January 19, 1976

MEMORANDUM TO THE CONFERENCE

Re: Capital Cases

I have read Jim Ginty's memorandum of today, and agree with his conclusions with one exception. It seems to me that the "other" issue in Songer v. Florida, No. 75-5800, may be a substantial one. While in the ordinary case it is certainly true that the reliance of the sentencing judge upon materials outside the record and not disclosed to the defendant or his counsel is permissible, Williams v. New York, 337 U.S. 241, the question takes on quite different coloration when the context is the constitutional validity of the sentence imposed. Without elaborating my concern, I suggest that we seriously consider substituting another Florida case for Songer. Proffitt v. Florida, No. 75-5706, seems, superficially at least, to be an ideal candidate.

P.S.
January 19, 1976

MEMORANDUM FOR THE CONFERENCE

Subject: Capital Cases

Pursuant to instructions of the Conference, this memorandum contains a more extensive presentation of the facts and issues involved in Gregg v. Georgia, 74-6257; Songer v. Florida, 75-5800; Jurek v. Texas, 75-5394; Roberts v. Louisiana, 75-5844; and Woodson and Waxon v. North Carolina, 75-5491. Roberts and Woodson are single-issue cases.

1. GREGG v. GEORGIA, 74-6257:

Facts: In November 1973, petitioner (then 25-years old) and a traveling companion named Allen (age 16) were hitchhiking north in Florida. They were picked up by Fred Simmons and Tex Moore. Subsequently, the automobile in which the four men were traveling broke down. A Florida State Highway Patrolman accompanied Simmons and Moore to an automobile dealer where Simmons purchased a 1960 red and white Pontiac. Simmons and Moore then reunited with petitioner and Allen and resumed their journey.

In north Florida, another hitchhiker, Dennis Weaver, was picked up. Petitioner drove during the period Weaver was in the car as both Moore and Simmons were drinking heavily. Weaver got out in Atlanta, about 11:00 p.m. the night of November 21. The other four men continued north.

Not too far from where Weaver was left off, in Gwinnett County, Georgia, the bodies of Simmons and Moore were found the next morning in a drainage ditch beside the highway. Simmons had been shot in the right corner of the right eye in the region of the temple and Moore had been shot once in the cheek and once in the rear of his head.

After reading about the murders in an Atlanta paper on November 23, Weaver contacted the Gwinnett County Police
Department, told them about his travels with the victims, gave descriptions of petitioner and Allen and the make and color of the automobile, and indicated that he thought their destination was Asheville, North Carolina. Based on this information, the Gwinnett Police broadcasted a wanted description for the car and suspects over the National Crime Information Center teletype. That message led to the subsequent arrest of petitioner and Allen in Asheville at 3:00 p.m. on November 24. At the time of the arrest, petitioner was driving a 1960 red and white Pontiac, subsequently determined to be the one Simmons had purchased. A "shake-down" search of petitioner produced a .25-caliber automatic pistol later found to be the murder weapon and $107 in cash. A search of the car produced a bill of sale of the car to Simmons and some old clothes, and a search of the motel room where petitioner was staying turned up a stereo tape outfit and a car stereo player.

Petitioner was given the Miranda warning at the time of his arrest and he signed a waiver of his rights. Petitioner and Allen were held at the police headquarters in Asheville. No interrogation of petitioner took place prior to the arrival of the Gwinnett County Police at approximately 9:30 that evening. After a hearing at which petitioner waived extradition proceedings, he was questioned at about 11:30 p.m. by a Gwinnett detective who first determined that petitioner had been advised of his rights and that he understood them. Petitioner gave a statement, reduced to writing, in which he admitted shooting Simmons and Moore, but claimed to have done it in self-defense. He also admitted taking the automobile and $400-500 from the bodies of the victims.

Apparently very soon after this first statement, petitioner made a second oral statement to one of the Gwinnett police officers. As the group was preparing to leave for the four hour drive back to Georgia, petitioner asked the officer for a cigarette. The officer gave him a cigarette and asked petitioner why he killed Simmons and Moore. As testified to at trial by the officer, petitioner's response was, "By God, I wanted them dead."

* The State's response says that this was determined from petitioner. The Ga. S. Ct. opinion is vague on this point. Petitioner doesn't mention it at all.
On the return trip to Georgia, they stopped at the scene of the crime shortly before 5:00 a.m., and in the presence of petitioner, Allen narrated how petitioner shot the two men. Allen, whose statement was testified to at trial by one of the detectives, related that when they stopped to permit Simmons and Moore to relieve themselves, petitioner told Allen "we're going to rob them"; that petitioner fired three shots at Simmons and Moore as they returned to the car; and that petitioner then went over to the two men, both of whom were then lying in a drainage ditch, and shot each in the head. Asked at the scene by the Chief of Police if that was how it happened, petitioner, as testified to by the Chief, replied that it was. When asked "You mean you shot these men down in cold blooded murder just to rob them?", petitioner replied "Yes."

Petitioner testified at trial, denying he made the above admissions and maintaining that he acted in self-defense when Simmons came at him with a knife or a pipe. No knife or pipe was found at the scene and the medical evidence indicated Simmons and Moore were highly intoxicated at the time of their deaths.

Petitioner was found guilty on both charges of murder and both charges of robbery. The jury recommended the death sentence on all four charges, finding in each instance that the offense was committed while the offender was engaged in the commission of another capital felony and that the offense was committed for the purpose of receiving property from the victims. Death sentences were imposed on each of the four counts.

In October 1974, the Ga. Supreme Court affirmed petitioner's convictions and the two death sentences for the offenses of murder, but set aside and remanded petitioner's two death sentences for the offenses of armed robbery.

Contentions: Petitioner presents the following five questions in his cert petition:

1. Whether probable cause for a subsequent warrantless arrest may be satisfied through information received from an informant who had not seen the commission of the crimes for which the arrest

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3/Allen entered a plea of guilty and received a life sentence. He did not testify at trial.
was made or any previous criminal or incriminating conduct on the part of the person arrested, and who had never been an informant in the past?

"2. Whether a waiver of rights executed after the administration of the Miranda warnings and at the time of arrest applies to custodial interrogation sessions held a matter of hours after arrest, where the person executing the waiver was neither interrogated at the time he was warned nor interrogated in the subsequent sessions by the same officers who had administered the Miranda warnings to him?

"3. Whether the totality of the circumstances under which a confession made by petitioner was obtained rendered the confession involuntary in violation of the Due Process of Law guaranteed by the Constitution of the United States?

"4. Whether the imposition and carrying out of the sentences of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

"5. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States and to the Due Process of Law and Equal Protection of the Laws guaranteed by the Constitution of the United States?"

On the first issue, petitioner asserts that there was insufficient probable cause to effect his arrest and, consequently, under the doctrine of Wong Sun it was error to admit into evidence the weapon, cash and other evidence seized from petitioner at the time of his arrest and also the statements he and Allen gave the Gwinnett Police. He urges that the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 114 (1964), applies to the "informant" Weaver's information, that Weaver was not known to the police and that they had no knowledge of his credibility and no corroboration of his "tip." Petitioner would limit United States v. Harris, 403 U.S. 573 (1971), to its facts.
The Georgia Supreme Court did not address petitioner's Aguilar contentions, but simply found that from the facts available to the police there was probable cause for a reasonably prudent person to believe that a crime had been committed by petitioner. The Georgia court noted the detail of the information provided by Weaver and cited to Harris.

The State, in its response, relies on the Supreme Court's holding. It points out, moreover, that a gas station receipt with a license number written on it was found in the pockets of one of the victims. The receipt corroborated Weaver's account of driving from Florida, and the license number, when forwarded to Florida police, led to a car description which also corroborated Weaver's statement. This circumstance is not referred to in the Supreme Court's opinion.

Petitioner cites no authority on point in support of his second issue, but relies on various dicta of Miranda and the fact that 13-15 hours passed between petitioner's waiver and his oral admission to the Chief of Police.

The Georgia Supreme Court noted that prior to petitioner's initial interrogation at 11:30 p.m., the Gwinnett County detective ascertained, apparently from petitioner, that he had been advised of his rights and that he understood them. The Court, citing two state cases in which there were lapses of 8 hours and 2 days, respectively, rather summarily found that petitioner's Miranda warnings had not gone stale.

Respondent Georgia asserts that a mere lapse in time without a reiteration of a former warning is not itself sufficient to invoke the exclusionary rule. The State cites three CA decisions: United States v. Manor, 454 F. 2d 342 (7th Cir. 1971) (1 hour lapse); United States v. Ostenberg, 423 F. 2d 704 (9th Cir. 1969), cert denied, 399 U.S. 914 (1970) (1 1/2 hour lapse); Miller v. United States, 396 F. 2d 492 (8th Cir. 1968), cert denied 393 U.S. 1031 (1969) (3-4 hour lapse).

As his third contention, petitioner urges that his confession must be considered involuntary under the "totality of the circumstances" standard of Haynes v. Washington, 373 U.S. 503 (1963). Petitioner's arguments here are not well focused and he makes no specific claims of overbearing, confusion, etc.

"Considering the totality of the circumstances," the Georgia Supreme Court found that the record supports the deter-
mination by the judge in a *Jackson v. Denno* hearing and by the jury that the statements were voluntarily made.

The State relies on the finding of the Supreme Court and notes that the determination here is essentially factual, citing *Lego v. Twomey*, 404 U.S. 477 (1972).

**Discussion:** Petitioner's probable cause issue clearly appears to lack merit. First, the State's added fact that the license number of the vehicle was obtained off the body of one of the victims, if supported by the record, would seem to resolve any corroboration issue. Second, the detail of Weaver's information itself supports its reliability. And third, the dubiousness with which informer's "tips" are considered, as expressed in *Aguilar*, would not seem applicable here. Weaver does not fit into that category of witness.

The 13-15 hour lapse between petitioner's Miranda warning and waiver and his oral admission is more troubling. However, there is no present per se rule governing and the lapse is probably just another circumstance to be considered in assessing the voluntariness of petitioner's confession. See *Schneckloth v. Bustamonte*, 412 U.S. 218 227 (1973). As such, the issue raised by petitioner is factual and the determination of the Supreme Court weighs heavily against its merit.

**Conclusion:** Certiorari may be limited to questions 4 and 5.

2. **SONGER v. FLORIDA, 75-5800:**

**Facts:** At approximately 6:00 a.m. on a cold morning in December, 1973, hunters searching for their lost dogs in rural Citrus County, Florida observed an automobile with its motor running, parked on a gravel road about fifty yards from the highway. They approached the car, knocked on the window of the passenger side and spoke to one, Ronald Jones, who raised up from a prone position on the front seat. Petitioner was lying down on the back seat with his face toward the front. Although he did not sit up or speak to them, petitioner's eyes were opened and he appeared to be listening to the conversation about dogs going on between the hunters and Jones.

Subsequently, between 8:30 and 9:00 a.m., two other hunters were about thirty feet behind Trooper Ronald Smith of the Florida Highway Patrol when he stopped to check the parked vehicle. *These hunters saw Smith approach the car which had*
an Oklahoma license plate, talk with Jones, search Jones at the rear of the automobile, and return to the car with his hand on his pistol. Smith leaned into the car and over the back seat as if to wake up the other subject. Suddenly, a fusillade of shots occurred. Trooper Smith died from four bullet wounds in his upper body and a wound in one knee. Petitioner came out of the back seat, shot once at the hunters when they told him to stop, jumped back inside the car and with Jones driving, attempted to drive away. One of the hunters shot the tires out and, as Jones and petitioner attempted to flee, shot Jones in the foot. Petitioner surrendered.

At his trial, petitioner, then 23-years old and an escapee from an Oklahoma "work-release" program, testified that he had been on drugs for four years and on his trip to Florida had taken "just various kinds, L.S.D., speed, marijuana." He testified that he was under the influence of drugs at the time of the shooting when he woke to find a "vision"—an arm that was pulling him—so he rolled to the floor of the car where he got his single action gun and fired repeatedly at the vision.

On instructions that they could find petitioner not guilty or guilty of first, second, or third degree murder, or manslaughter, the jury convicted petitioner of first degree (premeditated) murder. After a sentencing hearing, the jury recommended that petitioner be executed.

The trial judge then noted his receipt of a presentence investigation report (not seen by the jury) and the receipt by trial counsel of "a copy of the portion thereof to which they are entitled." The court expressly considered factual information contained in the report. It subsequently entered its judgment and sentence and filed its written findings in support of the death sentence.

Contentions: Petitioner raises the following questions in his cert petition:

*A previous memorandum that Smith was investigating the car as being stolen. He apparently was not at the time he approached the car since had had called in the license number of the vehicle to his dispatcher and was advised the car was not reported as stolen. What Smith was investigating is not clear.
"I. Whether the imposition and execution of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendments to the Constitution of the United States?

"II. Whether nondisclosure of a "confidential" portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment when the trial judge imposes the death sentence partially on the basis of the pre-sentence report?"

On the second issue, petitioner adopts the argument contained in Gardner v. Florida, No. 74-6593, on the same issue. He notes, however, that in contrast to the situation here, the jury in Gardner, which did not have access to the presentencing report, recommended mercy.

In Gardner, it is urged that at least some of the due process protections available at the guilt phase of the trial should be available at the sentencing stage. An analogy is drawn to the Colorado Sex Offenders' Act procedures successfully challenged in Specht v. Patterson, 386 U.S. 605 (1967). Violation of the right to counsel and due process are suggested.

The Florida Supreme Court held that consideration of the presentencing report was consistent with the sentencing procedures of the capital punishment statute and that there was no error. The Supreme Court noted that petitioner did not object to consideration of the report at trial and "that he received a copy of the PSI and had the opportunity to rebut it prior to sentencing." The Court does not address the constitutional issue.

Respondent Florida contends that the Court is without jurisdiction to consider this question since petitioner did not raise the constitutional issue before the Florida courts. The State attaches pertinent portions of petitioner's assignments of error and briefs. On the merits, it quotes from Williams v. New York, 337 U.S. 241, 252 (1949):

"'We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information
to assist him in the exercise of this awesome power of imposing the death sentence."

The State also notes Rule 32(c)(2), Fed. R. Crim. P., and Gregg v. United States, 394 U.S. 489 (1969), that in federal practice sentence reports are not made available to the defendant as a matter of right.

Discussion: There would first of all appear to be a factual question here as to whether or not anything in fact was withheld from petitioner. Secondly, petitioner's assignment of error to the Florida Supreme Court simply provides: "The court erred in ordering and considering the presentence investigation of defendant." and petitioner's brief argues only the statutory question. Finally, whatever analogy may be drawn to Specht is considerably weakened here by the requirement that the trial court reduce its justifications for the death penalty to writing and the mandatory appellate review of those justifications.

Conclusion: Certiorari can be limited to question I.

3. JUREK v. TEXAS, 75-5394;

Facts: In the afternoon of August 16, 1973, in Cuero, Texas, petitioner, then 25-years old, was, as related in his confession, driving around in a pick-up truck with two teen-age friends "drinking beer [and talking] about getting some pussy." One girl mentioned as a possibility could not be found; three 12-year olds playing in the park were eyed but not approached when one of the friends said they were "too young." Petitioner then dropped off his two friends and drove back to the park's swimming pool. The 10-year old victim who knew petitioner was invited for a ride; she crawled into the back of the pick-up. Several witnesses saw petitioner's readily identifiable truck, with the girl in back, speeding through town, with her screaming for help.

Petitioner drove out to a nearby river and got out; he and the victim talked for awhile. Petitioner became angry and choked her until she fell to the ground. He then picked up her body and threw her into the river. The child's body was discovered two days later. She had died by drowning. There was no evidence of sexual abuse.

When a search was started later that evening, one of the witnesses who had seen the girl conversing with someone in a
pick-up at the park identified the pick-up as the truck parked in front of petitioner's residence. Petitioner was arrested without a warrant at 1:15 a.m., August 17. The officers who arrested petitioner were aware of an outstanding arrest warrant for petitioner in another city, which they verified soon after his arrest.

The arresting officers gave petitioner the Miranda warning at the police station and questioned him for 45 minutes. Petitioner denied knowing where the child was. At 2:30 a.m. he was placed in a cell and was left alone until the morning when the county attorney questioned him, with Miranda warnings, for 15 minutes. Petitioner again denied any complicity. Two or three other officers spoke with him briefly during the morning. At approximately 12:40 p.m. he was taken to Austin for a lie detector test. Certain oral statements made there led to the discovery of the girl's body—petitioner admitted the murder.

After returning to Cuero about 9:30 p.m., petitioner was taken to a magistrate and advised that he was accused of murder with malice. About four hours later, after questioning by the district and county attorney, again with Miranda warnings, petitioner gave his first full confession at 1:15 a.m. (the 18th), in which he stated that he killed the child because she made derogatory comments about his family. He was then taken to an out-of-town jail to avoid contact with the victim's father. He was returned to the Cuero jail that afternoon where at approximately 7:30 p.m. that evening he gave his second confession. In this confession he stated that he had not told the complete truth in his earlier statement and that he killed the girl because she refused his sexual advances.

Counsel was appointed three days later.

The trial court found petitioner's confessions admissible, with written findings, after a pre-trial hearing. Psychiatric testimony at trial on the issue of voluntariness showed: petitioner had an overall IQ of 50—borderline mental retardation; that he had basic capacity to understand the card with the Miranda warnings and his own statements written out, but that under stress petitioner could tend to be swayed into signing something against his interest. There was also evidence presented that at the time of the signing of the confessions, petitioner was "nervous," "fidgety," "anxious" and that he "only spoke in monosyllables."

The jury found petitioner guilty of "capital murder while in the course of committing or attempting to commit kidnapping

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Petitioner notes that twelve members of the voir dire panel were excused for cause after indicating their opposition to capital punishment. No related Witherspoon issue is raised on cert, and apparently none was below.
and/or forcible rape." which language tracks one of the enumerated offenses in the Texas capital punishment statute.

Contentions: Petitioner raises the following questions in his cert petition:

"1. Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

"2. Was the admission at trial of petitioner's written confessions consistent with federal standards protecting rights secured by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?"

On the second issue, petitioner generally urges that the circumstances of his confession were unduly coercive and precluded a knowing, intelligent, voluntary waiver of his rights to remain silent and to be assisted by counsel. He notes in particular his low IQ, the delay in bringing him before a magistrate, the frequency of interrogation and lack of counsel. See generally, Gallegos v. Nebraska, 342 U.S. 55, 65 (1951).

Petitioner also contests the admission of his confession as a product of an unlawful arrest, citing Wong Sun and Morales v. New York, 396 U.S. 102 (1969) and challenging the Texas CCA's holding that they would be admissible "even though the arrest may have been under invalid process or without any process or legal right." Petitioner also challenges the CCA's alternative finding of probable cause for arrest.

After reviewing the facts, the Texas CCA notes that petitioner was warned repeatedly of his Miranda rights, that there is no evidence that he was deprived of food or sleep or denied customary amenities and that there is evidence that petitioner was alert enough to make minor corrections in the confessions before signing them. The CCA then notes that both the trial judge, after a Jackson v. Denno hearing, and the jury found the confessions voluntary and that "[a]bsent undisputed evidence which would render the confession inadmissible as a matter of law, the Court will not reverse the findings of the trial judge and jury as to the voluntariness of the confession. Lisenba v. California, 314 U.S. 219."
On the probable cause issue, the CCA refers to the many sightings by witnesses of petitioner's truck, particularly the identification of the pick-up by one of the witnesses as one at which the victim had stopped to converse with the driver earlier in the day. [That this particular identification was known to the police prior to the arrest apparently is conceded by petitioner. cert petition at 52 n. 56.] The CCA also notes the awareness of the arresting officers of the outstanding warrant for petitioner.

In response, the State aligns itself with the CCA.

Discussion: Again, this appears to be a "totality of the circumstances" issue similar to the one raised in Gregg. And again, although certain of the circumstances may be disturbing, the question is a factual one and the determinations below weigh heavily against its merit.

Conclusion: Certiorari may be limited to question 1.

4. ROBERTS v. LOUISIANA, 75-5844:

Facts: The facts provided by the present pleadings are very sketchy. No response has been received. The evidence petitioner was convicted on is not stated either in the cert petition or in the Louisiana Supreme Court opinion. The cert petition does not provide a statement of facts.

The opinion summarily relates that Richard Lowe, an attendant of a gas station, was shot and killed during an armed robbery committed by petitioner and one Calvin Arceneaux. Petitioner and Arceneaux entered the station office unarmed but removed a revolver from a desk drawer and used it to threaten, and finally kill, the attendant. The robbery netted petitioner and his accomplice two guns, two empty money bags and three dollars. The murder weapon was entered into evidence.

Contentions: Petitioner raises only a capital punishment question:

"1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Louisiana violates the Eighth or Fourteenth Amendments to the Constitution of the United States?"
Discussion: Obviously petitioner confessed or Arceneaux testified at the trial, but no confession issue was raised below and although petitioner raises prosecutorial discretion in his capital punishment argument, he does not allude to any deals made involving Arceneaux. The status of Arceneaux is not revealed. Similarly, no search and seizure issue was raised below. Aside from the capital punishment issue and the Taylor issue (women were excluded from petitioner's grand and petit juries), petitioner raised no substantive federal issues in the State Supreme Court.

Conclusion: The particulars of this case remain to be divulged. On the issues presented, however, there is no need to limit certiorari.

5. WOODSON and WAXTON v. NORTH CAROLINA, 75-5491:

Facts: Petitioners' convictions for first degree (felony) murder were based on their own testimony at trial and on the testimony of two accomplices, Tucker and Carroll, who were permitted to plead to lesser offenses and were sentenced to terms of imprisonment of from 20-30 years.

The testimony established that petitioners, Waxton (age 24) and Woodson (age 23), and two other black men--Tucker (18) and Carroll (19)--planned the armed robbery of an E-Z Shop in Dunn, N.C. Tucker and petitioner Waxton entered the store while Carroll and petitioner Woodson remained in a car outside. As she was about to wait on him, petitioner Waxton shot and killed the white shop attendant. [The North Carolina Supreme Court noted that the only significant difference in the testimony relates to who fired the shot that killed the store attendant; and, since each admitted being one of the four who conspired to rob the shop, legally it makes no difference whether Waxton or Tucker did it. Waxton, understandably, points the finger at Tucker. Tucker accuses Waxton. The testimony of Carroll and Woodson, although not eyewitnesses, strongly implicates petitioner Waxton. No findings are made on this point below.]

Contentions: Petitioners present only the capital punishment question:

"Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?"

Conclusion: Certiorari need not be limited.
ALTERNATIVE SELECTIONS:

I understand that as possible alternatives to Gregg v. Georgia, House v. Georgia, 74-5196 and McCorquodale v. Georgia, 74-6557, were considered.

1. HOUSE v. GEORGIA, 74-5196:

Facts: Petitioner, a 25-year old white male at the time, had been drinking heavily and was seen in the neighborhood the day of the offense. It is not clear how petitioner came under suspicion, but his confession relates that the two seven-year old boy victims followed him into the woods and were "picking" on him. When they would not leave him alone, he grabbed each of them by the neck. He made them take their clothes off and committed anal sodomy on both of the boys. When they kept on hollering, petitioner choked them to death.

The deceased children, when found, were nude. There was evidence that they both had been sexually assaulted and strangled with great force. Blood stains matching the type of one of the children were found on petitioner's pants.

Petitioner has no previous felony conviction. There was no evidence that he had previously been involved in any sex-related offenses or that he committed any crimes of violence. One year prior to his current conviction, petitioner was tried for another murder and was acquitted by a jury.

Petitioner contested the voluntariness of his confession at trial and on appeal. Allegations of physical abuse by the police were effectively rebutted. Petitioner, with Mr. Greenberg on the case, does not pursue the issue on certiorari.

Contentions: Counsel states at the beginning of the cert petition, p. 4:

"It is felt by counsel for petitioner that no question of constitutional importance is presented by the conviction of the petitioner. Petitioner will therefore confine himself in the petition to the question of the penalty imposed upon him. . . ."

The petition raises only the capital punishment question:
1. Whether the Georgia statute reinstating the death penalty permits discretionary imposition of that penalty in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the decision of this Court in *Furman v. Georgia*, 408 U.S. 238 (1972)?

2. Whether the punishment of death by electrocution violates the proscription of cruel and unusual punishment contained in the Eighth Amendment to the Constitution of the United States?

**Conclusion:** If taken, certiorari need not be limited.

2. **McCorquodale v. Georgia, 74-6557:**

**Facts:** In a bar along Atlanta's "Strip," petitioner, a male and a female friend accused the 17-year old victim of taking $40 or $50 from the male friend and giving the money to a black pimp. The young girl was then taken to the female friend's apartment where in the presence of the friend and her roommate, the two males physically and sexually assaulted the victim. The assault involved torture. Petitioner, after announcing that he would kill the girl, strangled her to death.

Two days after the homicide, Fulton County Detective Landrum was told that an informant of the Douglas County Sheriff's Office had told the sheriff that the perpetrators of the crime were known as "West" and "Bonnie." The informant had given their "general descriptions" and said that they frequented the "Strip" area of Atlanta.

Landrum knew of two people on the "Strip" by those names. He went there and contacted his own informant who told him that the murderer was "West" McCorquodale, and that the murder occurred in Bonnie Succow's apartment. Shortly thereafter he pointed out "West" to the detective.

Landrum approached petitioner and "told him we'd like to talk to him down at the police station" about a homicide. He read petitioner his Miranda rights. The detective testified at trial that petitioner was not under arrest and went with him voluntarily. Petitioner was readvised of his rights at the station and signed a waiver-of-counsel form. He at first denied knowledge of the murder. Meanwhile, however, the police found Bonnie Succow
and obtained a statement from her. Confronted with her statement, petitioner confessed.

The State argues that petitioner was then put under arrest. Prior to the confession, blood stains had been observed on petitioner's clothes and the clothes were seized. Miss Succow consented to the search of the apartment and various items were seized which together with the analysis of blood on petitioner's pants were later introduced into evidence. No warrant was obtained for petitioner's arrest or for the search of his person or the apartment.

In a pre-trial motion, petitioner contended that he was arrested at the "Strip" before the police had probable cause to do so and claimed that the clothing and confession should be suppressed. The motion was denied.

During the selection of the jury, the State examined veniremen regarding their attitudes toward capital punishment. Over petitioner's objection, seventeen of the veniremen were excluded for cause; fifteen were excluded when they stepped forward in response to the prosecution's request for those conscientiously opposed to capital punishment who would let their opinion prevent them from voting for the death penalty or from being fair and impartial on the question of guilt or innocence. Two other veniremen were subsequently excused for cause during the individualized voir dire.

The trial court rejected a guilty plea which petitioner sought to enter and instructed that a plea of not guilty be entered for him. The trial court also denied petitioner's request to waive a jury trial. Petitioner admitted his guilt during opening argument and presented no evidence. The jury returned a verdict of guilty of murder.

During his closing argument to the jury on sentencing, the assistant district attorney declared "after your decision, the Appellate Court will have a very important responsibility." The trial court instructed the jury to ignore the remark.

Contentions: Petitioner raises the following four questions in his cert petition:

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?
"2. Whether the exclusion for cause of seventeen veniremen on the ground of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

"3. Whether the decision of the court below holding petitioner's "technical arrest" valid on the basis of information obtained after the petitioner's apprehension and transportation to the police station is inconsistent with controlling decisions of this Court which establish that any significant deprivation of liberty is a "seizure" under the Fourth Amendment to the Constitution of the United States which requires constitutional justification, whether or not denominated an "arrest" and whether or not followed by a "technical arrest"?

"4. Whether a prosecutor's knowing, calculated and intentional declaration to the jury during closing argument at the penalty phase of a capital trial that "the Appellate Court will have a very important responsibility" subsequent to the jury's decision violates the Due Process Clause of the Fourteenth Amendment in a capital case where petitioner was subsequently sentenced to death?"

On the second issue, petitioner objects to the prosecution's method of addressing the veniremen en banc. He further argues that Witherspoon v. Illinois, 391 U.S. 510 (1968) established a prohibition against excluding veniremen for cause on account of their conscientious or religious scruples against the death penalty. He contends that the general voir dire did not make "unmistakably clear" that the excused veniremen would automatically vote against the imposition of capital punishment or that their conscientious scruples would prevent them from making an impartial decision as to guilt or innocence. See Witherspoon, 391 U.S. at 522 n. 1. Petitioner, adopting the briefs in Eberhart v. Georgia, 74-5174, and Hallman v. Florida, 74-6168, also contends that the systematic exclusion of the entire class of death-scrupled jurors at the guilt stage of Georgia's bifurcated-trial system results in a non-representable jury, there being no legitimate reason for disqualifying such persons at this stage of the proceedings. Petitioner contends
that such disqualification violates his due process, equal protection rights and his 6th Amend. right to a representative jury.

The Georgia Supreme Court summarily denied this assignment of error, citing Witherspoon.

The State also relies on Witherspoon and urges that whether the jury that deliberates a defendant's guilt or innocence is to be the same jury that set the defendant's punishment in the event of a guilty verdict is a matter of state law. The State also urges that Witherspoon was decided under the 6th Amend. as well as the 14th Amend. and that there is no need to reconsider Witherspoon.

On the third issue, petitioner argues from the fact that he was "taken into custody" at the time the detective approached him on the "Strip" [attempts by petitioner's counsel to find out if petitioner was free to go when he "volunteered" to go to the police station were thwarted by the trial judge.] and that there then existed no probable cause for his arrest. Under the doctrine of Wong Sun, petitioner urges that both the evidence obtained from petitioner's clothing and his confession should have been suppressed.

The Georgia Supreme Court did not address the issue directly, but appears to have concluded that the "arrest" took place after the police had obtained Miss Succow's statement. The Court held:

"Where...the police have a local tip,... a tip transmitted by a sheriff in another county to the same effect, a complete statement by an eyewitness...and what appeared to be blood spatters on the defendant's trousers, they were justified in arresting the defendant..." (emphasis added)

The State insists petitioner was not under arrest at the time.

On the fourth issue, petitioner extensively argues that the prosecutor's remark lessened the jury's estimate of the weight of their responsibility and was not subject to correction. Petitioner argues that the suggestion that an appellate court would review and correct the sentence imposed has traditionally been reversible error in capital cases where a death penalty if imposed, citing a number of state decisions.

The Georgia Supreme Court held that the remark did not constitute reversible error, finding no "manifest abuse" of the
Citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974) and Cupp v. Naughten, 414 U.S. 141 (1973), the State claims that the remark did not rise to the level of fundamental unfairness.

Discussion: Several of the cases before the Court raise Witherspoon questions. The holding of that case appears quite clear but, apparently, there is some question as to the application of its standards. The questions asked here were precise and within the guidelines of Witherspoon. Unless there is some question about the use of general voir dire to ascertain the extent of one's conscientious scruples against the death penalty, petitioner's second question would appear to lack merit. [Although counsel objected to the excusal of these veniremen for cause, there is no indication that he attempted to and was precluded from "rehabilitating" the excused veniremen. See petition, pp. 21-22. Had he been, this might put a different light on the issue.]

The probable cause for arrest issue is factual. What the police would have done if petitioner had not volunteered to go to the police station seems irrelevant. The apparent fact is that he did volunteer.

Petitioner's last issue is stronger than the usual prosecutorial misconduct assignment of error not only because of the punishment, but also because of the jury's unique function under the Georgia capital punishment statute. The question is nevertheless a factual one and the remark here does not appear to raise the issue to one of constitutional dimension. Moreover, in a case cited and appended by petitioner, Prevatte v. State, the Georgia Supreme Court has shown itself willing to reverse where the misconduct exceeds the bounds of due process.

Conclusion: Certiorari can be limited to question 1.

SUMMARY:

1. Gregg v. Georgia, 74-6257, grant limited to questions 4 and 5.
2. Songer v. Florida, 75-5800, grant limited to question 1.
3. Jurek v. Texas, 75-5394, grant limited to question 1.
4. Roberts v. Louisiana, 75-5844, no need to limit grant.
5. **Woodson v. North Carolina, 75-5491, no need to limit grant.**

   It is noted that the form of the order granting certiorari in Furman and in each of the companion cases read:

   "Petition for writ of certiorari to... limited to the following question:


   Fowler is a single-issue case and certiorari was simply granted.

   [Signature]
   James B. Ginty
January 20, 1976

Re: Capital Cases

MEMORANDUM TO THE CONFERENCE:

I have Potter's memorandum of January 19 and I agree with him to the extent that we should take no case on which we do not all agree to limit the issue.

Before we conclude to take Proffitt in place of Songer, I trust each one will review the material available.

Regards,
MEMORANDUM TO THE CONFERENCE

Re: Capital Cases

In Songer v. Florida, No. 75-5800, the issues other than the death penalty are insubstantial in my view and I would be comfortable limiting the grant in that case as Jim Ginty concludes. I would, however, limit the grant in Gregg v. Georgia, No. 74-6257, to Question 4 and would not include Question 5 as Jim suggests.

B.R.W.

January 20, 1976
MEMORANDUM FOR THE CONFERENCE

Subject: Capital Cases

My memorandum yesterday did not discuss a possible exception to Songer v. Florida:

PROFFITT v. FLORIDA, 75-5706

Facts: At about 4:45 a.m. July 10, 1973, the decedant's wife, Patricia Medgebow, was awakened by her husband's moaning. She saw her husband propped up on one elbow with what later was discovered to be a knife in his hand. Suddenly, a man jumped up and struck Mrs. Medgebow several times before fleeing through the open sliding glass doors of the garden apartment. Fingerprints were later found on the door. They did not match petitioner's prints. There was "quite a bit of light" in the room and Mrs. Medgebow was able to give the police a description of her assailant but, at trial, she was unable to identify the appellant as the man. In her description, she claimed that the assailant was wearing a white pen-striped shirt and either brown or grey trousers. She testified that the assailant's shirt did not have a "Maas Brothers" emblem. She also stated that on the evening prior to the killing she had shared a marijuana cigarette with four other people.

A co-worker of petitioner testified that he had been drinking with petitioner that evening, that petitioner had dropped him home about 3:30 or 3:45 a.m. and that petitioner was wearing a white Maas Brothers' shirt with a blue oval emblem over the left breast, and grey trousers.

Petitioner's wife testified that petitioner had gone to work wearing a white Maas Brothers' shirt and grey pants the previous day (July 9) and that petitioner had on the same clothes when he returned to the couple's trailer about 5:15 a.m. the next morning (July 10). When he returned, petitioner went
into a bedroom, packed and left. Mrs. Proffitt called the police.

Mrs. Bassett who lived in the two bedroom trailer with petitioner and his wife testified she was awakened about 5:30 a.m. that morning and overheard a conversation between petitioner and his wife. She did not hear the complete conversation, but she testified that she did hear petitioner say that he had stabbed and killed a man during an attempted robbery and that he had beaten a woman. Mrs. Bassett stated that she had not seen petitioner, but she was sure his was the voice she heard.

A droplet and a smear of human blood were found on the Maas Brothers’ shirt, but the quantity was insufficient to type.

On this evidence, the jury found petitioner guilty of first degree murder.

During the sentencing portion of the bifurcated proceeding, a doctor testified that during a jail interview with petitioner, petitioner admitted that he had killed a man as a result of an "uncontrollable desire" and explained how he had rode around and found a place where a patio door was open and "went in and killed a man." The doctor testified that he considered petitioner a danger to society, "absolutely."

The jury recommended the death penalty and the court sentenced petitioner to death.

On appeal, petitioner raised eleven issues, most of which concerned evidentiary or procedural matters. He did object to the excusal of one juror because of "preconceived notion about the death penalty" but the facts are nowhere developed and the Florida Supreme Court summarily denied the assignment of error.

Contentions: Petitioner raises only the capital punishment question in his cert petition.

"1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?"
Conclusion: If taken, cert need not be limited.

James B. Ginty
January 21, 1976

MEMORANDUM TO THE CONFERENCE:

1. Gregg v. Georgia, 74-6257:

   If this were not a capital case, I would not vote to grant cert to decide Question 2. However, since it is a capital case, since the question has not previously been decided, and since the death sentence may rest largely on the defendant's admissions, I will vote to grant with respect to Question 2.

2. Songer v. Florida, 75-5800:

   In order to have a complete understanding of the sentencing judge's discretion under the Florida statute, we may need to know whether it is permissible for him to rely on material which is not in the record and which is not disclosed to the defendant. I am, therefore, persuaded that we should take Songer rather than Proffitt, and that we should grant cert on Question 2 as well as Questions 4 and 5. (I should explain that I think the arguments related to Question 5 may affect our consideration of the validity of the statutory scheme and, therefore, that question should be considered as well as Question 4.)

3. Jerek, 75-5394; Roberts, 75-5844 and Woodson, 75-5491:

   I agree with Mr. Ginty's recommendation.

Respectfully,

[Signature]

Copies to the Conference
January 21, 1976

MEMORANDUM TO THE CONFERENCE:

I am in accord with Jim Cinty's recommendations, except that I would substitute *Proffitt v. Florida*, No. 75-5706 for *Songer*.

Proffitt substituted for Songer.

L.F.F., Jr.

1-21-76
January 21, 1976

Capital Cases

MEMORANDUM TO THE CONFERENCE:

I am in accord with Jim Ginty's recommendations, except that I would substitute Proffitt v. Florida, No. 75-5706 for Songer.

L.F.P., Jr.
Memorandum to the Conference:

1. Gregg v. Georgia, 74-6257:

If this were not a capital case, I would not vote to grant cert to decide Question 2. However, since it is a capital case, since the question has not previously been decided, and since the death sentence may rest largely on the defendant's admissions, I will vote to grant with respect to Question 2.

2. Songer v. Florida, 75-5800:

In order to have a complete understanding of the sentencing judge's discretion under the Florida statute, we may need to know whether it is permissible for him to rely on material which is not in the record and which is not disclosed to the defendant. I am, therefore, persuaded that we should take Songer rather than Proffitt, and that we should grant cert on Question 2 as well as Questions 4 and 5. (I should explain that I think the arguments related to Question 5 may affect our consideration of the validity of the statutory scheme and, therefore, that question should be considered as well as Question 4.)

3. Jerek, 75-5394; Roberts, 75-5844 and Woodson, 75-5491:

I agree with Mr. Ginty's recommendation.

Respectfully,

[Signature]

Copies to the Conference
January 21, 1976

MEMORANDUM FOR THE CONFERENCE:

Subject: Capital cases.

Absent dissent the attached order will issue tomorrow at 11:00 a.m.

All counsel who can be reached have been notified today.

Regards,

W. E. B.
January 22, 1976

74-6257 GREGG V. GEORGIA

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

The petition for a writ of certiorari is granted limited to
question 4 presented by the petition which reads as follows:

"Whether the imposition and carrying out of the sentences of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?"

75-5394 JUREK V. TEXAS

The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to
question 1 presented by the petition which reads as follows:

"Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States?"

75-5491 WOODSON and WAXTON V. NORTH CAROLINA
75-5706 PROFFIT V. FLORIDA
75-5844 ROBERTS V. LOUISIANA

The motions for leave to proceed in forma pauperis and the
petitions for writs of certiorari are granted.

The briefs of the petitioners in these cases shall be filed with the Clerk on or before February 25, 1976. The briefs for the respondents shall be filed on or before March 25, 1976. These cases are set for oral argument at 1:00 PM on March 30, 1976, subject to further order of the Court.

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