitions. I do not think we can responsibly manipulate a judicial harmless-error rule to do just that. As Harry asked at oral argument, in what year does the error become harmless?

The State conceded at argument that it would seek to retry Hillery, who has already served 23 years of a life sentence. Because the evidence against him was almost

entirely tangible (tire tracks, glove prints, etc.), I am not as pessimistic as you are about the chances for reconviction. In any event, I do not think this unique factual setting should alarm us into overlooking the far-ranging consequences of attempting to preserve the conviction in this case by fashioning a radical change in the law.

I'm at a loss as to why I am given the special treatment mentioned in the last paragraph of your letter. My only hope is that you do not break the record previously established in Topco.

Sincerely,



Justice Powell

cc: The Conference

Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

From: Justice Marshall

Circulated: _____

Recirculated: **NOV 13 1985**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
 BOOKER T. HILLERY, JR.

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

[November —, 1985]

JUSTICE MARSHALL delivered the opinion of the Court.

The Warden of San Quentin State Prison asks this Court to retire a doctrine of equal protection jurisprudence first announced in 1880. The time has come, he urges, for us to abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded.

I

In 1962, the grand jury of Kings County, California, indicted respondent, Booker T. Hillery, for a brutal murder. Before trial in Superior Court, respondent moved to quash the indictment on the ground that it had been issued by a grand jury from which Negroes had been systematically excluded. A hearing on respondent's motion was held by Judge Meredith Wingrove, who was the sole Superior Court judge in the county and had personally selected all grand juries, including the one that indicted respondent, for the previous seven years. Absolving himself of any discriminatory intent, Judge Wingrove refused to quash the indictment.¹ Respondent was subsequently convicted of first-degree murder.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 3, 1985

Re: No. 84-836-Vasquez v. Hillery

Memorandum to Justice Brennan
Justice White
Justice Blackmun
Justice Stevens

Here is proposed re-draft in answer to Lewis' dissent.
Without dissent we will circulate this one.

Sincerely,

J.M.
T.M.

Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: DEC. 3 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
 BOOKER T. HILLERY, JR.

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

[December —, 1985]

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 4, 1985

Re: No. 84-836-Vasquez v. Hillery

Memorandum to Justice Brennan
Justice White
Justice Blackmun
Justice Stevens

I agree with HAB's suggestion and will eliminate the first full paragraph on page 11 of the proposed third draft.

Sincerely,

J.M.

T.M.

Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

Changes, pp. 1-11

From: Justice Marshall

Circulated: _____

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
 BOOKER T. HILLERY, JR.

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

[December —, 1985]

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The Warden of San Quentin State Prison asks this Court to retire a doctrine of equal protection jurisprudence first announced in 1880. The time has come, he urges, for us to abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 5, 1985

Re: No. 84-836-Vasquez v. Hillery

Dear Byron:

I have your note about the first paragraph of page 9 of the opinion. The reason for that paragraph is to answer a portion of the dissenting opinion. I would prefer to leave it in.

Sincerely,

Jm.

T.M.

Justice White

cc: The Conference

Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT
and p. 9

From: Justice Marshall

Circulated: _____

Recirculated: DEC 19 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
BOOKER T. HILLERY, JR.

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

[December —, 1985]

JUSTICE MARSHALL delivered the opinion of the Court.

The Warden of San Quentin State Prison asks this Court to retire a doctrine of equal protection jurisprudence first announced in 1880. The time has come, he urges, for us to abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded.

I

In 1962, the grand jury of Kings County, California, indicted respondent, Booker T. Hillery, for a brutal murder. Before trial in Superior Court, respondent moved to quash the indictment on the ground that it had been issued by a grand jury from which blacks had been systematically excluded. A hearing on respondent's motion was held by Judge Meredith Wingrove, who was the sole Superior Court judge in the county and had personally selected all grand juries, including the one that indicted respondent, for the previous seven years. Absolving himself of any discriminatory intent, Judge Wingrove refused to quash the indictment.¹ Respondent was subsequently convicted of first-degree murder.

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CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

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

November 15, 1985

Re: No. 84-836, Vasquez v. Hillery

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

cc: The Conference

Call Harry

✓

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 27, 1985

Re: No. 84-836, Vasquez v. Hillery

Dear Lewis:

I have just read your strong dissenting opinion in this case. I note that you seem consistently to refer to the opinion in Rose v. Mitchell as a "plurality" opinion. See, for example, the fifth line on page 4 of your opinion, the next to the last line on page 5, the next to the last line on page 6, etc.

May I respectfully suggest that Rose v. Mitchell was not a plurality opinion. This is evident from the line-up at the end of the headnote and from the description at the top of every page of the opinion. It is true that there were different majorities for various parts of the opinion, but I think there was a majority for every part.

Sincerely,

Harry

*I talked to HAB
& will make some
changes.*

Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 4, 1985

Re: No. 84-836, Vasquez v. Hillery

Dear Thurgood:

I am still with you in your third draft. It is not too important, but I would feel a little happier if the first full paragraph on page 11 were omitted.

I was interested in your new footnote 4. I enclose a copy of a note I sent to Lewis about his persistently characterizing the opinion in Rose v. Mitchell as a "plurality." I perhaps should have sent copies of this to those who had joined your opinion. In any event, here it is.

Sincerely,



Justice Marshall

cc: Justice Brennan
Justice White
Justice Stevens

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 7, 1985

84-836 Vasquez v. Hillery

Dear Thurgood:

In accord with my discussion at Conference, I probably will write in this case.

Whatever may be the merit of invalidating the conviction after a fair trial because of an improper composition of the grand jury, I view the rule that you apply as probably inapplicable to this case.

Here, the defendant was tried, convicted and sentenced to death in 1962. His grand jury discrimination claim was denied by the California Supreme Court in 1965. The claim was not raised in two subsequent appeals to that court. It was first raised on state habeas in 1974 -- nine years after it had been decided. The claim was not raised in federal habeas until 1978. Hillery, fairly convicted of a brutal murder (and sentenced to death three times), will quite possibly be placed back on the street because of a claim he raised in federal court sixteen years after his conviction.

In all likelihood, it is now some years too late to retry Hillery. It could well be that the Court's opinion in this case will encourage convicted persons with long sentences to defer seeking habeas relief until retrial becomes difficult or impossible.

It may be awhile before I write, and for this reason I have indicated briefly my line of thought.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

**DANIEL VASQUEZ, WARDEN, PETITIONER v.
 BOOKER T. HILLERY, JR.**

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

[December —, 1985]

JUSTICE POWELL, dissenting.

Respondent, a black man, was indicted by a grand jury having no black members for the stabbing murder of a 15-year-old girl. A petit jury found respondent guilty of that charge beyond a reasonable doubt, in a trial the fairness of which is unchallenged here.¹ Twenty-three years later, we are asked to grant respondent's petition for a writ of habeas corpus—and thereby require a new trial if that is still feasible—on the ground that blacks were purposefully excluded from the grand jury that indicted him. It is undisputed that race discrimination has long since disappeared from the grand jury selection process in Kings County, California. It is undisputed that a grand jury that perfectly represented Kings County's population at the time of respondent's indictment would have contained only one black member.² Yet the Court holds that respondent's petition must be granted,

¹ Respondent was thrice sentenced to death for this murder. See *People v. Hillery*, 10 Cal. 3d 897, 519 P. 2d 572 (1974); *ante*, at —, n. 2. That sentence was ultimately reduced to life imprisonment because the California Supreme Court found that imposition of the death penalty was in all cases inconsistent with the California Constitution. *Ibid.*

² According to 1960 census figures, 4.7% of Kings County's population was black. *Hillery v. Pulley*, 563 F. Supp. 1228, 1232 (ED Cal. 1983). Respondent's grand jury consisted of nineteen individuals, all of whom were white. *Id.*, at 1231.

12/03

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

From: **Justice Powell**

Circulated: _____

Recirculated: DEC 4 1985

Stylistic changes throughout

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
BOOKER T. HILLERY, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[December —, 1985]

JUSTICE POWELL, dissenting.

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p.4

pp. 8, 15

12/09

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

From: **Justice Powell**

Circulated: _____

Recirculated: _____ 10 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

**DANIEL VASQUEZ, WARDEN, PETITIONER v.
 BOOKER T. HILLERY, JR.**

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

[December —, 1985]

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12/18

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

PP. 1, 12

From: Justice Powell

Circulated: _____

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DEC 20 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
 BOOKER T. HILLERY, JR.

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

[December —, 1985]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and
 JUSTICE REHNQUIST join, dissenting.

Respondent, a black man, was indicted by a grand jury having no black members for the stabbing murder of a 15-year-old girl. A petit jury found respondent guilty of that charge beyond a reasonable doubt, in a trial the fairness of which is unchallenged here.¹ Twenty-three years later, we are asked to grant respondent's petition for a writ of habeas corpus—and thereby require a new trial if that is still feasible—on the ground that blacks were purposefully excluded from the grand jury that indicted him. It is undisputed that race discrimination has long since disappeared from the grand jury selection process in Kings County, California. It is undisputed that a grand jury that perfectly represented Kings County's population at the time of respondent's indictment would have contained only one black member.² Yet

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 21, 1985

Re: No. 84-836 Vasquez v. Hillery

Dear Chief,

I will be happy to take on the dissent in this case.

Sincerely,



The Chief Justice

cc: Justice Powell
Justice O'Connor

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

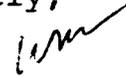
December 5, 1985

Re: No. 84-836 Vasquez v. Hillery

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

cc: The Conference

82 DEC -2 11:40

77-1111
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CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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

November 7, 1985

Re: 84-836 - Vasquez v. Hillery

Dear Thurgood:

Please join me.

Respectfully,

A handwritten signature in cursive script, appearing to read "John", likely representing Justice John Paul Stevens.

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 8, 1985

No. 84-836 Vasquez v. Hillery

Dear Thurgood,

I think I will wait 'til the dust settles
before voting on this.

Sincerely,

Sandra

4-1

Justice Marshall

Copies to the Conference

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-836

DANIEL VASQUEZ, WARDEN, PETITIONER *v.*
 BOOKER T. HILLERY, JR.

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

[December —, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

This Court has long held that upon proof of systematic exclusion of blacks from a grand jury issuing an indictment, the admittedly costly remedy of reversal of a conviction thereafter obtained through a fair trial is necessary in order to eradicate and deter such discrimination. Not until *Rose v. Mitchell*, 443 U. S. 545 (1979), however, did the Court squarely address the question whether, given the availability of this remedy on direct review, it is also necessary to make the same remedy available when the petitioner seeks to renew his claim of discriminatory exclusion on federal habeas corpus review. See *id.*, at 582 (POWELL, J., concurring in judgment).

I share the view expressed by JUSTICE POWELL in *Rose*: a petitioner who has been afforded by the state courts a full and fair opportunity to litigate the claim that blacks were discriminatorily excluded from the grand jury which issued the indictment should be foreclosed from relitigating that claim on federal habeas. The incremental value that continued challenges may have in rooting out and deterring such discrimination is outweighed by the unique considerations that apply when the habeas writ is invoked. The history and purposes of the writ, as well as weighty finality interests and considerations of federalism, counsel against permitting a petitioner to renew on habeas a challenge which does not under-