Following are my revised changes in response to Justice Blackmun's Memorandum of Nov. 27.

1. On page 4, change the first sentence of the first full paragraph to read: "In Rose v. Mitchell, 443 U.S. 545 (1979), the Court contended that the principle of these cases is inapplicable to grand jury discrimination claims, because grand jury discrimination 'destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.'" At the close of that sentence, insert the following footnote:

Although all parts of JUSTICE BLACKMUN's opinion in Rose v. Mitchell were joined by four
other Justices, its precedential weight is subject to some question. In particular, part II of the opinion—the part that discusses the legal principles applicable to grand jury discrimination claims generally—was not joined by five Justices who also joined in the judgment. Cf. Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) (Court's holding is "that position taken by those members who concurred in the judgment on the narrowest grounds"). Moreover, the opinion's discussion of general principles was wholly irrelevant to the result, which turned on the insufficiency of the evidence of discrimination. It is thus little more than an advisory opinion. See Flast v. Cohen, 392 U.S. 83, 94-95 (1968); Frankfurter, Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005-1007 (1924).

2. On page 5, text three lines from the bottom of the page, change the citation to read: "E. g., Rose v. Mitchell, supra, at 551; id., at 577-578 (Stewart, J., concurring in the judgment); id., at 590-591 (WHITE, J., dissenting)."

3. On page 6, text two lines from the bottom of the page, change the citation to read: "see Rose v. Mitchell, supra, at 558-559 (weighing costs and benefits of awarding relief to petitioners claiming grand jury discrimination)."
4. On page 11, change footnote 10 (once renumbered, it will be footnote 11) to read:

In my separate opinion in *Rose v. Mitchell*, supra, I took the position that, where a habeas petitioner is given a full opportunity to litigate his grand jury discrimination claim in state court, he should not be permitted to litigate the claim again on federal habeas corpus. 443 U.S., at 579 (POWELL, J., concurring in the judgment). I remain convinced that my conclusion was correct. Nor do I believe that in this case *stare decisis* weighs strongly against reexamining the question whether a defendant should be permitted to relitigate a claim that has no bearing either on his guilt or on the fairness of the trial that convicted him. *Rose v. Mitchell*, supra, decided in 1979, is the only case in which this Court has examined the issue, and *Rose's* authority is questionable. See note 4 supra.

It is unnecessary to reach the issue in this case, for I conclude that the judgment should be reversed on two other grounds: the harmless error, and the inappropriateness of the Court's remedy in cases in which the discrimination claim is raised so long after the claimant's conviction that retrial is difficult or impossible.

5. On page 13, change the first sentence of the first paragraph to read: "In *Rose v. Mitchell*, supra, the Court reasoned that the rule of automatic reversal imposes limited costs on society, since the State is able to retry successful petitioners, and since 'the State remains free
to use all the proof it introduced to obtain the conviction in the first trial."
TO: Justice Powell
FROM: Bill
DATE: December 2, 1985
RE: Vasquez v. Hillery, No. 84-836

Draft changes in response to Justice Blackmun's memorandum of Nov. 27

Following are my suggested changes in response to Justice Blackmun's Memorandum of Nov. 27, in which he objected to the use of the word "plurality" to describe his opinion in Rose v. Mitchell, 443 U.S. 545 (1979).

1. On page 4, change the first sentence of the first full paragraph to read: "In Rose v. Mitchell, 443 U.S. 545 (1979), JUSTICE BLACKMUN argued that the principle of these cases is inapplicable to grand jury discrimination claims, because 'destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.'" At the close of that sentence, insert the following footnote:
I recognize that JUSTICE BLACKMUN's opinion in Rose v. Mitchell is denominated an "opinion of the Court" in the United States Reports. 443 U.S., at 547. In my view, however, that label cannot properly apply to part II of the opinion—the part that discusses the legal principles applicable to grand jury discrimination claims generally. That part of JUSTICE BLACKMUN's opinion was joined by only two other Justices who also joined in the judgment. Ibid. (syllabus). In addition to these three, JUSTICE WHITE and JUSTICE STEVENS, both of whom authored dissenting opinions, expressed agreement with part II of JUSTICE BLACKMUN's opinion. Id., at 588 (WHITE, J., joined by STEVENS, J., dissenting); id., at 593 (STEVENS, J., dissenting). The precedential status of this portion of JUSTICE BLACKMUN's opinion thus rests on the agreement of the two dissenters.

Five or more Justices may agree on a particular abstract proposition of law, but it cannot be that such agreement automatically renders the medium of its expression an "opinion of the Court." The Constitution forbids the Court to issue advisory opinions; we must make our legal pronouncements in the context of actual controversies. Elast v. Cohen, 392 U.S. 83, 94-95 (1968); see Frankfurter, Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005-1007 (1924). It follows that an "opinion of the Court" must be a reasoned explanation of a judgment in which a majority of Justices join. The dissenting Justices who joined part II of JUSTICE BLACKMUN's opinion in Rose v. Mitchell did not thereby join in an explanation for the judgment in that case; to the contrary, they expressly dissented from that judgment. Their agreement with JUSTICE BLACKMUN's statement of principles thus has no more precedential weight than the rest of their comments in dissent. See Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) (Court's holding is "that position taken by those members who concurred in the judgment on the narrowest grounds").
2. On page 5, text three lines from the bottom of the page, change the citation to read: "E. g., Rose v. Mitchell, supra, at 551 (opinion of JUSTICE BLACKMUN); id., at 577-578 (Stewart, J., concurring in the judgment); id., at 590-591 (WHITE, J., dissenting)."

3. On page 6, text two lines from the bottom of the page, change the citation to read: "see Rose v. Mitchell, supra, at 558-559 (weighing costs and benefits of awarding relief to petitioners claiming grand jury discrimination)."

4. On page 11, change footnote 10 (once renumbered, it will be footnote 11) to read:

In my separate opinion in Rose v. Mitchell, supra, I took the position that, where a habeas petitioner is given a full opportunity to litigate his grand jury discrimination claim in state court, he should not be permitted to litigate the claim again on federal habeas corpus. 443 U.S., at 579 (POWELL, J., concurring in the judgment). I remain convinced that my conclusion was correct. Nor do I believe that in this case stare decisis weighs strongly against reexamining the question whether a defendant should be permitted to relitigate a claim that has no bearing either on his guilt or on the fairness of the trial that convicted him. Rose v. Mitchell, supra, decided
in 1979, is the only case in which this Court has examined the issue. The discussion in JUSTICE BLACKMUN's opinion in Rose was wholly irrelevant to the result, which turned on the sufficiency of the habeas petitioners' evidence. Moreover, that discussion did not command the support of five members who also joined in the judgment, and is therefore not binding precedent. See note 4 supra.

It is unnecessary to reach the issue in this case, for I conclude that the judgment should be reversed on two other grounds: the harmlessness of the error, and the inappropriateness of the Court's remedy in cases in which the discrimination claim is raised so long after the claimant's conviction that retrial is difficult or impossible.

5. On page 13, change the first sentence of the first paragraph to read: "In Rose v. Mitchell, supra, JUSTICE BLACKMUN argued that the rule of automatic reversal imposes limited costs on society, since the State is able to retry successful petitioners, and since 'the State remains free to use all the proof it introduced to obtain the conviction in the first trial.'"
December 5, 1985

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

Dear Byron:

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

Sincerely,

T.M.

Justice White

cc: The Conference
Re: No. 84-836 Vasquez v. Hillery

Dear Lewis,

Please join me.

Justice Powell

cc: The Conference

December 5, 1985
December 13, 1985

84-836 - Vasquez v. Hillery

Dear Thurgood,

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

Sincerely yours,

Justice Marshall

Copies to the Conference
Re: No. 84-836 - Vasquez v. Hillery

Dear Lewis:

Please show me joining your dissent.

Regards,

Justice Powell

Copies to the Conference
84-836 Vasquez v. Hillery (Bill)

TM for the Court 10/19/85
1st draft 11/7/85
2nd draft 11/13/85
3rd draft 12/5/85
4th draft 12/19/85
Joined by JPs 11/7/85
    WJB 11/8/85
    BRW 11/12/85
    RAB 11/15/85

LFP dissenting
1st draft 11/26/85
2nd draft 12/4/85
3rd draft 12/10/85
4th draft 12/20/85
Joined by WBR 12/85
    CJ 12/18/85

SOC concurring in the judgment
1st draft 12/10/85

LFP letter to TM 11/7/85
Seeing Justice Never Done

The case that would not end torments a California town

Hanford, Calif., is a farm community, the kind of place where people know each other by name and trust each other by nature. “You can go downtown without a dime in your pocket, do your shopping and come back to pay later,” says City Councilman J. Brent Malidi. “It’s not faceless like L.A.” In any town, the brutal killing of a teenage girl leaves a deep mark, but in Hanford the wound remains, 24 years after the crime. And now the U.S. Supreme Court has rubbed the wound open again all those years later.

Emerging from fundamental questions about the Constitution, Supreme Court rulings are fashioned to guide justice throughout the country. But their impact is felt not immediately on a smaller scale among the people whose controversies the court has ruled upon. People in Hanford understand the larger principle the court recently reaffirmed—that blacks may not be systematically excluded from grand juries—but most in town are horrified that the result may be the release of a man they believe is a forestside killer.

In March 1962, the body of 15-year-old Marlene Miller was found dumped in an irrigation ditch behind her home, a pair of scissors embedded in her throat, her shorts and underwear slit open. Within hours police arrested Booker T. Hillery Jr., a local black ranch hand already on parole from an earlier rape conviction. Circumstantial physical evidence, including his belt and tire prints from his car, was found near the scene of the crime. Hillery insisted on his innocence, but a jury found him guilty of murder, and he was sentenced to death.

Then began the sort of unremitting and tortuous legal battle that leads critics to complain that justice is never final in the U.S., while admirers say that justice is never prematurely closed off. Twice Hillery’s sentence was thrown out by the California Supreme Court because of irregularities in the sentencing phases of his trial. Twice he was recondemned to death. Then in 1974 his sentence was reduced to life because of a California decision barring capital punishment in the state.

In 1980, Hillery was paroled from a California prison and set free on parole from an earlier rape conviction. In December 1983, police arrested Hillery again, this time for digging out of storage nine key witnesses may have died since the original trial. Others have moved away. Old witnesses, like the best, the scissors and the tire track photographs, will have to be dug out of storage. Worse, although the Supreme Court’s Miranda decision was not handed down until four years after the killing, local rulings on its retroactive application may permit Hillery’s attorney to exclude statements made by his client after his arrest, Stiffer modern rules on evidence gathering may also apply.

“Something about this killing has stuck in this community,” says William Prati, California’s deputy attorney general. “These people won’t forget it.” Neighbors say that Marlene’s parents, now in their 70s, dread the possible reopening of the case. They still reside in Hanford, though the house they lived in at the time of their daughter’s death has long since been torn down. The memories have been harder to demolish. “The sad thing is that it keeps coming back,” says Marlene’s brother Walter Jr.

“The end is not in sight.”

—by Richard Laya

Reported by Paul A. Wittenham/Hanford

Local front page in 1962; Hillery in 1986

“These people won’t forget it.”

Time, February 17, 1986

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