(ORDER LIST: 558 U.S.)

TUESDAY, JANUARY 19, 2010

APPEALS -- SUMMARY DISPOSITION

09-416) SCHWARZENEGGER, GOV. OF CA V. PLATA, MARCIANO, ET AL.
)
09-553) CA STATE REPUBLICAN LEGISLATOR V. PLATA, MARCIANO, ET AL.

The appeals are dismissed for want of jurisdiction. The Court takes note that a further order has been entered in this case, but that order is not the subject of these appeals. It is also noted that the district court has stayed its further order pending review by this Court.

CERTIORARI -- SUMMARY DISPOSITIONS

07-1483 PATRICK, WARDEN V. SMITH, SHIRLEY R.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *McDaniel* v. *Brown*, 558 U.S. ___ (2010).

08-652 BEARD, SEC., PA DOC, ET AL. V. ABU-JAMAL, MUMIA

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Smith* v. *Spisak*, 558 U.S. ___ (2010).

08-7757 WATTS, DARIAN A. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the position asserted by the Solicitor General in her brief for the United States filed on May 8, 2009.

09-122 HUNTER, DEMARICK V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the position asserted by the Solicitor General in her brief for the United States filed on November 25, 2009.

09-5370 VAZQUEZ, CARLOS V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the position asserted by the Solicitor General in her brief for the United States filed November 16, 2009.

09-5995 JOHNSON, BRUCE A. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Abuelhawa* v. *United States*, 556 U.S.

___ (2009).

09-7408 LINTON, PRINCE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *United States* v. *Booker*, 543 U.S. 220 (2005).

ORDERS IN PENDING CASES

09A541 NORTON, SALLY V. FANNIE MAE

The application for stay addressed to Justice Sotomayor and referred to the Court is denied.

09M63 KASTNER, KRISTOFER T. V. MARTIN & DROUGHT, INC., ET AL.

09M64 COOLEY, KIM J. V. ST. BERNARD PARISH, ET AL.

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

1, ORIG.) WISCONSIN, ET AL. V. ILLINOIS, ET AL.
)
2, ORIG.) MICHIGAN V. ILLINOIS, ET AL.
)
3, ORIG.) NEW YORK V. ILLINOIS, ET AL.

The motion of Michigan for preliminary injunction is denied.

08-1234 KIYEMBA, JAMAL, ET AL. V. OBAMA, PRESIDENT OF U.S., ET AL.

The motion of petitioners for leave to proceed *in forma pauperis* is granted.

09-338 RENICO, WARDEN V. LETT, REGINALD

The motion of respondent for appointment of counsel is granted. Marla R. McCowan, of Detroit, Michigan, is appointed to serve as counsel for the respondent in this case.

09-529 VOPA V. REINHARD, JAMES S., ET AL.

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

09-6554 PLUMMER, WILLIAM P. V. CALIFORNIA

09-6764 ROYSE, JOHN A. V. CORNING GLASS WORKS, INC.

09-6888 BEAVER, STEVEN E. V. McNEIL, SEC., FL DOC

09-6916 HOWARD, GREGORY T. V. SUPREME COURT OF OH, ET AL.

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

09-7550 JONES, DONALD G. V. LIBERTY BANK AND TRUST, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until February 9, 2010, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

09-7565 CORINES, PETER J. V. KILLIAN, WARDEN

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until February 9, 2010, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court. Justice Sotomayor took no part in the consideration or decision of these motions.

CERTIORARI DENIED

08-11060 FERGUSON, FRANK L. V. WEST VIRGINIA

09-197 KIMCO OF EVANSVILLE, ET AL. V. INDIANA

09-224 NICKELS, STANLEY R. V. GRAND TRUNK WESTERN RR, INC.

09-294 UNUS, AYSHA N., ET AL. V. KANE, DAVID, ET AL.

09-302 MASARIK, DANIEL V. UNITED STATES

09-310 WILLIAMS, LARRY A. V. UNITED STATES

09-314 VIRGINIA BEACH, VA V. TANNER, BRADLEY, ET AL.

09-325 ARONOV, ALEXANDRE V. NAPOLITANO, SEC. OF HOMELAND

09-343 EDISON ELECTRIC INST., ET AL. V. PIEDMONT ENVIRONMENTAL, ET AL.

09-379 ALLMOND, WILBUR V. AKAL SECURITY, INC., ET AL.

09-385 BAKERY MACHINERY & FABRICATIONS V. TRADITIONAL BAKING, INC.

09-395 RICCI, ASSOC. ADM'R, NJ, ET AL. V. KAMIENSKI, PAUL

09-412 SMC CORP., ET AL. V. NORGREN, INC., ET AL.

09-439 QSI HOLDINGS, INC., ET AL. V. ALFORD, DENNIS E., ET AL.

09-447 HECKER, DENNIS, ET AL. V. DEERE & CO.

09-518 BULLOCK, ANDREW J. V. KLEIN, ARTHUR S., ET AL.

09-549 UNITED STATES, ET AL. V. SMITH, BYRON

09-550 FESSLER, JOSEPH, ET UX. V. KIRK SAUER DEVELOPMENT, ET AL.

09-555) ASHABRANNER, TERRY V. GOODMAN, JEANETTE
)
09-574) GOODMAN, JEANETTE V. HARRIS COUNTY, TX, ET AL.

09-556 SCHREINER, BRIAN V. EWING, KRISTI, ET AL.

09-558 RATCLIFF, ELIJAH W. V. TEXAS

09-561 PARKHURST, ROSS, ET UX. V. TABOR, STEPHEN, ET AL.

09-565 BASON, LANISE V. YUKINS, WARDEN

09-568 MAREMONT CORPORATION V. ST. JOHN, FLORENCE D.

09-575 ENGLISH-SPEAKING UNION V. JOHNSON, JAMES, ET AL.

09-577 HALE, MARY, ET AL. V. BEXAR COUNTY, TX

09-585 HARVEST INSTITUTE, ET AL. V. UNITED STATES

09-586 CLAPP O'CALLAGHAN, ALISON E. V. GUARDIANSHIP OF THORA M. MOULTON

09-588 GOLDEN, ROBERTA A. V. HOUSMAN, CHARLES H., ET AL.

09-595 CIPTANAGARA, CHAYADIPURNAMA V. HOLDER, ATT'Y GEN.

09-598 MACDERMID, DONALD H. V. DISCOVER FINANCIAL SERVICES

09-603) DELAWARE COUNTY, PA, ET AL. V. FAA, ET AL.
)
09-607) ROCKLAND COUNTY, NY, ET AL. V. FAA, ET AL.

09-618 JIMINEZ, MIGUEL V. VAUGHAN, WARDEN

09-633 CIMINI, MARK V. SMITH, MARILYN R., ET AL.

09-635 SHINNECOCK SMOKE SHOP V. KAPPOS, DIR., PATENT & TRADEMARK

09-646 CARNIVAL CORP. V. THOMAS, PULIYURUMPIL M.

09-649 KONOP, ROBERT C. V. HAWAIIAN AIRLINES, INC.

09-651 HIRMER, CLAUDIA C., ET AL. V. UNITED STATES

09-653 GEARING, THOMAS J. V. CALIFORNIA

09-655 WADE, STANLEY L. V. UNITED STATES

09-691 EPIS, BRYAN J. V. UNITED STATES

09-692 OLIS, JAMIE V. UNITED STATES

09-5202 BOOKER, ANTHONY T. V. MISSISSIPPI

09-5455 GILES, DALE V. UNITED STATES

09-6167 PATTERSON, CLEO V. UNITED STATES

09-6179 AGUILERA-MEZA, EUSEBIO V. UNITED STATES

09-6245 HARGROVE, AARON V. WALKER, WARDEN

09-6441 GLOVER, ROBERT V. UNITED STATES

09-6457 MOLINA-GAZCA, ALEJANDRO V. UNITED STATES

09-6504 THOMPSON, BRENTON D. V. WILLIAMS, DANIEL, ET AL.

09-6577 MITCHELL, BARBARA L. V. O'BRIEN, KELLY

09-6605 BERRY, HASSAN S. V. UNITED STATES

09-6650 PENDLETON, RICKY V. V. BALLARD, WARDEN

09-6792 KERN, ADAM L. V. UNITED STATES

09-6835 VAN HOOSEN, DANIEL S. V. KRAMER, WARDEN

09-6846 WHITE, DEMONTRELL W. V. UNITED STATES

09-6983 OWEN, DUANE E. V. McNEIL, SEC., FL DOC, ET AL.

09-6985 RUCKER, FRED V. IL DEPT. OF CHILDREN SERVICES

09-7156 CORNWELL, SIDNEY V. BOBBY, WARDEN

09-7168 WADFORD, KELLY V. UNITED STATES

09-7326 ISA, TARIQ V. UNITED STATES

09-7424 RAY, GEORGE E. V. FEDERAL INSURANCE CO.

09-7435 HAYWOOD, REGINALD V. BEDATSKY, JEFF, ET AL.

09-7442 JACKSON, MICHAEL J. V. FLORIDA

09-7443 HALE, TIMOTHY A. V. TENNIS, SUPT., ROCKVIEW, ET AL.

09-7444 THOMAS, B. J. V. MICHIGAN

09-7453 SAIRRAS, GIOVANNI V. SCHLEFFER, JONATHAN, ET AL.

09-7457 FULLER, CURTIS V. BERGH, WARDEN

09-7460 HOOKS, JAMES A. V. BRUTON, ARCHIE, ET AL.

09-7466 CORDOVA, TRACEY, ET AL. V. ARAGON, DEREK, ET AL.

09-7471 CHAVEZ, DAVID I. V. SWARTHOUT, WARDEN

09-7476 MURRAY, MARY J. V. MILWAUKEE COUNTY, WI, ET AL.

09-7478 JOHNSON, ROGER V. KELLY, SUPT., MS

09-7479 KETCHUM, MELVIN V. THALER, DIR., TX DCJ

09-7481 WILSON, DAVID W. V. HAWS, WARDEN

09-7496 LOGGINS, WILLIAM V. CLINE, WARDEN, ET AL.

09-7497 KARES, STEPHEN J. V. ENIEX, JEFFREY, ET AL.

09-7501 RUTLEDGE, ARTHUR D. V. THALER, DIR., TX DCJ

09-7503 STRAW, AARON J. V. KLOPOTOSKI, SUPT., DALLAS

09-7506 BROWN, HOWARD V. KELLEY, CURTISS J., ET AL.

09-7510 JENNER, DAVID K., ET AL. V. ZAVARES, EXEC. DIR., CO DOC

09-7512 BEDFORD, KENNETH J. V. WEBB, WARDEN

09-7517 PEREZ, STEVEN V. TEXAS

09-7524 REESE, KEVIN J. V. TEXAS

09-7525 WALDIE, WAYNE V. CALIFORNIA

09-7526 TRUMP, KIMELA V. V. THALER, DIR., TX DCJ

09-7528	VILLARREAL, LIONEL V. SMITH, WARDEN
09-7534	VICTORIA, ALFREDO V. CONWAY, SUPT., ATTICA
09-7538	BRONSON, PURCELL V. KELCHNER, SUPT., CAMP HILL
09-7540	IVANOVA, MARINA N. V. MICHIGAN
09-7542	GRUBER, MARK V. BUESCHER, CO SEC. OF STATE
09-7557	PERRY, CALVIN L. V. VIRGINIA
09-7566	ERICKSON, HEIDI K. V. MASSACHUSETTS
09-7569	FELIX, SMITH V. HOLDER, ATT'Y GEN.
09-7570	MAJOR-DAVIS, SAMUEL J. V. THALER, DIR., TX DCJ
09-7571	CLEVELAND, GEORGE V. ABERNATHY, MAYOR, ET AL.
09-7575	DAVIS, JERRY L. V. EITEL, THOMAS, ET AL.
09-7587	VINNIE, RAYMOND P. V. MASSACHUSETTS
09-7593	ANTHONY, MARK T. V. CIRCUIT COURT OF MI, ET AL.
09-7597	MASON, ANTOINE V. ILLINOIS
09-7600	BARNES, HARDIS L. V. THALER, DIR., TX DCJ
09-7606	TRAVALINE, SCOTT J. V. TRAVALINE, ROBIN
09-7609	MOORE, HERBERT W. V. THALER, DIR., TX DCJ
09-7610	DILLEHAY, NICIE V. HUD, ET AL.
09-7611	DIAZ, MICHAEL A. V. TEXAS
09-7612	DUPONT, TIMOTHY V. GERRY, WARDEN
09-7616	JOHNSON, LAMIN V. CATE, SEC., CA DOC, ET AL.
09-7617	MATYLINSKY, FRANK J. V. BUDGE, WARDEN
09-7619	VAN SWAIT, ARTHUR V. EVANS, WARDEN
09-7625	SINGLETON, BENJAMIN R. V. JOHNSON, JEFFREY, ET AL.
09-7651	NALL, EMMETT R. V. McCALL, WARDEN
09-7655	EVANS, JAMAR J. V. MERCY MEDICAL CENTER
09-7694	CHARLES, GERELL V. MICHIGAN
09-7696	SAQUIC-SACCHE, DIEGO V. HOLDER, ATT'Y GEN.

09-7701 GOLDEN, ANDREDA V. HUBBELL INC., ET AL.

09-7761 LASKEY, LAURIE M. V. VISION INFOSOFT

09-7790 WHITE, CAESAR V. FL DEPT. OF HIGHWAY SAFETY

09-7830 WATTS, TRACY V. WILSON, HARRY, ET AL.

09-7866 EMBUSCADO, RESTITUTO V. DC COMICS, ET AL.

09-7873 FOSTER, WILLVERTO L. V. ALABAMA

09-7893 JOHNSON, ROBERT V. COOK INC.

09-7921 BLOUNT, DONALD A. V. HARDY, CORR. ADM'R, NASH, ET AL.

09-7985 CRESSWELL, DORIAN V. UNITED STATES

09-7987 FISCHER, TERANCE V. UNITED STATES

09-7988 GOODMAN, LARRY D. V. UNITED STATES

09-7989 GARBA, OSMAN V. UNITED STATES

09-7994 JACKSON, WARREN L. V. UNITED STATES

09-7996 McMILLAN, RICHARD T. V. UNITED STATES

09-7997 HAMDY, MOHAMED B. V. UNITED STATES

09-7999 VINSON, WAYNE V. UNITED STATES

09-8004 REED, MICHAEL C. V. UNITED STATES

09-8008 WINGO, KARL V. UNITED STATES

09-8009 SINGLETARY, ALBERT B. V. UNITED STATES

09-8010 ROACH, MANUEL A. V. UNITED STATES

09-8013 BRIDE, TITUS V. UNITED STATES

09-8016 SUMMAGE, KERWIN L. V. UNITED STATES

09-8017 ROBERSON, EUGENE V. UNITED STATES

09-8025 CARDONA, NORA H. V. UNITED STATES

09-8027 BREWER, TRENT V. UNITED STATES

09-8028 ADAMS, LOREN J. V. UNITED STATES

09-8030 AKEL, ANTONIO V. UNITED STATES

09-8032 EBERHARDT, IVAN V. UNITED STATES

09-8033 FOWLER, DEXTER E. V. UNITED STATES

09-8035 FALLS, LAMONT G. V. UNITED STATES

09-8036 GLAWSON, RICHARD B. V. UNITED STATES

09-8038 HUMPHREY, ARINDUS V. UNITED STATES

09-8040 HAYES, KHNUM H. V. UNITED STATES

09-8045 GRAVELY, DWAUNE V. UNITED STATES

09-8047 HOBERECK, STANLEY V. UNITED STATES

09-8051 COLIN-LUJAN, CARLOS V. UNITED STATES

09-8054 MEJIA-RIOS, ALEJANDRO V. UNITED STATES

09-8056 ORTEGA, WILLIAM V. UNITED STATES

09-8058 REGISTER, MARLON X. V. UNITED STATES

09-8060 WALTERS, BRANDON L. V. UNITED STATES

09-8062 CRUZ, ENIL J. V. UNITED STATES

09-8063 CARDOZA-PUENTE, ARTURO V. UNITED STATES

09-8064 GARCIA, ART V. UNITED STATES

09-8071 HERROD, TRORY Q. V. UNITED STATES

09-8073 SIMPKINS, JAMES V. UNITED STATES

09-8075 HECKE, STEVEN J. V. UNITED STATES

The petitions for writs of certiorari are denied.

08-1401 METRISH, WARDEN V. NEWMAN, DANIEL A.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

09-315 BUSCH, DONNA K. V. MARPLE NEWTON SCHOOL DISTRICT

The motion of Indian River School District for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

09-333 GARCIA, GUADALUPE L., ET AL. V. VILSACK, SEC. OF AGRIC.

The petition for a writ of certiorari is denied. The Chief Justice took no part in the consideration or decision of this petition.

09-359 MALDONADO, NANO V. IWASAKI, RANDELL

The petition for a writ of certiorari is denied. Justice Breyer took no part in the consideration or decision of this petition.

09-430 WAHI, RAKESH V. CHARLESTON AREA MEDICAL, ET AL.

The motion of Association of American Physicians and Surgeons, Inc. for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

09-484 O'BRIEN, SUPT., OLD COLONY V. O'LAUGHLIN, MICHAEL

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

09-567 VAN DE BERG, STEPHEN M. V. SSA, ET AL.

The motion of petitioner to defer consideration of the petition for a writ of certiorari is denied. The petition for a writ of certiorari is denied.

09-7452 SLEZAK, GARY V. GLOVER, SAMUEL, ET AL.

09-7461 GHEE, DEDRA V. TARGET NATIONAL BANK

09-7498 LAU, HON V. BROWN, ATT'Y GEN.

09-7499 LAU, HON V. ADAMS, WARDEN

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

09-7516 LEIGHT, KENNETH V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

09-7537 ADAMSON, R. CASPER V. McNEIL, SEC., FL DOC

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

09-7599 BAILEY, DEMETRIUS V. WAKEFIELD, DAVID, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*). Justice Stevens dissents. See *id.,* at 4, and cases cited therein.

HABEAS CORPUS DENIED

09-8096 IN RE JAMES E. WALLS

09-8190 IN RE SAUL A. GUTIERREZ

09-8237 IN RE HENRY E. MILLER

09-8285 IN RE EDWARD B. BARTOLI

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

09-7455 IN RE DARREL L. WILBER

The petition for a writ of mandamus is denied.

09-7492 IN RE RAYSHON THOMAS

The petition for a writ of mandamus and/or prohibition is denied.

REHEARINGS DENIED

08-10000 HUFF, ROSE V. KY RETIREMENT SYSTEMS

08-10781 CALLES, ANTONIO A. V. URIBE, WARDEN

09-5031 LANGON, STEVE V. FLORIDA

09-5176 GORDON, RONALD X. V. SUPREME COURT OF TX, ET AL.

09-6411 WHIRTY, JOHN R. V. THALER, DIR., TX DCJ

09-6413 ROTH, JOHN W. V. PENNSYLVANIA

09-6546 MILLER, ROMIE H. V. FRIEL, WARDEN

09-6569 BURROUGHS, DELORIS V. BROADSPIRE

09-6637 CUMMINGS, BERTHA L. V. MOORE, EDDIE N., ET AL.

09-6777 HERBERT, SUSAN V. UNITED STATES, ET AL.

09-6980 IN RE GERALD LESTER

09-6999 JONES, MARLIN B. V. PLATTEVIEW APARTMENTS, ET AL.

09-7006 IN RE JOSEPH C. MINNEMAN

09-7015 MONTES, GUSTAVO S. V. UNITED STATES

09-7348 BEVERLY, KENNETH D. V. UNITED STATES

The petitions for rehearing are denied.

SUPREME COURT OF THE UNITED STATES

ERIC PRESLEY *v.* GEORGIA

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

No. 09–5270. Decided January 19, 2010

PER CURIAM.

After a jury trial in the Superior Court of DeKalb County, Georgia, petitioner Eric Presley was convicted of a cocaine trafficking offense. The conviction was affirmed by the Supreme Court of Georgia. 285 Ga. 270, 674 S. E. 2d 909 (2009). Presley seeks certiorari, claiming his Sixth and Fourteenth Amendment right to a public trial was violated when the trial court excluded the public from the *voir dire* of prospective jurors. The Supreme Court of Georgia's affirmance contravened this Court's clear precedents. Certiorari and petitioner's motion for leave to proceed *in forma pauperis* are now granted, and the judgment is reversed.

Before selecting a jury in Presley's trial, the trial court noticed a lone courtroom observer. *Id.,* at 270–271, 674 S. E. 2d, at 910. The court explained that prospective jurors were about to enter and instructed the man that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. *Id.,* at 271, 674 S. E. 2d, at 910. The court then questioned the man and learned he was Presley's uncle. *Ibid.* The court reiterated its instruction:

> "'Well, you still can't sit out in the audience with the jurors. You know, most of the afternoon actually we're going to be picking a jury. And we may have a couple of pre-trial matters, so you're welcome to come in after we . . . complete selecting the jury this afternoon. But, otherwise, you would have to leave the

> sixth floor, because jurors will be all out in the hallway in a few moments. That applies to everybody who's got a case.'" *Ibid.*

Presley's counsel objected to "'the exclusion of the public from the courtroom,'" but the court explained, "'[t]here just isn't space for them to sit in the audience.'" *Ibid.* When Presley's counsel requested "'some accommodation,'" the court explained its ruling further:

> "'Well, the uncle can certainly come back in once the trial starts. There's no, really no need for the uncle to be present during jury selection. . . . [W]e have 42 jurors coming up. Each of those rows will be occupied by jurors. And his uncle cannot sit and intermingle with members of the jury panel. But, when the trial starts, the opening statements and other matters, he can certainly come back into the courtroom.'" *Ibid.*

After Presley was convicted, he moved for a new trial based on the exclusion of the public from the juror *voir dire*. At a hearing on the motion, Presley presented evidence showing that 14 prospective jurors could have fit in the jury box and the remaining 28 could have fit entirely on one side of the courtroom, leaving adequate room for the public. App. to Pet. for Cert. E–37, E–41. The trial court denied the motion, commenting that it preferred to seat jurors throughout the entirety of the courtroom, and "it's up to the individual judge to decide . . . what's comfortable." *Id.,* E–38. The court continued: "It's totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation." *Id.,* at E–42 to E–43. On appeal, the Court of Appeals of Georgia agreed, finding "[t]here was no abuse of discretion here, when the trial court explained the need to exclude spectators at the voir dire stage of the proceedings and when members of

the public were invited to return afterward." 290 Ga. App. 99, 100–101, 658 S. E. 2d 773, 775 (2008).

The Supreme Court of Georgia granted certiorari and affirmed, with two justices dissenting. After finding "the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire," the Supreme Court of Georgia rejected Presley's argument that the trial court was required to consider alternatives to closing the courtroom. 285 Ga., at 272, 273, 674 S. E. 2d, at 911. It noted that "the United States Supreme Court [has] not provide[d] clear guidance regarding whether a court must, sua sponte, advance its own alternatives to [closure]," and the court ruled that "Presley was obliged to present the court with any alternatives that he wished the court to consider." *Id.,* at 273, 674 S. E. 2d, at 911, 912. When no alternatives are offered, it concluded, "there is no abuse of discretion in the court's failure to sua sponte advance its own alternatives." *Id.,* at 274, 674 S. E. 2d, at 912.

This Court's rulings with respect to the public trial right rest upon two different provisions of the Bill of Rights, both applicable to the States via the Due Process Clause of the Fourteenth Amendment. The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." The Court in *In re Oliver*, 333 U. S. 257, 273 (1948), made it clear that this right extends to the States. The Sixth Amendment right, as the quoted language makes explicit, is the right of the accused.

The Court has further held that the public trial right extends beyond the accused and can be invoked under the First Amendment. *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501 (1984) *(Press-Enterprise I).* This requirement, too, is binding on the States. *Ibid.*

The case now before the Court is brought under the

Sixth Amendment, for it is the accused who invoked his right to a public trial. An initial question is whether the right to a public trial in criminal cases extends to the jury selection phase of trial, and in particular the *voir dire* of prospective jurors. In the First Amendment context that question was answered in *Press-Enterprise I. Id.*, at 510. The Court there held that the *voir dire* of prospective jurors must be open to the public under the First Amendment. Later in the same Term as *Press-Enterprise I*, the Court considered a Sixth Amendment case concerning whether the public trial right extends to a pretrial hearing on a motion to suppress certain evidence. *Waller* v. *Georgia*, 467 U. S. 39 (1984). The *Waller* Court relied heavily upon *Press-Enterprise I* in finding that the Sixth Amendment right to a public trial extends beyond the actual proof at trial. It ruled that the pretrial suppression hearing must be open to the public because "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." 467 U. S., at 46.

While *Press-Enterprise I* was heavily relied upon in *Waller*, the jury selection issue in the former case was resolved under the First, not the Sixth, Amendment. *Press-Enterprise I*, *supra*, at 516 (STEVENS, J., concurring) ("The constitutional protection for the right of access that the Court upholds today is found in the First Amendment, rather than the public trial provision of the Sixth" (footnote omitted)). In the instant case, the question then arises whether it is so well settled that the Sixth Amendment right extends to jury *voir dire* that this Court may proceed by summary disposition.

The point is well settled under *Press-Enterprise I* and *Waller*. The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or

in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. "Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 380 (1979). There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit. That rationale suffices to resolve the instant matter. The Supreme Court of Georgia was correct in assuming that the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors.

While the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller,* 467 U. S.*,* at 45. "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Ibid. Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.,* at 48.

In upholding exclusion of the public at juror *voir dire* in the instant case, the Supreme Court of Georgia concluded,

despite our explicit statements to the contrary, that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives. While the Supreme Court of Georgia concluded this was an open question under this Court's precedents, the statement in *Waller* that "the trial court must consider reasonable alternatives to closing the proceeding" settles the point. *Ibid.* If that statement leaves any room for doubt, the Court was more explicit in *Press-Enterprise I:*

> "Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." 464 U. S., at 511.

The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Id.,* at 505. The public has a right to be present whether or not any party has asserted the right. In *Press-Enterprise I*, for instance, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential. *Id.,* at 503–504. The Court, nonetheless, found it was error to close the courtroom. *Id.,* at 513.

Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial.

Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.

Petitioner also argues that, apart from failing to consider alternatives to closure, the trial court erred because it did not even identify any overriding interest likely to be prejudiced absent the closure of *voir dire*. There is some merit to this complaint. The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course. As noted in the dissent below, "the majority's reasoning permits the closure of voir dire in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." 285 Ga., at 276, 674 S. E. 2d, at 913 (opinion of Sears, C. J.).

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*. But in those cases, the particular interest, and threat to that interest, must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I, supra,* at 510; see also *Press-Enterprise Co.* v. *Superior Court of Cal., County of Riverside*, 478 U. S. 1, 15 (1986) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]").

We need not rule on this second claim of error, because even assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.

The Supreme Court of Georgia's judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ERIC PRESLEY *v.* GEORGIA

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

No. 09–5270. Decided January 19, 2010

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Today the Court summarily disposes of two important questions it left unanswered 25 years ago in *Waller* v. *Georgia*, 467 U. S. 39 (1984), and *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501 (1984) *(Press-Enterprise I).* I respectfully dissent from the Court's summary disposition of these important questions.

First, the Court addresses "whether it is so well settled that [a defendant's] Sixth Amendment right" to a public trial "extends to jury *voir dire* that this Court may proceed by summary disposition." *Ante*, at 4. The Court's affirmative answer to this question relies exclusively on *Waller* and *Press-Enterprise I;* but those cases cannot bear the weight of this answer.

The Court correctly notes that *Waller* answers whether a "defendant's Sixth Amendment right to a public trial applies to a suppression hearing" (not to jury *voir dire*), 467 U. S., at 43, and that *Press-Enterprise I* interprets the *public's* First Amendment right to attend jury *voir dire*, 464 U. S., at 509, n. 8, so neither *Waller* nor *Press-Enterprise I* expressly answers the question here, see *ante*, at 4. That acknowledgment should have eliminated any basis for disposing of this case summarily; the Court should reserve that procedural option for cases that our precedents govern squarely and directly. See, *e.g.*, *United States* v. *Haley*, 358 U. S. 644 (1959) *(per curiam)* (summarily reversing a federal court's judgment that refused to follow, or even mention, one of our precedents upholding

the statute in issue under identical circumstances).

The Court nevertheless concludes that *Waller* and *Press-Enterprise I*—in combination—"well settl[e]" the "point." *Ante*, at 4. It admits that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question," but, apparently extrapolating from *Press-Enterprise I*, asserts that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." *Ante*, at 4–5. But this conclusion decides by implication an unstated premise: that jury *voir dire* is part of the "public trial" that the Sixth Amendment guarantees. As JUSTICE STEVENS recognized in *Press-Enterprise I*, that case did not decide this issue. See 464 U. S., at 516 (concurring opinion) ("If the defendant had advanced a claim that his Sixth Amendment right to a public trial was violated by the closure of the *voir dire*, it would be important to determine whether the selection of the jury was a part of the 'trial' within the meaning of that Amendment"). Until today, that question remained open; the majority certainly cites no other case from this Court answering it. Yet the Court does so here—even though the Supreme Court of Georgia did not meaningfully consider that question, and petitioner does not ask us to do so.* I am unwill-

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* In full, petitioner's two questions presented state:

"I. This Court has established that the public cannot be expelled from a courtroom unless the presence of the public creates a 'substantial probability' of prejudice to an 'overriding interest.' But is some case-specific evidence required to meet this 'substantial probability' test, or can generalized fears that would apply equally to nearly every trial suffice?

"II. This Court has repeatedly held that a trial court must consider reasonable alternatives to closing a proceeding before it can exclude the public. But who bears the burden of suggesting such alternatives? Must the proponent of closure establish that closure is necessary, in that there are no reasonable alternatives available? Or to overcome a

ing to decide this important question summarily without the benefit of full briefing and argument.

Second, I am also unwilling to join the Court in reading the "'alternatives to closure'" language it quotes from *Waller* and *Press Enterprise I* as squarely foreclosing the decision of the Supreme Court of Georgia. See *ante*, at 6. The Court chides the Supreme Court of Georgia for "conclud[ing], despite *our explicit statements* to the contrary, that trial courts need not consider alternatives to closure *absent an opposing party's proffer of some alternatives*." *Ante*, at 5–6 (emphasis added). But neither *Waller* nor *Press-Enterprise I* expressly holds that jury *voir dire* is covered by the Sixth Amendment's "[P]ublic [T]rial" Clause. Accordingly, it is not obvious that the "alternatives to closure" language in those opinions governs this case.

Even assuming the Court correctly extends *Waller* and *Press-Enterprise I* to this (Sixth Amendment *voir dire*) context, neither opinion "explicit[ly]" places on trial courts the burden of *sua sponte* suggesting alternatives to closure "absent an opposing party's proffer of some alternatives." *Ante,* at 6. The statement that a "'trial court must consider reasonable alternatives to closing the proceeding,'" *ibid.* (quoting *Waller*, *supra*, at 48), does not definitively establish who must *suggest* alternatives to closure that the trial court must then *consider*, nor does it expressly address whether the trial court must suggest such alternatives in the absence of a proffer. I concede that the language can easily be read to imply the latter, and the Court may well be right that a trial court violates the Sixth Amendment if it closes the courtroom without *sua sponte* considering reasonable alternatives to closure. But I would not decide the issue summarily, and certainly would

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closure motion must an opponent of closure establish that reasonable alternatives do exist?" Pet. for Cert. i.

not declare, as the Court does, that *Waller* and *Press-Enterprise I* "settl[e] the point" without "leav[ing] any room for doubt." *Ante*, at 6.

Besides departing from the standards that should govern summary dispositions, today's decision belittles the efforts of our judicial colleagues who have struggled with these issues in attempting to interpret and apply the same opinions upon which the Court so confidently relies today. See, *e.g., Ayala* v. *Speckard*, 131 F. 3d 62, 70–72 (CA2 1997) (en banc), cert. denied, 524 U. S. 958 (1998); 131 F. 3d, at 74–75 (Walker, J., concurring); *id.*, at 77–80 (Parker, J., dissenting). The Court's decision will also surely surprise petitioner, who did not seek summary reversal based on the allegedly incorrect application of this Court's well-established precedents by the Supreme Court of Georgia, but instead asked us to "resolve this split of authority" over whether "the opponent of closure must suggest alternatives to closure" or whether "those seeking to exclude the public must show that there is no available less-intrusive alternative." Pet. for Cert. 18.

SUPREME COURT OF THE UNITED STATES

MARCUS A. WELLONS *v.* HILTON HALL, WARDEN

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

No. 09–5731. Decided January 19, 2010

PER CURIAM.

From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect. The disturbing facts of this case raise serious questions concerning the conduct of the trial, and this petition raises a serious question about whether the Court of Appeals carefully reviewed those facts before addressing petitioner's constitutional claims. We know that the Court of Appeals committed the same procedural error that we corrected in *Cone* v. *Bell*, 556 U. S. ___, ___ (2009) (slip op., at 17–18). We do not know how the court would have ruled if it had the benefit of our decision in that case.

Petitioner Marcus Wellons was convicted in Georgia state court of rape and murder and sentenced to death. Although the trial looked typical, there were unusual events going on behind the scenes. Only after the trial did defense counsel learn that there had been unreported *ex parte* contacts between the jury and the judge, that jurors and a bailiff had planned a reunion, and that "either during or immediately following the penalty phase, some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts," 554 F. 3d 923, 930 (CA11 2009). The judge had not reported any of this to the defense.

Neither Wellons nor any court has ascertained exactly what went on at this capital trial or what prompted such "gifts." Wellons has repeatedly tried, in both state and federal court, to find out what occurred, but he has found

himself caught in a procedural morass: He raised the issue on direct appeal but was constrained by the nonexistent record, and the State Supreme Court affirmed his conviction and sentence. *Wellons* v. *State*, 266 Ga. 77, 88, 463 S. E. 2d 868, 880 (1995). He sought state habeas relief and moved to develop evidence. But the court held that the matter had been decided on appeal and thus was res judicata. See 554 F. 3d, at 932. He raised the issue again in his federal habeas petition, seeking discovery and an evidentiary hearing. But the District Court "concluded that Wellons' claims . . . were procedurally barred, and accordingly denied his motion for an evidentiary hearing on these claims." *Id.*, at 933.[1] Before the Eleventh Cir-

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[1] Although the District Court found most of petitioner's claims to be procedurally barred, it alternatively declined to permit an evidentiary hearing because Wellons did not have enough evidence of bias or misconduct. JUSTICE ALITO wrongly suggests that the District Court reached that conclusion by reviewing a proffer that Wellons' attorneys assembled by "contacting all but 1 of the jurors," many of whom "spoke freely." *Post*, at 2 (dissenting opinion). Even apart from the fact that these interviews were informal and unsworn, they shed almost no light on what had occurred. The juror who allegedly "gave the penis to the judge," App. C to Pet. for Cert. 36, was "hostile and refused to talk," *id.*, at 37; one "refused to talk about the trial," *id.*, at 36; another "did not want to talk about the case," *id.*, at 37; and one "conferr[ed]" with his wife who then "slammed and bolted the door," *ibid.* Of those jurors who were willing to talk at all, one admitted to being "concerned that she might say something that would be used for a mistrial," *id.*, at 35, and none admitted to knowing how or why the jury selected its "gifts," see *id.*, at 35–36, 37. (Implausibly, JUSTICE ALITO suggests that Wellons' lawyers may not have asked how or why the jury selected its "gifts," *post*, at 3, though he bases that speculation only on the fact that no *questions* appeared in the proffer of *facts*.) Rather, the jurors discussed other matters and did so in the briefest of terms. All told, "everything that Petitioner . . . learned," App. C to Pet. for Cert. 38, filled only a few sheets of paper, see *id.*, at 35–36, 37.

Moreover, the subjects that the jurors did discuss may very well support Wellons' view that his trial was tainted by bias or misconduct. For example, one interviewee "was surprised" that a fellow juror had been allowed to serve on a capital trial, given that her sister had been

cuit, Wellons "argue[d] that the district court erred in denying his motions for discovery and an evidentiary hearing to develop his judge, juror, and bailiff misconduct claims because they are not procedurally barred." *Id.*, at 935. The court disagreed, holding that Wellons' claims were procedurally barred. *Ibid.*

As our dissenting colleagues acknowledge, *post*, at 1 (opinion of SCALIA, J.); *post*, at 1 (opinion of ALITO, J.), the Eleventh Circuit's holding was an error under *Cone,* 556 U. S., at ___ (slip op., at 17–18). "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Id.*, at __ (slip op., at 17). Both dissenting opinions assume that "the issue on which *Cone* throws light does not affect the outcome" because "the Eleventh Circuit . . . also decided that petitioner was not entitled to habeas relief *on the merits*." *Post*, at 1–2 (opinion of SCALIA, J.). Having found a procedural bar, however, the Eleventh Circuit had no need to address whether petitioner was otherwise entitled to an evidentiary hearing and gave this question, at most, perfunctory consideration that may well have turned on the District Court's finding of a procedural bar.

Although Wellons appealed the denial of "his motions for discovery and an evidentiary hearing," 554 F. 3d, at 935, the Eleventh Circuit did not purport to address the merits of *that* issue at all.[2] The court stated only that "[e]ven if we assume that Wellons's misconduct claims are not procedurally barred, they do not entitle Wellons to

murdered by a man after he completed serving a life sentence. *Id.,* at 36.

[2] As JUSTICE ALITO explains at some length, see *post*, at 2–4, the *District Court* did discuss the merits of that issue, but the District Court's analysis has little relevance on whether the Court of Appeals made an alternative holding or rather affirmed the District Court's decision on the ground that petitioner's claim was procedurally barred.

habeas *relief*." *Id.*, at 936 (emphasis added). This opaque statement appears to address only whether petitioner was entitled to ultimate relief in the form of a new trial, not whether petitioner's allegations, combined with the facts he had learned, entitled him to the discovery and evidentiary hearing that he sought.

The Eleventh Circuit's reasoning does not suggest otherwise. The court observed that Wellons' claims of misconduct were "grounded in his speculation as to the meaning underlying the jurors' chocolate 'gifts'" and "the surmise attached to their passive receipt of these gifts." *Ibid.* This statement likewise indicates only that on the existing record, habeas relief was inappropriate, not that an evidentiary hearing should be denied. After all, had there been discovery or an evidentiary hearing, Wellons may have been able to present more than "speculation" and "surmise." The Eleventh Circuit also pointed to the state court's decision on direct appeal, see *id.*, at 937, and reviewed that decision "[i]n light of the evidence presented before the Georgia Supreme Court," *ibid.* This, too, is typical of a court reviewing the denial of habeas relief, not the denial of discovery or an evidentiary hearing. [3]

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[3] JUSTICE ALITO asserts that the Eleventh Circuit "stated in unequivocal terms that its holding on the merits of petitioner's claim was independent of its holding on the question of procedural default." *Post*, at 1. But that does not address the question: The merits of what? The question whether to grant habeas relief or whether to permit discovery and an evidentiary hearing?

Contrary to our dissenting colleagues, *post,* at 4 (opinion of ALITO, J.), we do not find it dispositive that the section of the Eleventh Circuit's opinion about judge, juror, and bailiff misconduct began with a full page statement of the standard of review, which in turn included a sentence about the circumstances under which an evidentiary hearing is warranted. See 554 F. 3d, at 934–935. Immediately following the standard of review that JUSTICE ALITO quotes, the panel explained that "'if the record . . . precludes habeas relief, a district court is not required to hold an evidentiary hearing,'" and that "the record reveals that [Wellons'] claims . . . are procedurally barred." *Id.*, at 935.

Moreover, even assuming that the Eleventh Circuit intended to address Wellons' motions for discovery and an evidentiary hearing, we cannot be sure that its reasoning really was independent of the *Cone* error. The fact that his claims rested on "speculation" and "surmise" was due to the absence of a record, which was in part based on the *Cone* error. And as the Eleventh Circuit's reasoning turned on "the evidence presented before the Georgia Supreme Court," 554 F. 3d, at 937, there is serious doubt about whether it necessarily relied on the very holes in the record that Wellons was trying to fill.

Our dissenting colleagues allege that the Court is "degrad[ing] . . . our traditional requirements for a GVR." *Post*, at 2 (opinion of SCALIA, J.); see *post*, at 4 (opinion of ALITO, J.). But the standard for an order granting certiorari, vacating the judgment below, and remanding the case (GVR) remains as it always has been: A GVR is appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the

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Moreover, the allegedly "unequivocal" holding that JUSTICE ALITO quotes was preceded by a discussion of the deference owed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to the "Georgia Supreme Court's judgment as to the substance and effect of the ex parte communication." *Id.*, at 937. This is the classic formulation of a decision of whether to grant habeas relief. Indeed, it would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual findings were erroneous. If that were the case, then almost no habeas petitioner could ever get an evidentiary hearing: So long as the state court found a fact that the petitioner was trying to disprove through the presentation of evidence, then there could be no hearing. AEDPA does not require such a crabbed and illogical approach to habeas procedures, and there is no reason to believe that the Eleventh Circuit thought otherwise.

ultimate outcome" of the matter. *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam)*. As already discussed, there is, at least, a "reasonable probability," *ibid.*, that the denial of discovery and an evidentiary hearing rested in part on the *Cone* error. And in light of the unusual facts of the case, a "redetermination may determine the ultimate outcome," 516 U. S., at 167; cf. *Williams* v. *Taylor*, 529 U. S. 420, 442 (2000) (holding that several "omissions as a whole disclose the need for an evidentiary hearing"); *Smith* v. *Phillips*, 455 U. S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias"). The Eleventh Circuit's opinion is ambiguous in significant respects. It would be highly inappropriate to assume away that ambiguity in respondent's favor. That is especially so in a case in which petitioner's allegations and the unusual facts raise a serious question about the fairness of a capital trial.

Both dissenting opinions suggest that if there is a strong case for discovery and an evidentiary hearing, then the Court "should summarily reverse or set the case for argument." *Post*, at 2 (opinion of SCALIA, J.); see also *post*, at 4–5 (opinion of ALITO, J.). But as we have explained, "a GVR order conserves the scarce resources of this Court," "assists the court below by flagging a particular issue that it does not appear to have fully considered," and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence*, *supra*, at 167.

Unlike JUSTICE SCALIA, *post*, at 3, we do not believe that a "self-respecting" court of appeals would or should respond to our remand order with a "summary reissuance" of essentially the same opinion, absent the procedural default discussion. To the contrary, in light of our decision in *Cone,* we assume the court will consider, on the merits, whether petitioner's allegations, together with the undis-

puted facts, warrant discovery and an evidentiary hearing.

The petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and the motion of petitioner for leave to proceed *in forma pauperis* are granted. The judgment is vacated, and the case is remanded to the Eleventh Circuit for further consideration in light of *Cone* v. *Bell*, 556 U. S., at ___ (slip op., at 17–18).

SUPREME COURT OF THE UNITED STATES

MARCUS A. WELLONS *v.* HILTON HALL, WARDEN

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

No. 09–5731. Decided January 19, 2010

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Petitioner Marcus Wellons was convicted in Georgia state court of capital murder and sentenced to death. After exhausting direct appeal and state postconviction review, he filed a petition for habeas corpus in federal court under 28 U. S. C. §2254. Wellons claims, among other things, that misconduct on the part of the trial judge, jurors, and court bailiff deprived him of a fair trial. The District Court denied relief, and the Eleventh Circuit affirmed.

Today the Court grants Wellons' petition for certiorari, vacates the judgment of the Eleventh Circuit, and remands ("GVRs") in light of *Cone* v. *Bell*, 556 U. S. ___ (2009). The Eleventh Circuit concluded that Wellons' claims were procedurally barred because the state postconviction court, noting that the State Supreme Court had rejected them on direct appeal, held the claims were res judicata. See 554 F. 3d 923, 936, and n. 6 (2009). This was error under *Cone*, see 556 U. S., at ___–___ (slip op., at 17–18), as respondent recognizes; indeed, the Eleventh Circuit has already recognized the abrogation of the opinion below on this point, see *Owen* v. *Secretary for Dept. of Corrections*, 568 F. 3d 894, 915, n. 23, (2009). But, as JUSTICE ALITO's dissent demonstrates, *post*, p. ___, the Eleventh Circuit (like the District Court) also decided that petitioner was not entitled to habeas relief *on the merits*. 554 F. 3d, at 936–938. Thus the Court GVRs in light of *Cone* even though the issue on which *Cone* throws light

does not affect the outcome.

The Court has previously asserted a power to GVR whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam)*. I have protested even that flabby standard, see *id.,* at 190–191 (SCALIA, J., dissenting), but today the Court outdoes itself. It GVRs where the decision below does *not* "rest upon" the objectionable faulty premise, but is independently supported by other grounds—so that redetermination of the faulty ground will assuredly *not* "determine the ultimate outcome of the litigation." The power to "revise and correct for error," which the Court has already turned into "a power to void for suspicion," *id.,* at 190 (same) (internal quotation marks and alteration omitted), has now become the power to send back for a re-do. We have no authority to decree that. If the Court thinks that the Eleventh Circuit's merits holding is wrong, then it should summarily reverse or set the case for argument; otherwise, the judgment below must stand. The same is true if (as the Court evidently believes) the Court of Appeals should have required an evidentiary hearing before resolving the merits question. If they erred in that regard their judgment should be reversed rather than remanded "in light of *Cone* v. *Bell*"—a disposition providing no hint that what we really want them to do (as the Court believes) is to consider an evidentiary hearing.

The systematic degradation of our traditional requirements for a GVR has spawned a series of unusual dispositions, including the GVR so the government can try a less extravagant argument on remand, see *Department of Interior* v. *South Dakota*, 519 U. S. 919, 921 (1996) (SCALIA, J., dissenting), the GVR in light of nothing, see

Youngblood v. *West Virginia*, 547 U. S. 867, 872 (2006) (same), and the newly-minted Summary Remand for More Extensive Opinion than Petitioner Requested (SRMEOPR), see *Webster* v. *Cooper*, 558 U. S. ___, ___ (2009) (slip op., at 3). Today the Court adds another beast to our growing menagerie: the SRIE, Summary Remand for Inconsequential Error—or, as the Court would have it, the SRTAEH, Summary Remand to Think About an Evidentiary Hearing.

It disrespects the judges of the Courts of Appeals, who are appointed and confirmed as we are, to vacate and send back their authorized judgments for inconsequential imperfection of opinion—as though we were schoolmasters grading their homework. An appropriately self-respecting response to today's summary vacatur would be summary reissuance of the same opinion, minus the discussion of *Cone*. That would also serve the purpose of minimizing the delay of justice that today's GVR achieves (Wellons has already outlived his victim by 20 years; he committed his murder in 1989).

SUPREME COURT OF THE UNITED STATES

MARCUS A. WELLONS *v.* HILTON HALL, WARDEN

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

No. 09–5731. Decided January 19, 2010

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's disposition of this case represents a misuse of our authority to grant, vacate, and remand (GVR). The decision of the Court of Appeals plainly rests on two independent grounds: first, that petitioner procedurally defaulted his claim that the judge, bailiff, and jurors had an inappropriate relationship that impaired his right to a fair trial and, second, that petitioner's claim failed on the merits. See 554 F. 3d 923, 936 (CA11 2009). While it is true that the first of these grounds is inconsistent with *Cone* v. *Bell*, 556 U. S. ___ , ___ (2009) (slip op., at 17–18), there is no basis for vacating the decision below unless some recent authority or development provides a basis for reconsideration of the second ground as well. But the *per curiam* identifies no such authority. Instead, the *per curiam* uses *Cone* as a vehicle for suggesting that the Court of Appeals should reconsider its decision on the merits of petitioner's claim.

In order to defend this disposition, the *per curiam* refuses to credit the Court of Appeals' explanation of the basis of its decision. The Court of Appeals twice stated in unequivocal terms that its holding on the merits of petitioner's claim was independent of its holding on the question of procedural default. See 554 F. 3d, at 937–938 ("[E]ven if these claims were properly before us on habeas review, we would not disturb the Georgia Supreme Court's conclusion on the merits of these claims"); *id.*, at 936 ("Even if we assume that Wellons's misconduct claims are

not procedurally barred, they do not entitle Wellons to habeas relief"). But the *per curiam* states that the Court of Appeals' consideration of the merits "may well have turned on the District Court's finding of a procedural bar" and that "we cannot be sure that [the panel's] reasoning really was independent of the *Cone* error." *Ante*, at 3, 5.

Even worse, the *per curiam* unjustifiably suggests that the Court of Appeals gave at most only "perfunctory consideration" to petitioner's claim that he was entitled to an evidentiary hearing and may not have "carefully reviewed" the relevant facts. *Ante*, at 3, 1. The majority may not be satisfied with the Court of Appeals' discussion, but the majority has no good reason for suggesting that the lower court did not give the issue careful consideration.

The District Court refused petitioner's discovery request on the ground that petitioner did not make a sufficient showing to warrant interrogation of the jurors. As the detailed opinion of the District Court reveals, the state habeas judge allowed petitioner's attorneys to contact all of the jurors and relevant court personnel; the attorneys succeeded in contacting all but 1 of the jurors; 6 of the 11 jurors who were contacted, as well as the bailiffs and court reporter, were interviewed; and the attorneys made a proffer of the information provided by these interviewees.[1] There is no suggestion that the attorneys were restricted in the questions that they were permitted to ask the interviewees, and it appears that the jurors who were interviewed spoke freely, even discussing their understanding of the judge's instructions on the law and the jury's delib-

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[1] As the District Court observed, "[p]etitioner's state habeas corpus counsel contacted all but one of the jurors seeking their comments." App. C to Pet. for Cert. 34. The proffer shows that six jurors were interviewed: DeArmond, *id.*, at 35, Henry, *ibid.*, Givhan, *id.*, at 36, Humphrey, *id.*, at 37, Moore, *ibid.* and Smith, *ibid.* The Court's description of some of the matters that the jurors mentioned during the interview confirms that these jurors "spoke freely." See *ante,* at 2, n. 1.

erations.[2] Cf. Fed. Rule Evid. 606(b). Interestingly, the proffer does not reflect that the attorneys asked any of the jurors what would appear to be the most critical question, namely, why the strange gifts were given to the judge or the bailiff.[3] See App. C to Pet. for Cert. 34–38. If any such questions had been asked and answers favorable to petitioner's position had been provided, one would expect that information to appear in the proffer.

After examining the proffer made by petitioner's attorneys, the District Court concluded that this submission did not justify formal discovery. With respect to what the *per curiam* describes as the "unreported *ex parte* contacts between the jury and the judge," *ante*, at 1—which apparently consisted of a brief exchange of words that occurred

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[2] The *per curiam* assumes that the jurors who were interviewed must have spoken only "in the briefest of terms" because "'everything that Petitioner. . . learned'" "filled only a few sheets of paper." *Ibid.* The mere fact that the unsworn proffer submitted by petitioner's state habeas counsel consisted of four pages, see App. C to Pet. for Cert. 35–38, does not seem to me to provide a sufficient basis for concluding that the jurors interviewed spoke only "in the briefest of terms." The length of the proffer is equally consistent with the possibility that the jurors interviewed spoke at length but did not supply information that petitioner's counsel deemed helpful to his case.

[3] The main reason for the interviews was to inquire about the gifts, and the proffer shows that the jurors who were interviewed discussed this matter. See, *e.g.*, App. C to Pet. for Cert. 35 (a juror "stated that 'we,' the jurors gave a pair of chocolate breasts to the bailiff and the chocolate penis just followed"); *ibid.* (a juror "stated that some of the jurors decided to send a pair of edible chocolate breasts to one of the female bailiffs and an edible chocolate penis to the trial judge"); *id.*, at 37 (a juror "remembered discussion about giving a chocolate penis to the judge"). Nevertheless, petitioner's proffer includes no information as to *why* the gifts were given—not even a statement to the effect that the jurors interviewed were asked this question and said that they did not know. Cf. *id.*, at 35 (noting that a particular juror "did not know *whose idea it was* to send the chocolate penis to the judge," but not including any representation as to her understanding of *why* the gifts may have been given (emphasis added)).

when the judge entered the room in a restaurant where the jurors were dining—the District Court concluded that "nothing that Petitioner has presented provides even the slightest indication that anything more than a simple greeting occurred," App. C to Pet. for Cert. 43.

With respect to the gifts that were given to the judge and a bailiff after the trial ended, the District Court stressed that they were "inappropriate" and represented "an unusual display of poor taste in the context of a proceeding so grave as a capital trial," *ibid.*, but the Court noted that petitioner had not proffered any evidence that any of the jurors or court personnel who were interviewed had said anything that substantiated the assertion that "an inappropriate relationship existed between the judge, the bailiff, and the jury," *id.*, at 44.

A fair reading of the Court of Appeals' opinion is that that court likewise held that petitioner was not entitled to the discovery he sought because that discovery was unlikely to yield evidence substantiating his claim. See 554 F. 3d, at 935 (quoting *Schriro* v. *Landrigan*, 550 U. S. 465, 474 (2007) ("When deciding whether to grant a federal habeas petitioner's request for an evidentiary hearing, 'a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief' ")).

I agree with the Court that the strange and tasteless gifts that were given to the trial judge and bailiff are facially troubling, and I am certainly not prepared at this point to say that the decision below on the discovery issue was correct. But unlike the Court, I do not think it is proper for us to use a GVR to address this matter. The lower courts have decided the discovery issue, and now this Court has two options. First, if we wish to review the question whether petitioner made a sufficient showing to justify interrogation of the jurors, we should grant the

petition for a writ of certiorari and decide that question. Second, if we do not wish to tackle that fact-bound question, we should deny review or GVR in light of a recent authority or development that casts doubt on the judgment of the court below. What the Court has done—using a GVR as a vehicle for urging the Court of Appeals to reconsider its holding on a question that is entirely independent of the ground for the GVR—is extraordinary and, in my view, improper.