

ARTICLE

REACHING OUT TO DO JUSTICE: THE RISE AND FALL OF THE SPECIAL DOCKET OF THE U.S. SUPREME COURT

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ABSTRACT

In 1964–1967, the Supreme Court put three complicated cases involving individuals in a permanent state of suspension on what would come to be known as the “Special Docket.” Under this largely unknown feature of the Court’s practice, the cases were held without decision until after the parties involved died in the 1990s. Although the impulse to mercy in these cases was understandable (all involved mental illness and two were capital cases), as a small experiment, it must be adjudged a failure because there is a reasonable possibility that in each case just outcomes were not achieved. Assuming that the Court thought judicial intervention was necessary to avoid an unjust outcome, using the normal tools of decision might have been better.

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<i>This is a court of law, young man, not a court of justice.</i>	<i>Man sows in joy and reaps in sorrow; His soul is fire, his feet are clay;</i>
Attributed to Oliver Wendell Holmes, Jr. ¹	<i>He builds his life upon tomorrow, And dies before he finds today.</i>
	Diana Kearny Powell ²

I. INTRODUCTION

In the mid-1960s, the Supreme Court put three cases in a permanent state of suspension, placing them on what the Court called the “Special Docket.” As terms passed, thousands of other cases came and went. Chief Justice Warren was replaced by Warren Burger, and he in turn was succeeded by William Rehnquist. But cases on the Special Docket, two capital cases and an attorney-discipline case, remained in limbo. The Court held them, apparently waiting for the parties to die. In 1994 and 1995, after the parties were dead, the Court disposed of the cases. The Special Docket is virtually unknown as an institutional feature of the Supreme Court. One major treatise on Supreme Court practice offered this description: “The ‘S’ or special docket is reserved for those matters of whatever description that have been taken off some other docket and are being held indefinitely for one reason or another.”³ Unanswered is the question of what reason would make the Court want to hold a case indefinitely without decision.

Two of the cases, *Anderson v. Kentucky* (S-1)⁴ and *Rees v. Peyton* (S-2),⁵ involved severely mentally ill death row inmates.

1. LAURENCE J. PETER, PETER’S QUOTATIONS 277 (1977).
2. Diana Kearny Powell, *Life*, AM. POETRY MAG., Apr. 1933, at 13.
3. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 26 (7th ed. 1993).
4. *Anderson v. Commonwealth*, 353 S.W.2d 381 (Ky. 1961), *cert. denied*, 369 U.S. 829 (pro se petition) and 369 U.S. 863, *and cert. granted*, 371 U.S. 886 (1962), 371 U.S. 937 (1962) (pro se motions denied), 376 U.S. 940 (“By joint agreement of the parties this case is continued indefinitely.”), 377 U.S. 902 (pro se motion to correct denied), 379 U.S. 805 (1964) (pro se motion for a hearing denied), *and cert. dismissed*, 515 U.S. 1155 (1995) (“It appearing that petitioner died April 6, 1994, the writ of certiorari is dismissed as moot.”).
5. *Rees v. Peyton*, 225 F. Supp. 507 (E.D. Va. 1964) (habeas corpus petition), *aff’d en banc*, 341 F.2d 859 (4th Cir. 1965), *jurisdiction retained*, 384 U.S. 312 (1966) (per curiam), *and petition for cert. held in abeyance*, 386 U.S. 989 (1967), *and cert. dismissed*, 516 U.S. 802 (1995); *see Rees v. Commonwealth*, 127 S.E.2d 406 (Va. 1962) (per curiam), *cert. denied*, 372 U.S. 964, *and reh’g denied*, 373 U.S. 947 (1963). *See generally* Phyllis L. Crocker, *Not to Decide Is to Decide: The U.S. Supreme Court’s Thirty-Year Struggle with*

The certiorari petitions presented difficult legal issues about how courts should handle such a defendant's efforts to fire lawyers and otherwise control the litigation. The Court's failure to decide probably reflected the Court's unreadiness to decide the issues on the merits. Yet, this difficulty cannot approach a complete explanation. As Alexander Bickel famously explained, the Court can deploy its "passive virtues" to deny review in cases that are both "cert. worthy" and involve high stakes when the Court is institutionally unprepared to confront the issues.⁶ Because the Court often lets even very important issues "percolate" in lower courts before granting certiorari, litigants in early cases may find themselves out of luck, even though they would have prevailed had their cases arisen later. In these two cases, though, instead of either denying review or reaching the merits, the Court essentially negotiated judicial settlements, making clear through correspondence with lawyers that these defendants should not be executed.⁷

In re Disbarment of Diana Kearny Powell (S-3) involved Diana Kearny Powell, an attorney, poet, and last member of a once-prominent family. Ms. Powell had professional connections with several members of the Court, having argued before the D.C. Circuit during Warren Burger's tenure as a judge there. But her major interaction with Chief Justice Burger and Justice Thurgood Marshall came in her own case, a lawsuit about a trust

One Case About Competency to Waive Death Penalty Appeals, 49 WAYNE L. REV. 885 *passim* (2004) (providing an in-depth review of the *Rees* case and how it remained on the Supreme Court docket for thirty years).

6. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46, 52 (1961). The Court's jurisdiction is now almost entirely discretionary. In *Newell v. Norton*, 70 U.S. (1 Wall.) 257, 268 (1865), the Court stated: "Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony." See Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 716–31 (2009) (discussing the Supreme Court's use of a procedure for granting certiorari, vacating the decision without a finding of error, and remanding cases back to the lower courts for reconsideration (GVRs) instead of accepting the case and providing a new ruling); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 394–95 (2004) (suggesting the role of the Supreme Court is not only to rule on those cases that do come before them, but also to determine which cases should come before them). See generally Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 275, 279 (2006); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 562, 565 (1985).

7. See *infra* Part II.A (discussing the *Anderson* case); *infra* Part II.B (discussing the *Rees* cases).

of which Ms. Powell claimed to be the sole beneficiary. As a D.C. Circuit judge, Warren Burger cast the deciding vote and wrote the opinion rejecting her claim. The decision brought him years of litigation, as Ms. Powell sued the Court, the Department of Justice, banks, lawyers, and others she held responsible for the unfavorable result. As Solicitor General, Thurgood Marshall defended one of the suits.

Because of her indiscriminate and intemperate lawsuits, which included multiple failed certiorari petitions and petitions for rehearing, the U.S. District Court for the District of Columbia, then the primary bar authority in the District, reluctantly disciplined her. Then, as now, a member of the Supreme Court bar disciplined by another bar was also subject to discipline by the Supreme Court.⁸ In 1967, as a matter of course, the clerk issued an order to show cause why Ms. Powell should not be reciprocally disciplined by the Supreme Court. The Court took no further action until 1994, four years after her death.⁹

This Article tells the story of the only three cases ever placed on the Supreme Court's Special Docket, *Anderson v. Kentucky*, *Rees v. Peyton*, and *In re Disbarment of Diana Kearny Powell*. It proposes that the impulse to do justice may have been noble, but ultimately the experiment failed. It almost certainly would have been fairer to the litigants themselves to have let the ordinary course of justice play out. This is not to say that the Court should not be concerned with injustices in particular cases, even if there is no major precedent to be established. Instead, the point is that the Court's delay might well have led to less favorable outcomes for the litigants themselves.

II. THE SPECIAL DOCKET CASES

A. *Anderson v. Kentucky (S-1)*

Henry Rogers Anderson was on death row for murder from 1960 until his death from natural causes in 1994. His certiorari petition was granted in 1962, but the Court never reached the merits, dismissing the case as moot in 1995, about a year after he died.

1. *The Crime*. On October 26, 1958, Earnest Alden Terry, Jr., a prominent Louisville doctor, was killed while walking to

8. SUP. CT. R. 8(1).

9. See *infra* Part II.C (discussing the *Powell* cases).

church. A man shot him once in the head and fired twice more into his body after he fell to the sidewalk. The shooter then retrieved a brown hat from his car and placed it and the gun next to the victim. As the shooter drove away, witnesses wrote down his license plate; police identified Henry Rogers Anderson as the car's owner. Minutes later, the police arrested Anderson at his apartment. After three witnesses identified him in a lineup, he was charged with murder.¹⁰

Henry Anderson was a native of Paducah, Kentucky.¹¹ He was well educated; he even received a law degree from Notre Dame and was admitted to the Indiana bar, although he never practiced.¹² Unemployed at the time of the murder, most recently he had worked for General Electric in Louisville.¹³ He was terminated in March 1958 after a year's leave of absence;¹⁴ General Electric placed him on leave because Anderson, flying a small plane, dropped 30,000 pamphlets over General Electric's facility.¹⁵ Entitled "War Declared; General Electric, Traitor to Democracy" and written under Anderson's pen name, "Hank O'Kaintuck," the pamphlet explained that Anderson left General Electric in March 1957 for health reasons, and it criticized two General Electric executives.¹⁶ Subsequently, Anderson met with Dr. Terry, a company doctor, who diagnosed Anderson with "Schizophrenia, Paranoid Type" and asked him to get treatment.¹⁷ When Anderson refused, Terry

10. Tom Karsell & George Koper, *E.A. Terry, Jr., Shot on Way to Church*, COURIER-J. (Louisville), Oct. 27, 1958, § 1, at 1.

11. *Id.*

12. *Id.*; Anderson v. Commonwealth, 353 S.W.2d 381, 385 (Ky. 1961), *cert. granted*, 371 U.S. 886 (1962).

13. Karsell & Koper, *supra* note 10.

14. *Id.*

15. *Former Employee "Bombs" G.E. Plant from Air*, COURIER-J. (Louisville), July 19, 1957, § 2, at 1; Karsell & Koper, *supra* note 10.

16. *Former Employee "Bombs" G.E. Plant from Air*, *supra* note 15; see Karsell & Koper, *supra* note 10 (stating that the pamphlets accused General Electric of being a "traitor to democracy").

17. Harry Amon, *Three Doctors Assert Anderson Mentally Ill at Time of Slaying*, COURIER-J. (Louisville), Apr. 9, 1959, § 1, at 1. Schizophrenia is a mental disorder that involves a broad spectrum of cognitive and emotional disturbances. The most characteristic disturbances include delusions or hallucinations; disorganized speech and thought processes; or a reduction in the range of emotional experience (also known as affective flattening). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297-99 (4th ed. 2000). The Paranoid Type of Schizophrenia is characterized by the presence of prominent delusions or auditory hallucinations without extensive disruption to cognitive or emotional functioning. Delusions tend to be persecutory or grandiose in nature and organized around a consistent theme. Other features include anxiety, anger, aloofness, and argumentativeness. Individuals who experience delusions with persecutory themes may be prone to suicidal behavior and, when combined with anger, violence. *Id.* at 313-14.

recommended termination.¹⁸ The murder occurred a few months later.

2. *Anderson's Three Trials.* Anderson was indicted on October 29, 1958.¹⁹ During Anderson's arraignment the next day, he repeatedly interrupted the prosecutor, his counsel, and the judge, and also asked to speak.²⁰ He later explained that he wanted to ask the judge "if he still believes that progress is General Electric's most important product."²¹ It took three trials to obtain a valid verdict.

a. *Trial 1—April 6, 1959.* Three court-appointed psychiatrists examined Anderson before trial and the majority determined that while he suffered from paranoid schizophrenia, he could assist in his own defense and receive a fair trial.²² Anderson's first trial began on April 6, 1959.

The prosecution produced three eyewitnesses identifying Anderson as the killer and another who testified that before the murder Anderson said he would "get Dr. Terry."²³ The psychiatrists, apparently called as defense witnesses, bolstered the prosecution's case by testifying that although mentally ill, Anderson could differentiate between right and wrong and was thus legally sane.²⁴

Anderson wanted to defend the charges with a conspiracy theory. Nevertheless, his attorneys raised the possibility of insanity early in the proceedings.²⁵ However, they did not formally enter the defense until just before Anderson took the

18. Amon, *supra* note 17.

19. *Jurors Indict Anderson for Dr. Terry's Slaying*, COURIER-J. (Louisville), Oct. 30, 1958, § 1, at 1.

20. *Anderson Psychiatric Tests Set*, COURIER-J. (Louisville), Oct. 31, 1958, § 2, at 1.

21. *Id.*

22. *Anderson v. Commonwealth*, 353 S.W.2d 381, 384–85 (Ky. 1961), *cert. granted*, 371 U.S. 886 (1962); see *Psychiatrists Report, Anderson Called Able Mentally to Face Trial*, LOUISVILLE TIMES, Feb. 25, 1959, at A-9. Anderson voiced no objection to a psychiatric examination, but he did request that instead of being examined by three doctors in Kentucky, he be examined in Geneva, Switzerland, by "12 doctors, 'four from Russia, four from Sweden, and four from the United States.'" *Anderson Psychiatric Tests Set*, *supra* note 20.

23. Jim Morrissey, "Could Have Killed Terry, but Don't Know" – Anderson, LOUISVILLE TIMES, Apr. 8, 1959, at A-14.

24. Amon, *supra* note 17. On direct examination, one of the psychiatrists, Dr. Gaines, testified that Anderson "was not treatable and not curable. He should be under supervision so he [will not] hurt himself or someone else." *Id.* Another psychiatrist, Dr. Trawick, stated, "The subject seemed to suffer from auditory hallucinations and delusions." *Id.*

25. *State Seeks Death for Anderson in Terry Murder Trial*, LOUISVILLE TIMES, Apr. 6, 1959, at A-10.

stand.²⁶ This decision was tactical, and the only evidence of the alleged conspiracy came in through Anderson's testimony in an attempt by his lawyers to bolster the insanity defense.

Anderson testified for more than ten hours,²⁷ telling his life story to demonstrate his mental state at the time of the murder.²⁸ He described an increasingly desperate man fruitlessly searching for employment.²⁹ When asked about the murder, Anderson claimed that he was suffering a "mental block" regarding that morning, but he admitted that it was possible he had committed the act.³⁰

The all-male jury³¹ found Anderson guilty.³² However, it could not agree on the appropriate sentence; ten jurors voted for the death penalty and two held out for life imprisonment.³³ A new trial was required on both liability and penalty.

b. *Trial 2—November 14, 1959. Gideon v. Wainwright*³⁴ had yet to be decided, but the Court had already established that those facing capital charges were entitled to appointed counsel.³⁵ Nevertheless, Anderson waived counsel and represented himself.³⁶ The validity of this waiver would prove to be an important issue.

Anderson based his defense solely on the conspiracy against him that he claimed began during his employment at General Electric.³⁷ He argued that General Electric, the *Courier-Journal*,

26. Morrissey, *supra* note 23.

27. Amon, *supra* note 17.

28. Morrissey, *supra* note 23.

29. *Id.*

30. *Id.* Anderson's brother also testified on his behalf, describing him as a "hopeless idealist who believed he could force a change in the social system" and a "man of high intelligence who sometimes passed into insanity. . . . He was a man with a superego." Amon, *supra* note 17.

31. Morrissey, *supra* note 23.

32. Harry Amon, *Final Vote Is 9 to 3 to Convict*, COURIER-J. (Louisville), Nov. 27, 1959, § 1, at 1.

33. *Id.*; Harry Amon, *Judge Dismisses Jurors as Second Anderson Trial Ends Hopelessly Deadlocked*, COURIER-J. (Louisville), Nov. 27, 1959, § 1, at 1.

34. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Gideon*, the Court held that the right to counsel for an indigent defendant in a criminal trial was a fundamental right essential for a fair trial. *Id.* at 344.

35. *Powell v. Alabama*, 287 U.S. 45, 72-73 (1932).

36. *Anderson v. Commonwealth*, 353 S.W.2d 381, 383 (Ky. 1961), *cert. granted*, 371 U.S. 886 (1962). Anderson had a law degree from Notre Dame, and his admission to the Indiana bar, in addition to his inability to find counsel to present the defense of his choosing, weighed in the court's decision allowing him to represent himself. *Id.* at 385.

37. Anderson's pamphlet, "War Declared; General Electric, Traitor to Democracy" is the first concrete piece of evidence showing his belief in a conspiracy. His subsequent

the police, and the prosecutor's office were framing him for Dr. Terry's murder.³⁸ To prove the conspiracy, Anderson called Mark F. Ethridge, the publisher of both the *Courier-Journal* and the *Louisville Times*. Anderson questioned Ethridge extensively about a cartoon that had appeared in the *Courier-Journal*, which Anderson contended was intended to depict him and had been published to coincide with his second trial.³⁹ Anderson also probed Ethridge's and the *Courier-Journal's* connections to General Electric to prove that they were conspiring to frame him. Anderson called a number of other witnesses, including various General Electric employees and officials, a psychiatrist by whom he had refused to be examined, and one of the prosecutors from Anderson's first trial.⁴⁰

Anderson was argumentative and combative, sometimes yelling at witnesses and mocking the prosecutor.⁴¹ Surprisingly, he did not testify, relying solely on his conspiracy theory.⁴² Despite Anderson's obvious hostility and contempt for the proceeding, his presentation left three jurors with a reasonable doubt, thereby hanging the jury.⁴³ The newspaper praised Anderson's presentation of his case, stating that he "surprised the court with his ability" and did a "masterful job," especially during cross-examination and closing arguments.⁴⁴

disability and the termination of his employment exacerbated the breadth given to the conspiracy, and as time went on, Anderson added many other conspirators to his list. *See id.* at 385 (referring to Anderson's delusion of persecution by the General Electric Company, as well as by newspapers and public officials).

38. Jim Hankin, *Anderson Calls Witness A Liar, Is Warned By Judge*, LOUISVILLE TIMES, Nov. 23, 1959, at C-8.

39. Harry Amon, *Anderson Tries to Show Comics "Hounded" Him*, COURIER-J. (Louisville), Nov. 20, 1959, § 1, at 1.

40. *See id.*; Hankin, *supra* note 38. Anderson called three psychiatrists who were appointed by the court to determine whether Anderson was competent to stand trial. Dr. Keller was on the original panel of psychiatrists, but Anderson had refused to speak with him, later stating that he intentionally upset him by repeatedly calling him "Mr. Geller." Amon, *supra* note 17.

41. Hankin, *supra* note 38.

42. Amon, *supra* note 32.

43. *Id.* Frank Haddad, Anderson's attorney appointed for appeal, disputed this characterization of the vote. Reply to Response to Petition for a Writ of Certiorari at 2, *Anderson v. Kentucky*, 515 U.S. 1155, No. S-1 (dismissed 1995). Specifically, he contended that the results of a jury poll were not included in the record nor provided for by law and, in any case, were irrelevant for determining whether Anderson's right to counsel had been violated. *Id.* Unless otherwise noted, all references to papers in the Supreme Court's files are from the National Archives.

44. *See* Amon, *supra* note 32. Interestingly, the attention to detail that Anderson was praised for—"[seizing] on the slightest discrepancy in the prosecution's case and magnifying it repeatedly to the jury"—is also a prominent feature of the paranoid personality with which he was diagnosed. *Id.*

c. Trial 3—January 18, 1960. Kentucky tried Anderson for a third time, again seeking the death penalty. However, Anderson was tired and unable to litigate as vigorously as he had in the second trial.⁴⁵ The newspaper said his dress was “almost shabby,” and his trial notes consisted of only a few sheets of stationery rather than the volumes he used before.⁴⁶ Like the previous juries, Anderson’s third jury was all-male.⁴⁷ But unlike at his previous trial, he did not question the prospective jurors, although he exercised eight peremptory challenges based on the prosecutor’s questioning.⁴⁸

At trial, Anderson seemed unable to control himself. He continued to accuse the judge of conspiring against him, yelled at witnesses, and treated the prosecutors with contempt.⁴⁹ He even called the judge as a defense witness, but after being insulted and accused of conspiracy to convict Anderson, the judge stepped down.⁵⁰ Anderson and the prosecutor also had several heated exchanges, including one in which the prosecutor told the judge to “[s]hut [Anderson] up.”⁵¹ From newspaper accounts, Anderson was a shadow of the coherent and persuasive advocate he had been at his second trial.⁵²

Because of what the Kentucky Court of Appeals later characterized as Anderson’s “obstreperous” tactics, the trial court extended trial sessions, over his objections, well into the evening, sometimes as late as 11:30 p.m.⁵³ The jury was forced to sleep at the jail one night because no hotel rooms were available.⁵⁴

According to Anderson, every bit of the violence, anger, and calm was clearly calculated towards acquittal or eventual vindication,⁵⁵ but in the end, it was not enough. After the third

45. See Harry Amon, *Anderson 3d-Trial Jury Seated; Qualified to Bring Death Penalty*, COURIER-J. (Louisville), Jan. 19, 1960, § 1, at 1.

46. *Id.*

47. *Id.*

48. *Id.*

49. See, e.g., Harry Amon, *3 Witnesses Identify Anderson as Slayer*, COURIER-J. (Louisville), Jan. 20, 1960, § 1, at 1; Leonard Lefkow, *Anderson Given Contempt Warning*, LOUISVILLE TIMES, Jan. 20, 1960, § 1, at 1.

50. Harry Amon, *Anderson Puts Judge on Stand*, COURIER-J. (Louisville), Jan. 22, 1960, § 1, at 1.

51. Amon, *supra* note 45.

52. *Id.*

53. *Anderson v. Commonwealth*, 353 S.W.2d 381, 385–86 (Ky. 1961) (finding that the length of the sessions was almost entirely due to Anderson engaging in endless cross-examination), *cert. granted*, 371 U.S. 886 (1962); Amon, *supra* note 49.

54. *No Hotel Rooms Available—Jurors Spend the Night in Jail*, COURIER-J. (Louisville), Jan. 21, 1960, § 1, at 18.

55. Leonard L. Lefkow, *Henry Anderson—One Man in the Courtroom, Another Outside*, LOUISVILLE TIMES, Jan. 25, 1960, at D1.

trial, a jury finally convicted Anderson of murder and voted that he die in the electric chair.⁵⁶

3. *The Kentucky Appeal.* Anderson appealed to the Kentucky Court of Appeals, then Kentucky's highest court.⁵⁷ He was unable to assemble a record or file his papers in a timely manner.⁵⁸ Rather than allowing the appeal to lapse and Anderson to be executed without review, the Kentucky Court of Appeals granted an extension and appointed Frank Haddad and John Brown as counsel.⁵⁹ Anderson's attorneys presented nine claims of error, but focused on Anderson's waiver of his right to counsel.⁶⁰ Haddad and Brown argued Anderson had not been competent to "intelligently, competently, understandingly and voluntarily" waive his right to counsel, and, therefore, the trial court's failure to appoint counsel violated his rights under the Sixth Amendment of the U.S. Constitution.⁶¹

The court framed the issue as "what it would have availed Anderson to have had counsel."⁶² The court concluded that Anderson would have received no benefit because only two potential defenses were open to him: "One was insanity. The other was to attack the credibility of the Commonwealth's witnesses . . ."⁶³ At the first trial, the jury rejected an insanity defense and, based on this finding, the court concluded the defense would have been equally unavailing at the third trial.⁶⁴ The court further assumed that because the defense in the first trial rested solely on insanity, there must have been no concrete evidence to contradict the eyewitness testimony.⁶⁵ According to the court, the only other possible defense was to prove the eyewitnesses lied, as Anderson attempted to do in his second and third trials.⁶⁶ Thus, through this lens of "possible defenses," the

56. Harry Amon, *Jury Gives Anderson Death Penalty*, COURIER-J. (Louisville), Jan. 24, 1960, § 1, at 1.

57. *Anderson*, 353 S.W.2d at 383. The Court of Appeals was the highest court in Kentucky until 1976. Thus, this case was appealed straight from the trial court to Kentucky's court of last resort.

58. *Id.* (finding that it was only through individual efforts of the court reporter, the assistance of counsel, and the court's grant of an extension that the appeal was able to proceed).

59. *Id.*

60. *Id.* at 384–89.

61. *Id.* at 384 (quoting *Gholson v. Commonwealth*, 212 S.W.2d 537, 539 (Ky. 1948)).

62. *Id.* at 385.

63. *Id.* at 384.

64. *Id.*

65. *Id.*

66. *Id.*

court determined that appointed counsel would have been of little benefit to Anderson, and, therefore, the trial court's failure to appoint counsel over Anderson's objection was not reversible error.⁶⁷

The court also held that Anderson's waiver of counsel was valid, despite the psychiatrists' findings of mental illness, because they had ultimately concluded that he was intelligent and "completely oriented as to time, place and person."⁶⁸ Haddad and Brown argued that the court effectively determined Anderson's legal insanity by taking the case for review *sua sponte* and appointing counsel over Anderson's objections.⁶⁹ If he were capable and competent to act as his own counsel, they argued, the court would not have granted this review. The court disagreed and instead pointed out that Anderson graduated from Notre Dame Law School and successfully avoided conviction at his second trial.⁷⁰ These factors, coupled with the perceived futility of assistance of counsel, defeated any claim that Anderson was insane or unable to represent himself.

Haddad and Brown also objected to the evening sessions.⁷¹ Anderson had claimed he did not get enough sleep or food to have the stamina to conduct such long sessions, but the trial court had overruled his objections because the jury was worn out and wanted to hear more testimony.⁷² The trial court, as Haddad put it, "appeared to be more worried about the comfort of the jurors than the rights of the defendant."⁷³ The appellate court was not persuaded, holding that because this was Anderson's third trial, he should not have needed evenings to prepare, and it was within the trial court's discretion to try to limit the number of trial days.⁷⁴ Thus, the court affirmed Anderson's conviction and sentence.⁷⁵

67. *Id.* at 384–85.

68. *Id.*

69. Richard Harwood, *Anderson Sanity Is Argued*, LOUISVILLE TIMES, Apr. 14, 1961, at E1.

70. *Anderson*, 353 S.W.2d at 385.

71. *Id.* at 385–86.

72. *See id.* (revealing that although Anderson may have been tired, the length of the sessions was predominately his fault and unnecessary given that this was his third trial, and that it was reasonable for the court to extend the sessions in an effort to confine the trial to a reasonable number of days). Petition for a Writ of Certiorari to the Court of Appeals of Kentucky at 19, *Anderson v. Kentucky*, 515 U.S. 1155, No. S-1 (dismissed 1995).

73. Harry Amon, *Defense Claims Error in Instructions Given to Anderson Jury*, COURIER-J. (Louisville), Apr. 15, 1961, § 2, at 1.

74. *Anderson*, 353 S.W.2d at 386.

75. *Id.* at 389.

4. “*Our Demented Petitioner*”⁷⁶—*Henry Anderson and the Supreme Court*. Haddad and Brown petitioned for a writ of certiorari to the U.S. Supreme Court, advancing the same claims they had presented to the Kentucky Court of Appeals.⁷⁷ The Kentucky Civil Liberties Union (KCLU) filed an amicus brief focusing on the Kentucky Court of Appeals’s reliance on the reports of the psychiatrists that concluded Anderson was competent to assist in his own defense but said nothing about Anderson’s competence to conduct that defense himself.⁷⁸ Additionally, it alleged Kentucky must have violated Anderson’s rights in one of two ways—if Anderson were incompetent, the trial court violated his rights by not appointing counsel at trial, and if he were competent, the appellate court violated his rights by forcing counsel upon him.⁷⁹

Incompetent or not, Haddad’s and the KCLU’s actions enraged Anderson. Establishing a pattern that would continue for decades, he filed his own motions with the Supreme Court, repeatedly disavowing Haddad as his attorney and attempting to have KCLU attorney Joseph S. Freeland disbarred for filing the amicus brief without his consent.⁸⁰ He claimed continuing fraud and framing by General Electric and the *Courier-Journal*.⁸¹

76. Letter from Justice William Brennan, U.S. Supreme Court, to Chief Justice Earl Warren, U.S. Supreme Court (May 1, 1963) (emphasis added) (on file with the Earl Warren Papers at the U.S. Library of Congress).

77. See Petition for a Writ of Certiorari to the Court of Appeals of Kentucky, *supra* note 72.

78. Brief of Kentucky Civil Liberties Union as Amicus Curiae at 3–5, *Anderson v. Kentucky*, 515 U.S. 1155, No. S-1 (dismissed 1995).

79. *Id.* at 6. The KCLU favored a reversal of the trial court’s decision over a reversal of the appellate court’s decision, but it felt strongly that forcing appointed counsel on a competent defendant constituted a serious constitutional violation. *Id.* at 6.

80. *E.g.*, Motion: to Disbar One Joseph S. Freeland, *Anderson*, 515 U.S. 1155 (No. S-1). Anderson’s suspicion (and disdain) of Freeland was apparent in this motion. He stated:

CLU Freeland in his closing statement chooses to “believe” in Insanity, as this suits his own ambitions as an Employee of Governor Bert Combs of the Bingham Administration, and his own Personal Hate.

I am amazed that at the Supreme Court Level, a seasoned-ripe Counsel of any Stripe would dare propound a “Belief” as a substitute for[]a Record and Facts.

Id. at 4.

81. *Id.* at 3–4. In reference to the KCLU brief’s argument that appointing counsel to defendants in Anderson’s situation served the public interest, Anderson stated:

A HEARING would reveal that the Public interest is in fact a Private interest, an attenuation of Publisher Barry Bingham of the *Courier-Journal* and AP and of General Electric Corporate “Free Enterprise” (Sh-h-hh). A politics which needs “Insanity” to save itself from exposure, needs Anderson salted away in more than Death,—in a Silence beyond belief.

Id. at 3.

However, he believed the Supreme Court was not tainted as the state courts had been and hoped it would right the wrongs he had suffered.⁸² So, he wrote his own certiorari petition and attempted to have it heard instead of the one written by Haddad and Brown.⁸³ But the Court did not respond to his motions, and his court papers, which initially were cordial and respectful,⁸⁴ became increasingly confrontational.⁸⁵

The Supreme Court granted the Haddad/Brown certiorari petition on November 5, 1962,⁸⁶ after denying previous petitions filed by Anderson.⁸⁷ After reviewing the case file, John Davis, Clerk of the Supreme Court, recommended summary dismissal of every one of Anderson's motions and the appointment of Haddad

82. *Id.* at 2. He believed that “[w]hile the State may wink at a Fraud concocted by itself, I am sure that your own Court will not become sucker to perfidious Unconstitutionality, not even when second-guised as ‘Friend of Court.’” *Id.*

83. Motion: That the Haddad Petition and State Response be Stricken as a Joint Fraud. That My Own Certiorari #1235 be heard instead, *Anderson*, 515 U.S. 1155 (No. S-1). In his petition, he complained of the examinations by the psychiatrists and derogatory remarks Haddad made to the press. *Id.* at 4. A copy of Anderson's petition for certiorari was not obtained, but information about its contents was included in Anderson's motion to strike the other petitions. He alleged:

By bringing me to Trial that First Time, they confessed my sanity and their duplicity. Immediately, I moved to be my own Self-Counsel.

Prosecutor-Judge-Haddad did then resist even after fixing a Second Trial Date on April 23rd, when I took over as Self-Counsel. ALL three joined in an attempt to sneak the Psychos back into the Jail to “Declare me incompetent.” I refused to be alone with these Dipsoluties even a single moment.

Haddad made derogatory statements to the Press about any defense I might offer. But on October 24th, 1959, the Court acceded to my Constitutional Rights. But only temporarily.

And at Second Trial, it was the Prosecutor who placed the Psychos on the Stand, not this Self-Counsel. If Haddad couldn't then the Prosecutor would.

YET, all this is better stated in my own Certiorari # 1235.

Id.

84. *See generally id.* Though Anderson was respectful of the Court generally, the particular language he used to describe those people he did not like was clearly disrespectful and inappropriate in a court document.

85. By September of 1963, Anderson had latched onto Justice Potter Stewart as an enemy, claiming that “Potter Stewart is a product of the political Forces & Finances out of Kentucky & Ohio” and that he “has remained partisan to the politics that made him an appointee to the Bench. Specifically, of Property and Corporations.” Motion: that any HEARING DATE be postponed for 60 Days after the November Elections; to enable the following Court ORDERS for the following reasons, *Anderson*, 515 U.S. 1155 (No. S-1). As the Court continued to hold his case in abeyance, he found fault with individual Court members as well as the institution as a whole, stating: “[T]he ABA U.S. Supreme Court from bottom Shyster to TOP Profligate on the Bench . . . deliberately delayed HEARING in Open Court until the TIME & DEATH allows the Court and ABA Legal-Profession . . . the Opportunity to . . . Manufacture any Record suitable to its own Political purposes.” Letter from Henry R. Anderson to Justice David Souter, U.S. Supreme Court 1 (Nov. 15, 1990) (on file with National Archive and Record Administration).

86. *Anderson v. Kentucky*, 371 U.S. 886 (1962).

87. *Anderson Case Is Due Top Review*, COURIER-J. (Louisville), Nov. 6, 1962, § 2, at 36.

as counsel amicus curiae because it “[was] evident that the petitioner, in fact, [was] not able to present his case intelligently.”⁸⁸ The Court agreed, and Haddad continued to represent Anderson.

It became clear that Anderson’s competency had to be resolved before the Court could proceed. There was much correspondence between Haddad, the Kentucky Attorney General’s Office, and the Clerk. Kentucky Governor Bert Combs asked that a panel of three psychiatrists evaluate Anderson.⁸⁹ Anderson refused the evaluation, and the panel’s attempts to persuade him to talk “were successful only in bringing out evidence of his grandiosity and intense hostility toward the segment of society which [they] represented to him.”⁹⁰ The panel obtained additional information which “revealed a text book picture of paranoid thinking and, as well, revealed a persecutory trend indicating that groups were trying to declare him, or drive him, insane.”⁹¹ Based on this information, they concluded that Anderson was incompetent to act as his own counsel, to discharge counsel, or to assist counsel.⁹² This decision was remarkable in light of the opinion of psychiatrists who examined Anderson before trial and reached the opposite conclusion.⁹³ The record does not show that his conduct had changed—“Hank O’Kaintuck” was plainly an odd bird from the beginning of the case—so if he

88. Memorandum from John Davis, Clerk, U.S. Supreme Court, to the Chief Justice on Anderson v. Kentucky, No. 574, October Term, 1962 (Dec. 11, 1962).

89. Letter from John B. Breckinridge, Attorney Gen. of Ky., to John F. Davis, Clerk, U.S. Supreme Court (Sept. 19, 1963) (on file with author).

90. Letter from Hollis Johnson, M.D., Arthur R. Kasey, M.D., and John P. Bell, M.D., psychiatric panel evaluating Henry Anderson, to Bert T. Combs, Governor of Ky. 1 (Nov. 5, 1963) (on file with author).

91. *Id.*

92. *Id.* at 1–2. More specifically, they stated:

It is our professional opinion that this man is delusional and believes that there is a plot to discredit him and prove him “insane” It is apparently his psychotic inability to trust anyone other than himself that causes him to insist that he act as his own legal counsel. . . . [I]t is apparent that he believes he has a very special mission in life and that this has been interfered with on the part of many groups, including the National Association of Manufacturers, the Courier-Journal, the United States Chamber of Commerce[,] and the Civil Liberties Union. We believe his fixed delusions so seriously impair his reasoning and judgment and that his chronic hostility so obviously prevents his working constructively with another person that the questions asked [i.e., whether Anderson could act as his own counsel or assist appointed counsel] must be answered in the negative as stated above.

Id. at 2.

93. Letter from Bert T. Combs, Governor of Ky., to Dr. David M. Cox, President, Ky. State Med. Ass’n 1 (Sept. 24, 1963) (noting that before trial, psychiatrists found Anderson “completely oriented as to time, place and person”).

was incompetent in 1962, he probably should not have been tried in 1960.

Despite only being asked their opinion on Anderson's competency, the doctors went further:

We want to emphasize the seriousness of this case in which a very sick man cannot be helped by any presently known medical or psychiatric methods. We feel his very presence in a hospital would deter the therapy of other patients and be a threat to personnel. It is also our professional opinion that this man is extremely dangerous and that if released from protective custody, he may well kill, not one, but several other individuals. We recognize this situation as a dilemma not only for the courts and psychiatrists, but also for society. Yet, he is mentally ill and probably no one in either the legal or medical profession has, or probably can, set up a perfect rule for determining accountability for criminal acts by paranoids.⁹⁴

These pronouncements put Anderson in a legal and psychiatric limbo that Haddad, Attorney General Breckinridge, and the Supreme Court would have to sort out. Given the evidence, even Breckinridge had to concede that it was likely Anderson's case could not be resolved through any of the usual procedures.⁹⁵

Breckinridge filed a supplemental brief, updating the Court on Anderson's current mental capacity and more completely laying out his proposal that the Court continue the case indefinitely.⁹⁶ Breckinridge only halfheartedly argued for affirmance, but focused instead on the unique nature of the case.⁹⁷ If the Court affirmed, the death penalty could not be carried out because Kentucky law prohibited execution of insane persons, and if the Court reversed, Anderson could not be retried because he was not competent.⁹⁸ Furthermore, he could not be released because of the danger he posed. Thus, regardless of the Court's decision he would have to be somehow institutionalized.⁹⁹ Breckinridge concluded that "[t]his case does not present the urgency of immediate determination normally connected with death cases" and suggested the Court

94. Letter from Hollis Johnson, M.D., Arthur R. Kasey, M.D., and John P. Bell, M.D. to Bert T. Combs, *supra* note 90, at 2.

95. See Memorandum from John Davis, Clerk, U.S. Supreme Court, for the Files, *Anderson v. Kentucky*, No. 33, O.T. 1963 (Nov. 14, 1963).

96. See Supplemental Brief for Respondent, *Anderson v. Kentucky*, 515 U.S. 1155, No. S-1 (dismissed 1995).

97. *Id.* at 2, 6–8.

98. *Id.* at 7.

99. *Id.*

continue the case in some fashion, either indefinitely or for a specified period of time.¹⁰⁰

Anderson responded first. He challenged the validity of the psychiatric report and imposition of an insanity defense against his will.¹⁰¹ Haddad responded two months later and essentially agreed with Breckinridge that a continuance for some length of time would probably be the best solution.¹⁰² Haddad's view was that this remedy protected Anderson from execution until the Court decided that he had regained competency and ensured that whenever the case was heard, Anderson would have the opportunity to present his case as he had always wanted.¹⁰³

In the end, the Court issued a simple order: "By joint agreement of the parties this case is continued indefinitely."¹⁰⁴ The attorneys congratulated each other. In separate letters to the Governor of Kentucky, the Kentucky Attorney General, and Frank Haddad, Chief Justice Earl Warren noted that "this solution will serve the dual purposes of protecting the rights of both the individual and the state."¹⁰⁵ He went further, calling the continuance an "equitable and humanitarian solution to the difficult problems presented by [this] case."¹⁰⁶ Robert Matthews, Breckinridge's successor as Kentucky Attorney General, replied that it was "the only practical solution" given the circumstances of the case.¹⁰⁷

Anderson was less enthusiastic. He disbelievingly called the continuance order a mistake, maintaining that there could be no joint agreement of parties because he did not agree and Haddad could not speak for him.¹⁰⁸ He moved for the order to be corrected and for a hearing date to be set for his voluminous motions; the

100. *Id.* at 8.

101. RESPONSE, to supplemental Brief by STATE, *Anderson*, 515 U.S. 1155 (No. S-1).

102. Reply to Respondent's Supplemental Brief at 6, *Anderson*, 515 U.S. 1155 (No. S-1).

103. *Id.* at 2, 6-7.

104. *Anderson v. Kentucky*, 376 U.S. 940 (1964).

105. Letter from Chief Justice Earl Warren, U.S. Supreme Court, to Robert F. Matthews, Attorney Gen. of Ky. (Mar. 12, 1964) (on file with author); Letter from Chief Justice Earl Warren, U.S. Supreme Court, to Frank Haddad, Attorney (Mar. 12, 1964); Letter from Chief Justice Earl Warren, U.S. Supreme Court, to Edward T. Breathitt Jr., Governor of Ky. (Mar. 12, 1964). There were slight variations in the wording of the latter two letters, but they also contained this sentiment.

106. Letter from Chief Justice Earl Warren to Edward T. Breathitt Jr., *supra* note 105.

107. Letter from Robert Matthews, Attorney Gen. of Ky., to Chief Justice Earl Warren, U.S. Supreme Court (Mar. 19, 1964) (on file with author).

108. Motion: To correct the Court Order of March 9th, 1964, *Anderson v. Kentucky*, 515 U.S. 1155, No. S-1 (dismissed 1995) (requesting that the Court "act[] upon in aspect of Self-Counsel and Record Sanity).

Court formally denied both requests.¹⁰⁹ He then raised a “constitutional objection” to prevent his case from being remanded to a Kentucky state court.¹¹⁰ He pled with the Court for a hearing, complaining:

I cannot afford another six years to retrace my steps, to be again ignored at the U.S. Supreme Court Level. My Family & Friends cannot again afford even the Paper and Postage. My health is at the breaking point after six years in solitary confinement . . . trying to break me to ‘Insanity.’¹¹¹

Anderson continued to inundate the Court with motions, personal correspondence, and pamphlets. In this vein, he filed four largely unintelligible amicus briefs in other death penalty and habeas corpus cases pending before the Court¹¹² and sought a

109. *Id.*; *Anderson v. Kentucky*, 377 U.S. 902 (1964) (order denying motion to correct order); *Anderson v. Kentucky*, 379 U.S. 805 (1964) (order denying motion for a hearing).

110. Constitutional Objection, *Anderson*, 515 U.S. 1155 (No. S-1).

111. *Id.*

112. Anderson filed amicus briefs in *Jaggers v. Kentucky*, 403 U.S. 946 (1971) (“Amicus Curiae” by Henry R Anderson of Death Row, dated Aug. 22, 1969); *Maxwell v. Bishop*, 398 U.S. 262 (1970) (BRIEF “Amicus Curiae” by Henry R Anderson of Death Row, dated Sept. 15, 1969); *Chambers v. Maroney*, 399 U.S. 42 (1970) (BRIEF “Amicus Curiae” by Henry R Anderson on Mutual Issue “Inadequate Counsel”, but Contra, received Dec. 15, 1969); *Meyer v. Kentucky*, 406 U.S. 919 (1972) (“Amicus Curiae” by Henry R Anderson of Eddyville, Death Row, received Mar. 29, 1972). The Clerk evidently decided to file these documents in the S-1 file even though they pertained to other cases.

In his *Jaggers* brief, it is truly unclear what point Anderson was trying to make. In *Maxwell*, Anderson was concerned with the possibility that different juries would determine guilt and sentence in death penalty cases. As part of his brief, he incorporated a motion he filed with the Supreme Court equating separate juries with double jeopardy. BRIEF “Amicus Curiae” by Henry R Anderson of Death Row at 1, *Anderson*, 515 U.S. 1155 (No. S-1) (pertaining to *Maxwell*). It is again unclear why he was so opposed to this idea, but in some sense he may have associated it with his death sentence being vacated because he did not receive this second jury.

Anderson was particularly outraged by the mere consideration of *Chambers*, stating: “That Your Court would entertain under the circumstance of Chambers VS Maroney SUCH AN ISSUE prompts me to fly to my own defenses to prevent a possible flanking move.” MOTION for leave to file . . . And in Form of Pauper, *Anderson*, 515 U.S. 1155 (No. S-1) (pertaining to *Chambers*). Anderson apparently objected to any assessment of the adequacy of counsel and felt that his case had priority on this issue because the lawyers foisted on him were clearly inadequate as they were part of the plot to discredit him. See Letter from Hollis Johnson, M.D., Arthur R. Kasey, M.D., and John P. Bell, M.D. to Bert T. Combs, *supra* note 90, at 2 (detailing how Anderson’s conspiracy delusions influenced his refusal for court-appointed counsel).

Anderson’s amicus brief for *Meyer* began with a proclamation that “[i]t is the petition of Henry R Anderson that under Fundamental Law he has the inherent Right to file Papers of Intervention by way of AMICUS CURIAE in any Legal Action that threatens directly or indirectly his own Life, Liberty, or Due Process of Law under the Federal 14th.” AMICUS CURIAE by Henry R Anderson of Eddyville, Death Row at 1, *Anderson*, 515 U.S. 1155 (No. S-1) (pertaining to *Meyer*). In the brief, he stated his

restraining order against President Nixon.¹¹³ In 1971, Anderson complained that his court papers were censored by prison officials; a memo from the Kentucky Department of Corrections notes that certain writings contained “much vulgarity and profanity” and he was required by prison officials “to rewrite them and show a bit more respect for the Courts.”¹¹⁴ Anderson moved Justice Brennan for a restraining order prohibiting censorship of his documents. A handwritten note from Justice Brennan to the other Justices states: “[S]ince attached is a formal motion, it should be duplicated, circulated to conference + listed on next conference agenda. Don’t wait for response.”¹¹⁵ The Court denied the motion two weeks later.¹¹⁶ In 1978, Anderson also filed a class action lawsuit challenging his prison’s new mail regulation system, which was ultimately dismissed.¹¹⁷ Some Justices’ patience grew thin; a 1964 letter returning one of Mr. Anderson’s registered letters noted, “Justice Black has instructed this office to return this letter to you with the comment that ‘it has been refused by the addressee.’”¹¹⁸ Justice Black had voted against certiorari in 1962; perhaps he regarded this as evidence that he had been right.¹¹⁹

belief that judges should not be able to change death sentences to life sentences and voiced an objection “to any Court Ruling which substitutes Judges for Jurys in the matter of ‘Sentencing’; that separates ‘Sentencing’ from the Facts; that substitutes Dictatorship from Democracy. The province of Fact & Sentencing has always belonged to the Jury, not to Judges openly susceptible.” *Id.* at 5. Thus, it seems that in all of these cases, Anderson viewed any transfer of power from jury to judge as a threat to democracy.

113. Anderson sought a restraining order against President Nixon for his interference in death penalty issues. Motion: For Restraining Order against One Richard M Nixon Incumbant at White House at 2, *Anderson*, 515 U.S. 1155 (No. S-1) (arguing that all death penalty issues should be settled by “Legislative Law and Judicial ‘Due Process’”). He believed this interference was doing him “irreparable damage” and appeared to fear that Nixon’s actions would vacate his death sentence over his objections. *Id.*

114. Memorandum from William H. Lasley, Assoc. Warden of Treatment, Ky. State Penitentiary at Eddyville 2 (May 6, 1971).

115. Note from Justice William Brennan, U.S. Supreme Court, to Robert Seaver, Clerk, U.S. Supreme Court (May 10, 1971).

116. *Anderson v. Kentucky*, 402 U.S. 993 (1971).

117. *Anderson v. Bordenkircher*, Misc. Civil No. 78-12P (W.D. Ky. Oct. 26, 1978). Anderson’s suit requested a cease and desist order against Kentucky officials to prevent them from seizing prisoners’ papers. See MOTION for Restraining Order THAT State of Kentucky Officials Cease & Desist, *Anderson v. Bordenkircher*, No. 78-3623, (6th Cir. Mar. 15, 1979). The district court had dismissed the claim as malicious and frivolous and concluded that there was no way for Anderson to prove his claim. See *Anderson v. Bordenkircher*, Misc. Civil No. 78-12P (W.D. Ky. Oct. 26, 1978). Anderson appealed to the Sixth Circuit which affirmed the district court. *Anderson v. Bordenkircher*, No. 78-3623, (6th Cir. Mar. 15, 1979). He then appealed to the Supreme Court, and it is unclear what action, if any, the Court took.

118. Letter from John F. Davis, Clerk, U.S. Supreme Court, to Henry R. Anderson (Mar. 20, 1964).

119. U.S. Supreme Court Docket Sheet, *Anderson v. Kentucky*, 515 U.S. 1155, No. S-1 (dismissed 1995).

Several draft per curiam opinions written by Justice Brennan, combined with the conference sheet for the November 2, 1962 certiorari grant, suggest that Chief Justice Warren and Justices Douglas, Brennan, and Goldberg wanted to grant, vacate, and remand because the waiver of counsel was insufficient under the circumstances, just as Haddad asserted in his certiorari petition.¹²⁰ Perhaps another vote could have been picked up from the other five (three of whom—Justices White, Harlan and Clark—had voted for certiorari). Had the conviction been reversed, it might have been impossible to retry him. Of course, because of the severe danger he posed, he would certainly have been civilly committed. Perhaps life in a mental hospital would have been an easier time than life in a prison, yet from Anderson's own writings that would not have been his preference. In 1962, he wrote to the Court: "I have chosen death to insanity many times, oblivion to injustice—over and over. I take hell to a quibble, any day. My reputation is my life, Sirs, just as yours . . ." ¹²¹ Anderson wanted exoneration or execution and got neither.

The Supreme Court regularly revisited Anderson's case.¹²² In 1971, Robert Seaver, the Supreme Court Clerk, brought *Anderson* to Chief Justice Burger's attention because it had remained on the docket for so long.¹²³ Seaver's memo reports:

[I] discussed it later with Justice Brennan who did not have time to go into the matter in any detail but was strongly of the view that no action should be taken on the case at this time.

At the request of the Chief Justice, I spoke to Chief Justice Warren who described the entire background of the case to me and made certain suggestions . . .

120. Draft per curiam opinions for *Anderson v. Kentucky* (received Oct. 16, 18, 1962, in the Chambers of the Chief Justice); Petition for a Writ of Certiorari to the Court of Appeals of Kentucky, *supra* note 72.

121. VERY BRIEF on the MERITS at 8, *Anderson*, 515 U.S. 1155 (No. S-1).

122. Anderson's case was not completely ignored by others. An editor of the *Harvard Law Review* wrote to the Court asking about it. Letter from Jack M. Weiss III, Member, *Harvard Law Review*, to the Office of the Clerk, U.S. Supreme Court (Nov. 21, 1969). John Davis responded: "A problem developed as to the petitioner representation in this Court and his ability to make judgments with respect thereto, and this has not been resolved." Letter from John F. Davis, Clerk, U.S. Supreme Court, to Jack M. Weiss III, Member, *Harvard Law Review* (Nov. 26, 1969). Since 2007, Weiss has been chancellor of the Paul M. Hebert Law Center, Louisiana State University. LSU LAW CENTER, <http://www.law.lsu.edu/index.cfm?geaux=profiles.showbio&personnel=CF6FAAC4-1372-69E5-F7F06B39B1BB7672> (last visited Apr. 8, 2011).

123. Memorandum for the Anderson File, E. Robert Seaver, Clerk, U.S. Supreme Court (Apr. 16, 1971) (on file with author).

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REACHING OUT TO DO JUSTICE

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After the Conference on April 2, 1971, . . . the Chief Justice told me the Court had decided not to take any action in this case at this time.¹²⁴

Seaver noted that “in the present posture of this case the Court could be considered to have undertaken the responsibility of maintaining a continuing surveillance over petitioner’s condition, whereas this should be a state responsibility.”¹²⁵ The memo notes that Seaver “drafted the attached order that might possibly be used if the Court had decided to dispose of this case unilaterally, but Chief Justice Warren preferred the other approach.”¹²⁶ The attached draft order vacated the granting of certiorari, remanded to the state court, and stayed execution of the death sentence until it was determined that Anderson was “competent to pursue a petition for writ of certiorari in this Court. Upon such a finding, the petitioner may, within 90 days thereafter, file a petition for writ of certiorari in this Court.”¹²⁷

The memo also noted that Chief Justice Burger said that “we can place this case, . . . and any others being held indefinitely, on a suspension docket having a special series of numbers separate from the active cases.”¹²⁸ This memo reflects the formal creation of the Special Docket.

In 1987 Bruce Simpson, a Kentucky attorney, wrote to the Clerk inquiring about Anderson, whom he had met when visiting the Eddyville prison.¹²⁹ He was concerned that Anderson remained on death row pursuant to a death sentence that was unconstitutional after *Furman v. Georgia*¹³⁰ and urged the appointment of a legal guardian to assess Anderson’s interests.¹³¹ Spurred by the inquiry, the Clerk’s office then wrote a memo to the conference describing the case and proposing that “perhaps this is the time for the Court to take a further look at the case and decide whether something should be done.”¹³² A typed addition to one version of the memo in the Supreme Court file notes, “The Guinness Book of World Records included Anderson

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* The other two cases referred to in the memo were undoubtedly *Rees v. Peyton* and *In re Diana Kearny Powell*. See *infra*, Parts I.B–C (detailing the respective cases).

129. Letter from Bruce Simpson, Attorney, to Frank Lorson, Chief Deputy Clerk, U.S. Supreme Court (Mar. 25, 1987) (on file with author).

130. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

131. Letter from Bruce Simpson to Frank Lorson, *supra* note 129.

132. Memorandum to the Conference: Re: *Henry R. Anderson v. Kentucky*, No. S-1 1 (Apr. 7, 1987).

in its 1986 edition noting that Anderson had been 27 years on death row and in the Supreme Court of the United States on the same appeal.”¹³³

Laura Little, then a law clerk to Chief Justice Rehnquist and now a professor at Temple, discussed in a memorandum how *Anderson* and *Rees v. Peyton*, the other capital case being held, should again be reconsidered.¹³⁴ Proposed alternatives for *Anderson* included holding the cases indefinitely, which “would undoubtedly result in [Anderson] remaining on death row until he dies of natural causes”; vacating the death sentences, as had been done after *Furman*, and remanding; or requesting further briefing.¹³⁵

One memorandum noted that Anderson’s death sentence, unlike many others, had not been vacated after *Furman*: “[T]his was one of the cases that the Court had not held for *Furman* and accordingly no further action was taken on this writ.”¹³⁶ The memo reports that “Frank Lorson informs [the Court] that [petitioner] is still under sentence of death.”¹³⁷ However, neither this nor any other letter or memorandum in the file reflects that Anderson’s capital sentence had been commuted along with the rest of Kentucky’s capital prisoners.¹³⁸ While Anderson “refused” the commutation and remained on death row, it was far from clear that he was still subject to execution.¹³⁹

Little attached orders, which she credited to Frank Lorson, remanding *Anderson* pursuant to *Furman*.¹⁴⁰ Although the case

133. *Id.* at 2.

134. Memorandum from Laura Little to Chief Justice William Rehnquist Re: *Anderson v. Kentucky*, No. S-1, and *Rees v. Supt., Virginia State Penitentiary*, No. S-2 (May 11, 1987).

135. *Id.* at 3.

136. Memorandum to the Conference: Re: *Henry R. Anderson v. Kentucky*, No. S-1, *supra* note 132.

137. *Id.*

138. One study of Kentucky’s death-row records suggests that Anderson refused commutation of his death sentence:

After the *Furman* decision, the sentences of 23 Kentucky death row inmates were commuted to life imprisonment. . . . Our analysis of [Kentucky death row records] revealed that the *Furman* death row consisted of 23 inmates. . . . One member of this group “refused” the commutation of his sentence on the grounds that he was not guilty; therefore, in his mind, the acceptance of the commutation would constitute an admission of guilty. He has been housed continuously on death row since 1960 and still resides there.

Gennaro F. Vito & Deborah G. Wilson, *Back from the Dead: Tracking the Progress of Kentucky’s Furman-Commuted Death Row Population*, 5 JUST. Q. 101, 103 (1988) (citations omitted).

139. See *infra* notes 479–80 and accompanying text.

140. Memorandum from Laura Little to Chief Justice William Rehnquist Re: *Anderson v. Kentucky*, No. S-1, and *Rees v. Supt., Virginia State Penitentiary*, No. S-2, *supra* note 134. The document states:

was on the conference list for May 14, 1987, the Court evidently took no action.¹⁴¹

Newspaper articles in 1989¹⁴² and 1991¹⁴³ reflected continuing interest in the case. Mr. Simpson again wrote the Court in 1990, reiterating his concerns and faulting the Court for not attempting to treat Anderson's mental illness.¹⁴⁴ Anderson never got his day in court. Anderson succumbed to cancer on April 6, 1994, after spending thirty-four years on death row.¹⁴⁵ The Court seems to have learned of the death only a year later after an inquiry by an inmate-law clerk at Anderson's facility who wrote to the Court asking what they planned to do; shortly thereafter, the case was dismissed.¹⁴⁶ Upon learning of his death, Judge Higgins lamented Anderson's prolonged stay on death row while Frank Haddad remembered the brilliant man behind the schizophrenia.¹⁴⁷ By the end of his life, Anderson had submitted hundreds of pages of dense, often incoherent, documents to the Court asking for his case to be decided.

Proposed order for disposing of Anderson in a manner similar to the Court's disposition of the Furman holds:

No. S-1 ANDERSON, HENRY ROGERS v. KENTUCKY

The judgment is vacated insofar as it leaves undisturbed the death penalty imposed, and the case is remanded to the Supreme Court of Kentucky (as the successor of the Court of Appeals of Kentucky) for further proceedings. See Stewart v. Massachusetts, 408 U.S. 845 (1972). Accord Williams v. Kentucky, 408 U.S. 938 (1972).

Proposed order for disposing of Rees in manner similar to the Court's disposition of the Furman holds:

No. S-2 REES, MELVIN DAVIS v. SUPT., VIRGINIA STATE PENITENTIARY

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 insofar as it leaves undisturbed the death penalty imposed, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further proceedings. See Stewart v. Massachusetts, 408 U.S. 845 (1972); Mefford v. Warden, 408 U.S. 935 (1972); Fogg v. Slayton, 408 U.S. 937 (1972); Brickhouse v. Slayton, 408 U.S. 938; Arrington v. Maryland, 408 U.S. 938 (1972); Brown v. Virginia, 408 U.S. 940 (1972).

141. See Supplemental Conference List for May 14, 1987.

142. *Death Row Inmate Has Heart Surgery*, COURIER-J. (Louisville), Apr. 18, 1989, at B3.

143. Andrew Wolfson, *Mentally Ill Killer Has Spent 31 Years on Death Row*, COURIER-J. (Louisville), June 30, 1991, at A1.

144. Letter from Bruce Simpson, Attorney, to Chief Justice William H. Rehnquist, U.S. Supreme Court (Nov. 1, 1990) (on file with author).

145. Gil Lawson, *Henry Anderson Dies of Cancer, Had Been on Death Row for 34 Years*, COURIER-J. (Louisville), Apr. 23, 1994, at A-14.

146. Letter from Eugene W. Gall, #31 557 & SSU Legal Aide, 6-J-15, Ky. State Penitentiary at Eddyville, to William K. Suter, U.S. Supreme Court (June 6, 1995).

147. Lawson, *supra* note 145.

B. Rees v. Peyton (S-2)

Melvin Davis Rees was sentenced to death for murder in 1961 and died of natural causes in 1995. His petition for certiorari was before the Court from 1964 to 1995 without being decided.

1. *The Murders.* In early January 1959, a Virginia family disappeared while driving home from a visit with relatives.¹⁴⁸ Authorities searched for the family¹⁴⁹ and on March 4, 1959, the bodies of Carroll V. Jackson, Jr. and his infant daughter Janet were found outside Fredericksburg, Virginia.¹⁵⁰ Mr. Jackson had been beaten and shot in the head; the killer apparently left the child unharmed, but she died of exposure and suffocation from being trapped underneath her father's body.¹⁵¹ The rest of the family was found sixteen days later in a shallow grave near Annapolis, Maryland.¹⁵² Susan Ann, five years old, was lying on top of her mother, her skull bashed in.¹⁵³ Her mother, Mildred, who had also been struck repeatedly, had a stocking around her neck, indicating a potential hanging or strangulation.¹⁵⁴ Community outcry was immediate and intense; newspaper editorials demanded arrest and conviction of "the maniac" who killed the Jackson family.¹⁵⁵

For most of the next eighteen months, the FBI and police from Virginia, Maryland, and Washington, D.C. were stumped. They did, however, link this crime to the 1957 murder of Margaret Harold who was killed only 500 yards from where the bodies of Mrs. Jackson and Susan Ann were found.¹⁵⁶ The investigation revealed no apparent motive, nor did any of the evidence at the scene point to a suspect,¹⁵⁷ despite a list of over 1,500 potential

148. *Rees v. Commonwealth*, 127 S.E.2d 406, 408 (Va. 1962) (per curiam).

149. Bill McKelway, *Time Stands Still for Family's Killer Who Was Condemned 23 Years Ago*, RICHMOND TIMES-DISPATCH, Feb. 24, 1985, at A1.

150. Bill McKelway, *Rees Ends Denials, Relives Horror*, RICHMOND TIMES-DISPATCH, Feb. 24, 1985, at A1.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*; McKelway, *supra* note 149.

156. Tony Gieske & Andrew D. Kopkind, *D.C. Police Join Jackson Killer Hunt; Top Squad Assigned to Work in Case*, WASH. POST, Apr. 2, 1959, at A1.

157. *See id.* (describing the lack of evidence and "perplexing circumstances" surrounding the murders and detailing several theories for what may have happened); *Jackson Killer Bounty Up to \$7800; Leads Continue to Prove Worthless*, WASH. POST, Apr. 2, 1959, at B1 (describing the case as "baffling" and reporting that "one 'lead' after another prove[d] worthless").

perpetrators.¹⁵⁸ Eventually, however, the investigation centered on Melvin Davis Rees, Jr., a thirty-one-year-old musician from Hyattsville, Virginia.¹⁵⁹

Rees was arrested on June 24, 1960, in West Memphis, Arkansas, not for the murder of the Jackson family, but for killing Margaret Harold.¹⁶⁰ He had previously been investigated and polygraphed in connection with that case.¹⁶¹ Mrs. Harold was accidentally shot in a failed abduction attempt.¹⁶² Rees was initially looked at for the Jackson murders because of a previous sexual assault charge, but the investigation focused on him after a friend of Rees's wrote a letter to the police accusing Rees of the Harold murder.¹⁶³ The next day, Rees also was formally charged with the Jackson murders.¹⁶⁴

FBI agents searched his parents' home pursuant to their written permission.¹⁶⁵ There, in an attic crawlspace, the agents found a locked accordion case bearing the name of Dennis J. Werber.¹⁶⁶ They did not obtain a warrant, but opened the case with the permission of Rees's father, and found a pistol and a handwritten document that appeared to be an account of the Jackson family's fate.¹⁶⁷ The account, later termed Rees's "death diary,"¹⁶⁸ stated: "Drove to select area and killed husband & baby. Now the mother and daughter were *all*

158. Phil Casey & Jeffrey O'Neill, *Months of Tension, Suspicion Fade for Jacksons' Neighbors*, WASH. POST, June 26, 1960, at A3. A lack of leads led law enforcement to consult a psychic whose description of the murderer was sufficiently like a potential suspect they had questioned to assist the police in obtaining a search warrant for the gun used to kill Mr. Jackson. Jeffrey S. O'Neill & Harry Gabbett, *Telepathist's Suspect Faces Tests in Murder*, WASH. POST, June 11, 1960, at A3. Nothing connected this suspect to the crime, but, as a result of this investigation, he was subjected to a "lunacy commission" and consequently placed at a state hospital for further mental testing. *Id.* He was eventually committed to an insane asylum and not released despite Rees's arrest for the murders. *End of a Mystery?*, WASH. POST, June 28, 1960, at A14.

159. Casey & O'Neill, *supra* note 158.

160. Harry Gabbett, *Rees Accused by FBI of 2 Jackson Deaths*, WASH. POST, June 26, 1960, at A1; Alfred E. Lewis & Harry Gabbett, *Virginia Police Link "Evidence" with Rees*, WASH. POST, July 2, 1960, at C16.

161. Alfred E. Lewis & Eve Edstrom, *Year's Work by FBI Led to Rees' Arrest*, WASH. POST, June 29, 1960, at A3.

162. Albon B. Hailey & Harry Gabbett, *Rees Indicted, Note Is Divulged*, WASH. POST, June 29, 1960, at A1.

163. Lewis & Edstrom, *supra* note 161. Rees was never prosecuted for the sexual assault because the victim declined to testify. *Id.*

164. Gabbett, *supra* note 160.

165. *United States v. Rees*, 193 F. Supp. 849, 852 (D. Md. 1961).

166. *Id.*

167. *Id.* at 852-53.

168. Harry Gabbett, *Virginia Court Bars 'Death Diary' from Rees Trial in Jackson Slaying*, WASH. POST, Sept. 15, 1961, at A1.

*mine.*¹⁶⁹ It concluded with, “then tied & gagged, led to her place of execution and hung her.”¹⁷⁰ The *Washington Post* did not reprint the rest of the account, because of its allegedly obscene nature, stating only that it was “replete with obscenity and descriptions of perverted sexual acts.”¹⁷¹

Armed with this evidence, FBI Director J. Edgar Hoover personally announced the filing of federal kidnapping charges in Maryland for the deaths of Mrs. Jackson and Susan.¹⁷² Rees was indicted on June 28; Virginia had already issued arrest warrants in connection with the murders of the Jackson family.¹⁷³ Because the FBI arrested and charged Rees first, he would face trial on the federal kidnapping charges in Maryland, and then, depending on the outcome and the cooperation of the Department of Justice, he would be transferred to Virginia to stand trial for murder.¹⁷⁴

2. *From Federal Court to State Court and Back Again*

a. *United States v. Rees—The Federal Trial.* Rees first stood trial in U.S. District Court of Maryland on two counts of kidnapping for the abduction and murders of Mrs. Jackson and Susan.¹⁷⁵ Federal jurisdiction was invoked pursuant to 18 U.S.C. § 1201, which made it a federal crime to kidnap or abduct any person who is then “knowingly transport[ed] in interstate . . . commerce” and gave rise to a presumption of transportation in interstate commerce if the victim was not released within twenty-four hours.¹⁷⁶ However, the *Rees* court instructed the jury that the statute required the victim to have

169. Hailey & Gabbett, *supra* note 162.

170. *Id.*

171. *Id.* Despite being repeatedly referred to in the press, the actual account was not admitted in either of Rees’s trials, and the publicity that the account received formed a part of Rees’s eventual appeals to the U.S. Supreme Court. Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, with Appendix A at 13–15, *Rees v. Peyton*, 516 U.S. 802, No. S-2 (dismissed 1995).

172. Gabbett, *supra* note 160. The federal kidnapping law was invoked because it was unknown at the time whether Mrs. Jackson and Susan were killed in Maryland or Virginia. *Id.*; see 18 U.S.C. § 1201(a) (1958) (current version at 18 U.S.C. § 1201(a)(1) (2006)) (providing for punishment of persons who transport kidnapped individuals across state lines).

173. Gabbett, *supra* note 160 (noting that Virginia warrants were issued on June 25, 1960); Hailey & Gabbett, *supra* note 162 (discussing Rees’s June 28, 1960 indictment and Virginia’s concurrent plans to issue injunctions).

174. Gabbett, *supra* note 160; Stephen S. Rosenfeld, *Virginia to Bring Rees to Trial in 2 Murders*, WASH. POST, Mar. 2, 1961, at A3.

175. *United States v. Rees*, 193 F. Supp. 849, 850–51 (D. Md. 1961).

176. 18 U.S.C. § 1201(a), (b) (1958) (current version at 18 U.S.C. § 1201(a)(1), (b) (2006)).

been alive when transported.¹⁷⁷ It permitted the death penalty if the kidnap victim was killed.¹⁷⁸

Rees could not afford counsel, so the court appointed two local attorneys to represent him.¹⁷⁹ They worked diligently from the outset, delaying arraignment so that they could begin preparing a defense and arguing for the release of evidence and scientific testing results.¹⁸⁰ They also immediately questioned Rees's competency, stating that information provided by the government gave them reason to believe "Rees may be '... so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense.'"¹⁸¹ But a court-appointed psychiatrist proclaimed that there was "no valid reason" why Rees could not stand trial.¹⁸²

Trial began on January 25, 1961.¹⁸³ The jury pool included eighty-five people, several of whom were excluded for their views on capital punishment or because they had already formed views as to Rees's guilt.¹⁸⁴ The prosecution presented a case that was "almost entirely circumstantial."¹⁸⁵ The main evidence of guilt included two gun grips found at the scene of the crime that matched the gun found in Rees's accordion case, and the testimony of a Maryland woman who identified Rees as the man who ran her car off the road and forced her husband into the trunk of the car at gunpoint so that he could sexually assault

177. *Rees*, 193 F. Supp. at 858. The court stated that this element of the federal statute "does not appear to have been authoritatively decided by any court," but it nevertheless instructed the jury that in this case, transportation alive was an "essential element of the crime which had to be proved to their satisfaction beyond a reasonable doubt." *Id.* A later amendment to the statute clearly removed this requirement, allowing federal jurisdiction "regardless of whether the person was alive when transported across a State boundary if the person was alive when the transportation began." Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, § 702(a), 112 Stat. 2974, 2987 (codified as amended at 18 U.S.C. § 1201(a)(1) (2006)).

178. 18 U.S.C. § 1201(a) (1958) (now codified at 18 U.S.C. § 1201(a) (2006)).

179. *Court Appoints Lawyers to Defend Melvin Rees*, WASH. POST, July 12, 1960, at A3.

180. *Rees' Attorneys Win Delay in Arraignment*, WASH. POST, July 13, 1960, at C4; see Alan L. Dessoff, *Rees Attorneys Entitled to See Some Evidence*, WASH. POST, Oct. 6, 1960, at A3 (discussing defense counsel's requests for witness lists and evidence gathered by the prosecution); *Prosecutors Release Data on Rees Case*, WASH. POST, Aug. 19, 1960, at A3 (noting the defense counsel's motion for information and evidence from the prosecution); *Rees' Attorneys Request Data on Murder Clues*, WASH. POST, Sept. 28, 1960, at A20 (discussing defense counsel's requests for inspection of evidence, witness lists, and the results of scientific tests).

181. *Murder Trial Set Jan. 25 for Rees*, WASH. POST, Dec. 9, 1960, at C12.

182. *Rees Is Held Competent for Trial*, WASH. POST, Dec. 17, 1960, at A3.

183. *Connie Feeley, Rees Cool, Passionless as Murder Trial Starts*, WASH. POST, Jan. 26, 1961, at A1.

184. *Id.*

185. *The Rees Verdict*, WASH. POST, Feb. 24, 1961, at A18.

her.¹⁸⁶ The prosecution called a number of technical witnesses who testified about the match between the gun and the grips, as well as some blood that was found on both.¹⁸⁷ However, there was not enough blood to show that it belonged to any of the Jacksons.¹⁸⁸

The prosecution attempted to admit the gun found in the accordion case into evidence along with the written account of the murders.¹⁸⁹ Rees's lawyers objected that both items were the fruit of an illegal search.¹⁹⁰ The judge suspended the trial, and, after a day-long hearing, concluded that the gun was admissible but the written account was not.¹⁹¹ Although the judge did not elaborate on his reasons, it appears the judge found the search reasonable under the Fourth Amendment because Rees's parents gave written permission for the search, but excluded the documents because they implicated Rees's Fifth Amendment right not to incriminate himself.¹⁹²

The other major piece of evidence introduced by the prosecution was the testimony of June Tuozzo, who testified that Rees had sexually molested her in 1958. She described a chain of events much like what was hypothesized to have happened to the Jackson family. She said Rees ran her and her husband's car off the road and, brandishing a gun, forced her husband into the trunk and then molested her in the front seat. She testified that afterwards he was remorseful and apologetic and let her and her husband go. Rees's attorneys opposed the introduction of this testimony; however, the judge ruled that there were enough similarities between the two cases to establish a method and motive for the Jackson killings. Mrs. Tuozzo's husband followed her on the stand as the last prosecution witness, presenting virtually the same testimony and also identifying Rees as the perpetrator. The prosecution rested after three weeks of testimony and sixty-eight witnesses.¹⁹³

186. *Id.*

187. Constance Feeley, *Jury Told Blood Found on Gun in Rees' Home*, WASH. POST, Jan. 31, 1961, at A1; see Constance Feeley, *Gun Grips Called Rees Link to Slayings*, WASH. POST, Feb. 1, 1961, at A3 (describing the prosecution's method of proving the connection between the gun and the grips).

188. See Feeley, *Jury Told Blood Found on Gun in Rees' Home*, *supra* note 187 (noting the prosecution could not even identify the blood type).

189. Constance Feeley, *Rees Trial Is Suspended for Ruling on Evidence*, WASH. POST, Feb. 9, 1961, at A3.

190. Constance Feeley, *Gun Found in Home of Rees Parents Admitted in Evidence as Slaying Link*, WASH. POST, Feb. 10, 1961, at A1.

191. *Id.*

192. *Id.*

193. See Constance Feeley, *Mother of 2 Describes Terror Ride*, WASH. POST, Feb. 15, 1961, at A1 (providing a detailed description of Tuozzo's testimony).

At the close of the prosecution's case, Rees's attorneys moved for a directed verdict contending that there was insufficient evidence to prove that Mrs. Jackson and Susan were alive when transported to Maryland, an element of the offense.¹⁹⁴ The motion was denied, and Rees presented his defense.¹⁹⁵

Rees's witnesses testified that Rees was at their home the night that the Jacksons disappeared, although their testimony was discredited somewhat when the husband admitted that he and his wife had talked about her testimony over lunch.¹⁹⁶ Counsel also attempted to create a reasonable doubt by suggesting that Glen Moser, Rees's former friend who had told the police Rees committed the Harold murder, was insane.¹⁹⁷ The defense called Moser's mother to the stand to elicit testimony about her attempt to get her son declared mentally incompetent; however, the judge ruled that this testimony was irrelevant.¹⁹⁸ The defense also tried to create some doubt as to whether the gun found in the Rees home was truly the murder weapon.¹⁹⁹ But, in the end it was not enough. After a four-week trial and ninety-one witnesses,²⁰⁰ Rees was convicted on all charges.²⁰¹ However, after deliberating for about five hours, the all-male jury recommended a sentence of life imprisonment, not death.²⁰²

After the verdict was read, Rees moved for a judgment of acquittal or, in the alternative, for a new trial, again advancing the rather unsympathetic, if technically plausible, argument that there was no evidence that the victims were alive when transported to Maryland.²⁰³ The court disagreed, finding that there was ample circumstantial and direct evidence that they were killed at or near where they were buried.²⁰⁴

194. *Id.*

195. Constance Feeley, *D.C. Couple Alibis Rees in Slayings*, WASH. POST, Feb. 16, 1961, at A1.

196. *Id.*

197. Constance Feeley, *Rees Not to Testify in Jackson Murder Trial*, WASH. POST, Feb. 21, 1961, at C13.

198. *Id.*

199. See Constance Feeley, *Summing Up Begins Today in Rees Trial*, WASH. POST, Feb. 22, 1961, at A3 (discussing evidence presented by the defense calling the gun's authenticity into question).

200. *Id.*

201. See *The Rees Verdict*, *supra* note 185 (noting jury's decision that Rees was guilty beyond a reasonable doubt).

202. Constance Feeley, *Rees Is Convicted of Murder; Jurors Bar Death Sentence*, WASH. POST, Feb. 24, 1961, at A1; see *The Rees Verdict*, *supra* note 185 (discussing the jury's failure to recommend the imposition of the death penalty on Rees).

203. *United States v. Rees*, 193 F. Supp. 849, 851, 858–59 (D. Md. 1961).

204. *Id.* at 858–60.

Rees's motion for a new trial challenged the admissibility of various pieces of evidence. The trial raised novel and complex evidence issues.²⁰⁵ The *Washington Post* described it as "one of the most technically complicated in criminal history," and it was "believed to have set a new record in whispered bench conferences and legal arguments in chambers."²⁰⁶ Rees advanced five claims of evidentiary error. Specifically, he alleged that the court should not have admitted the bad act testimony of Mr. and Mrs. Tuozzo; the pistol found in the accordion case; the pistol grips found near Mr. Jackson's body; or the testimony of a Virginia official about the test to determine the caliber of bullet that killed Mr. Jackson. He also argued that the court had improperly limited the cross-examination of Glen Moser.²⁰⁷ The court summarily dismissed the claim about the ballistics testing, but it analyzed the others in detail, ultimately concluding that there was no basis for a new trial.²⁰⁸

The night after the judge denied all defense motions, and the evening before Rees was to be sentenced, a local station in Baltimore aired a "television drama" in which nine of the twelve jury members reenacted their deliberations.²⁰⁹ On its own lawyer's advice, the station had not consulted the judge or any of the attorneys, although the jurors who participated were allegedly told the show would not air without the judge's approval.²¹⁰ Rees's attorneys received a postponement of sentencing and were given an opportunity to view the tape for violations of Rees's rights.²¹¹

205. The same issues were raised in the subsequent Virginia state trial and the writ of habeas corpus. See *Rees v. Commonwealth*, 127 S.E.2d 406, 407–08 (Va. 1962) (outlining Rees's contentions of the trial court's evidentiary errors); *Rees v. Peyton*, 225 F. Supp. 507, 509 (E.D. Va. 1964) (noting Rees raised the same arguments in both federal and state court). For the most part, they centered on the admissibility of certain evidence in the possession of the FBI. *The Rees Verdict*, *supra* note 185.

206. *The Rees Verdict*, *supra* note 185.

207. *Rees Files Plea for Acquittal or New Trial*, WASH. POST, Mar. 1, 1961, at A3. For further elaboration of these arguments, see *Rees*, 193 F. Supp. at 852, 855–56, 858.

208. *Rees*, 193 F. Supp. at 858–60.

209. Constance Feeley, *Jury on TV Stalls Rees Sentencing*, WASH. POST, Mar. 24, 1961, at A1.

210. *Id.*

211. *Id.* The FBI conducted its own investigation as to whether the program and the juror comments constituted obstruction of justice. Constance Feeley, *FBI to Investigate TV Re-enactment of Deliberations by Rees Trial Jury*, WASH. POST, Mar. 25, 1961, at A1. The court also appointed two attorneys to review the videotape and its subsequent consequences to determine whether the jurors or television station personnel might be in contempt of court. *United States v. Rees*, 193 F. Supp. 861, 861–62 (D. Md. 1961). The attorneys found that the program clearly had "interfere[d] with the orderly processes of justice" because of the obvious delay in sentencing and subsequent motions filed by defense attorneys. *United States v. Rees*, 193 F. Supp. 864, 865 (D. Md. 1961). However,

After viewing the tape, Rees's attorneys brought new motions for a new trial, a mistrial, or to set aside the verdict, arguing that the broadcast improperly influenced the court in sentencing Rees; demonstrated that in their deliberations, the jurors had considered matters not presented at trial; and could prejudice Rees's defense in pending state prosecutions.²¹² The court denied the motion.²¹³

The court sentenced Rees to life imprisonment on April 6, 1961.²¹⁴ He reacted sadly to the news, and his lawyers asked that his sentence not begin until the time for appeal had passed.²¹⁵ However, after discussion with his lawyers, Rees decided not to appeal the conviction any further.²¹⁶ Finally Virginians would have a chance to mete out their own justice by bringing Rees back to stand trial where, in their minds, he rightly belonged.

b. Commonwealth v. Rees—*The Virginia Trial*. Rees arrived in Virginia on May 23, 1961.²¹⁷ At the preliminary hearing, Rees's attorneys unsuccessfully attempted to get him housed at the

they concluded that because the acts did not take place in the courtroom or its immediate geographical vicinity, the court had no authority to issue contempt of court citations. *Id.* at 867.

212. *Rees*, 193 F. Supp. at 862–64.

213. *Id.* at 864. Regarding the first ground alleging improper influence, Judge Thomsen simply stated that the program did not influence his decision in any way. *Id.* at 863. On the second ground, he engaged in a more substantive analysis of the law. After examining the law on jury verdicts, he determined that the state of the law protects jury deliberations from a post hoc examination searching for some ground to invalidate the verdict, except when there is a suggestion of extraneous influence. *Id.* at 863–64. Thus, as applied to this case, he found that the public statements by jury members could not be used to impeach their verdict, regardless of whether there was a possibility they considered inadmissible evidence or considered the evidence improperly. *Id.* As for the claim that rights in future cases may be prejudiced, the court held that, while possibly true, this claim did not provide grounds to invalidate prior proceedings and should only be addressed when and if it became an issue in future proceedings. *Id.* at 864.

214. *Rees Given Life Term in Slayings*, WASH. POST, Apr. 7, 1961, at A1.

215. *Id.*

216. Constance Feeley, *Rees Drops Appeal of Conviction*, WASH. POST, Apr. 18, 1961, at A3.

217. *Rees Awaits Virginia Trial*, WASH. POST, May 24, 1961, at C1. Significant jurisdictional maneuvering occurred before Rees could be brought to trial in state court. Because he had been convicted in federal court, the transfer to Virginia required the Department of Justice's permission, along with substantial cooperation between federal and state authorities. See Rosenfeld, *supra* note 174 (discussing cooperation between the Department of Justice, the FBI, and the state of Virginia to facilitate prosecution of Rees in Virginia). Robert F. Kennedy personally promised substantial Department of Justice cooperation, and Virginia's governor actually set up a conference to determine how this could legally be accomplished. *Id.* There were also potential complications if Rees were to be given the death penalty in Virginia. Because of the primacy of his federal sentence, the President would have to commute his federal sentence in order to free him for execution in Virginia. Feeley, *supra* note 216.

Fredericksburg jail rather than the state penitentiary, which was fifty-five miles away.²¹⁸ Rees was indicted for Mr. Jackson's murder on June 5, but the grand jury chose not to charge based on baby Janet's killing.²¹⁹ Again, Rees challenged the admissibility of the pistol and diary.²²⁰ Like the federal district court, the Virginia court found the gun admissible, but excluded the "death diary" because it was a personal paper not legally seizable and its use would violate Rees's Fifth Amendment rights.²²¹

Rees was tried for Mr. Jackson's murder in Spotsylvania County, Virginia, "among the folks whose neighbors he [was] accused of killing."²²² It was "the largest murder trial in that county in the current era, and it received all the publicity, newspapers, [and] television people could possibly give it."²²³ The courtroom was packed, six telephone lines were added, and a storage room in the courthouse was cleared out and made into a makeshift press room.²²⁴ Judge John D. Butzner, Jr., later a federal trial and appellate judge, presided.

Rees was charged with murder in the first degree, punishable by death.²²⁵ Seventy-five jurors were called, and in the end only nineteen were qualified to sit on the jury.²²⁶ The evidence presented at trial was generally the same as that presented in the federal trial,²²⁷ except that one new witness, Thornton Shackelford,

218. *Rees Given Virginia Hearing in 2 Jackson Family Killings*, WASH. POST, May 27, 1961, at B18.

219. *Rees Indicted in Virginia*, WASH. POST, June 6, 1961, at A3.

220. *Rees Takes Stand in Va. Hearing*, WASH. POST, Sept. 2, 1961, at D1.

221. Harry Gabbett, *Virginia Court Bars 'Death Diary' from Rees Trial in Jackson Slaying*, WASH. POST, Sept. 15, 1961, at A1.

222. Harry Gabbett, *Panel of 75 Exhausted in Selection of Rees Jury*, WASH. POST, Sept. 19, 1961, at A3.

223. Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, with Appendix A, *supra* note 171, at 9.

224. Harry Gabbett, *Concession Outside Rees Trial Aids Spotsylvania Church Goals*, WASH. POST, Sept. 25, 1961, at A3; see Harry Gabbett, *Rees Trial Moves Fast After Jury Is Sworn In*, WASH. POST, Sept. 20, 1961, at A3 (noting the crowded nature of the courtroom).

225. See *Rees v. Commonwealth*, 127 S.E.2d 406, 407 (Va. 1962) (per curiam) (noting that Rees was found guilty of murder in the first degree and sentenced to death). Rees was never tried for the murder of the youngest Jackson child, owing primarily to the life sentence he received for the father's murder.

226. Gabbett, *supra* note 222. At least eighteen of those dismissed stated they were convinced of Rees's guilt, and another nine were excused because of their personal feelings about capital punishment. *Id.*

227. See Gabbett, *Rees Trial Moves Fast After Jury Is Sworn In*, *supra* note 224 (noting that the evidence used in the Virginia trial would mirror the evidence used in the federal trial); Harry Gabbett, *Surprise Witness Puts Rees near Crime Scene*, WASH. POST, Sept. 27, 1961, at A3 (describing the prosecution's use of testimony from an FBI ballistics

testified that he saw Rees within thirty miles of the abduction site exhibiting behavior similar to that which the Tuozzos described.²²⁸ Through over an hour of cross-examination, his testimony remained consistent and he never wavered in his identification of Rees.²²⁹ The trial lasted nine days, but it took the jury less than an hour to reach a guilty verdict and fix punishment at death.²³⁰

Rees again moved to set aside the verdict.²³¹ The judge deferred ruling until after the defense filed a brief in support of its motion; however, due to a delay in transcription, the hearing did not occur until three months later.²³² The defense made many of the same arguments advanced in the federal trial.²³³

Judge Butzner analyzed the issues thoughtfully²³⁴ but denied the claims and sentenced Rees to death in the electric chair.²³⁵ Rees appealed to the Supreme Court of Appeals of Virginia, but the court affirmed in a decision adopting the trial court's opinion verbatim.²³⁶ Rees then appealed to the U.S. Supreme Court, but the certiorari petition and petitions for rehearing were denied.²³⁷

c. *Rees v. Peyton—Habeas Corpus.* Rees's final attempt to overturn his conviction was in the form of a habeas corpus petition filed with the U.S. District Court for the Eastern District of Virginia claiming that the Virginia conviction violated his constitutional rights.²³⁸ Before U.S. District Judge Lewis, Rees's attorneys again alleged that their representation of Rees was

expert to link Rees's gun to the crime scene); Harry Gabbett, *Rees Found Guilty of Jackson Slaying, Faces Death in Chair*, WASH. POST, Sept. 29, 1961, at A3 (referencing the expert ballistics testimony in the state case).

228. Gabbett, *Surprise Witness Puts Rees near Crime Scene*, *supra* note 227; see *supra* pp. 224–25 (describing the Tuozzos' similar testimony establishing a method).

229. Gabbett, *Surprise Witness Puts Rees near Crime Scene*, *supra* note 227.

230. Gabbett, *Rees Found Guilty of Jackson Slaying, Faces Death in Chair*, *supra* note 227. Many speculated that it took the jury less than half an hour to deliberate on Rees's fate. The jury received the case at 3:47 p.m. and had to walk to another building to begin deliberations. They were back thirty minutes later with a question for the judge and had reached a verdict by 4:40 p.m. *Id.*

231. *Rees v. Commonwealth*, 127 S.E.2d 406, 407 (Va. 1962) (per curiam).

232. *Hearing Set on Jan. 4 for Rees Appeal*, WASH. POST, Sept. 30, 1961, at A3.

233. See *Rees*, 127 S.E.2d at 408 (outlining Rees's assertions of the trial court's errors); see also *Hearing Set On Jan. 4 for Rees Appeal*, *supra* note 232 (discussing the background of Rees's appeal).

234. See *Rees*, 127 S.E.2d at 406, 408–23 (adopting Judge Butzner's opinion in full given its exhaustive and correct nature).

235. Walter B. Douglas, *Rees Sentenced to Die in Virginia Chair April 6*, WASH. POST, Jan. 5, 1962, at B1.

236. *Rees*, 127 S.E.2d at 408.

237. *Rees v. Virginia*, 372 U.S. 964 (1963), *reh'g denied*, 373 U.S. 947 (1963).

238. *Rees v. Peyton*, 225 F. Supp. 507, 508–09 (E.D. Va. 1964).

hampered by his incarceration at the state penitentiary.²³⁹ However, this time they introduced specific evidence of interference. His attorneys stated that the Commonwealth notified them on a Friday that it intended to call a witness the following Monday who was unknown to the defense and who would testify to seeing Rees near the scene of the crime the day it occurred.²⁴⁰ They argued that their representation was handicapped because they could not talk directly to Rees that night, and instead had to relay questions over the telephone through a U.S. marshal.²⁴¹ The court was not persuaded that a true handicap existed because Rees was available for conference in Spotsylvania for as long as needed on both the Friday and Monday before the testimony was actually offered.²⁴²

They also renewed the claim that venue should have been changed. Under Virginia law, to warrant a change of venue, the party seeking the venue change must “show clearly that there is such a widespread feeling of prejudice on the part of the citizens of the county as will be reasonably certain to prevent a fair and impartial trial.”²⁴³ Thus, the law required the defendant to produce some positive evidence of jury bias to overcome the presumption of a fair and impartial venire. The defense did not produce this positive evidence; nevertheless, it argued that the sheer volume of press coverage, which included a great deal of evidence not admitted at trial, constituted an “external influence” on the jury that rendered it unable to give Rees a fair trial.²⁴⁴

To prove external influence, the defense obtained copies of all newspaper articles, television broadcasts, and radio broadcasts and attempted to subpoena all of the jury members at the state trial to determine what media they had viewed and what parts they remembered.²⁴⁵ Judge Lewis refused to allow Rees to call any jurors based on the prohibition of post hoc examination of “external influence” on jury members.²⁴⁶ In Judge Lewis’s opinion, clearly the jurors had viewed many of these stories, but during voir dire they had stated they could fairly and impartially consider the evidence presented.²⁴⁷

239. *Id.* at 508–10.

240. *Id.* at 510.

241. *Id.*

242. *Id.*

243. *Id.* (quoting *Farrow v. Commonwealth*, 89 S.E.2d 312, 313 (Va. 1955)).

244. *Id.* at 510–12.

245. *Id.* at 511.

246. *Id.* at 512.

247. *Id.* at 511–13.

The final claim was that the search of Mr. and Mrs. Rees, Sr.'s home and the subsequent search of the accordion case were unconstitutional under the Fourth Amendment.²⁴⁸ The defense called two new witnesses at this hearing, neighbors of Mr. and Mrs. Rees, Sr., whom the Reeses had been visiting when they were notified of their son's arrest.²⁴⁹ One neighbor testified that she left the room when the FBI agents arrived and when she came back in, "Mr. Rees was standing, supported on either side by his elbows, by both of the FBI men . . . and he was as white as a sheet."²⁵⁰ However, she was not in the room when Mr. Rees, Sr. consented to the search.²⁵¹ Based on this testimony and that of Mr. Rees, Sr. himself, Rees's attorneys argued that FBI agents exploited his emotional distress by applying "implied coercion" to obtain permission to search the house.²⁵² As an alternative, Rees's attorneys argued that his parents had no authority to consent to the opening of the accordion case that clearly was not theirs.²⁵³

The court rejected both of these contentions, finding the parents' consent was voluntary and that they had the authority to consent.²⁵⁴ Because the search was constitutionally permissible, the gun was properly seized as an instrumentality of the crime and properly admitted at trial.²⁵⁵

Defense counsel appealed to the U.S. Court of Appeals for the Fourth Circuit, which heard the case en banc.²⁵⁶ The opinion, written by Judge Albert Bryan, found particularly significant the fact that Rees's accordion case was not only hidden in his parents' home without their knowledge, but contained a nametag that appeared to negate Rees's ownership of the case.²⁵⁷ Thus, they had a clear interest in opening the case and viewing its contents.²⁵⁸

With regard to venue, Judge Bryan's analysis was again slightly different than the opinions before him. He stated that there was no way to completely avoid the publicity generated by the various trials, but that the judges did as much as possible to

248. *Id.* at 513–14.

249. *Id.*

250. *Id.* at 514 (quoting the trial transcript) (internal quotation marks omitted).

251. *Id.*

252. *See id.* at 513–14 (rejecting an argument of implied coercion).

253. *See id.* at 514 (explaining that Rees Sr.'s consent was sufficient to legitimize the search).

254. *Id.*

255. *Id.*

256. *Rees v. Peyton*, 341 F.2d 859 (4th Cir. 1965).

257. *Id.* at 862–63. The tag bore the name and information of a Dennis J. Werber, a man unknown to both parents. *Id.*

258. *Id.* at 863.

minimize its effect.²⁵⁹ Furthermore, a change of venue would have been no help to Rees because the trial's publicity had undoubtedly reached the far corners of the state.²⁶⁰ In the end, the court denied all but one of Rees's claims, and the error found was not deemed prejudicial.²⁶¹

*d. "The only judgment I seek is that of Christ."*²⁶² Rees at the Court. The certiorari petition raised the same issues that were argued to the trial and appellate courts. The first issue, whether Rees was denied a fair trial because of the pretrial publicity, was supported by the inclusion of many of the newspaper articles and television and radio broadcasts concerning Rees's guilt, the so-called "Death Diary," and his prior convictions in Maryland.²⁶³ The other two claims, the search and seizure of the accordion case and the consent to search obtained from Melvin Rees, Sr., were substantially the same as had been presented before.²⁶⁴ The ACLU filed an amicus brief authored by Monroe Freedman in support of certiorari, urging the Court to definitively resolve the question of pretrial publicity because the issue could only be expected to become more prevalent with time.²⁶⁵

259. *Id.*

260. *Id.* at 863–64.

261. *Id.* at 863–65. Judge Bryan's analysis of the location of Rees's incarceration did not differ substantially from the previous opinions. *Id.* at 864. However, the court did find error with the district court's refusal to allow the testimony of a juror's neighbor about a conversation regarding the attack on June Tuozzo. *Id.* at 865. Nevertheless, because the juror stated he could be impartial and because the attack was public record by virtue of the trial in Maryland, the court did not feel this error was substantial enough to warrant vacating Rees's conviction. *Id.*

262. Letter from Melvin Davis Rees to S. White Rhyne Jr., Attorney for Defendant (received Sept. 21, 1965) (emphasis added) (on file with author).

263. Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, with Appendix A, *supra* note 171, at 8–10, 13–16. Interestingly, two years earlier, Rees filed a certiorari petition, in which the Court specifically requested the Commonwealth of Virginia to respond. *Id.* at 15–16. After receiving the response, the Court summarily denied review. *Id.* Presuming this denial was in some relation to the Commonwealth's assertion that the record was incomplete because reproductions of the articles and broadcasts referred to were not attached to the petition, the second certiorari petition included many of them. *Id.* There were more than 750 media references to incriminating but inadmissible evidence, more than 120 of which referenced the Death Diary. *Id.* at 13. According to Rees's attorneys, the "incriminating information w[as] even more damaging to petitioner than if [it] had been admitted in evidence at trial, for he had not even the opportunity to attack [it] by cross-examination and rebuttal." *Id.* at 15.

264. *Id.* at 21–29.

265. Brief Amicus Curiae for the American Civil Liberties Union and the National Capital Area Civil Liberties Union in Support of the Petition for a Writ of Certiorari at 6, *Rees v. Peyton*, 516 U.S. 802 (1995) (S-2). It also argued that the lower courts' decisions on Melvin Rees Sr.'s consent to search the accordion case was in direct conflict with

Less than a month after the certiorari petition was filed, Rees wrote to his lawyer directing that the appeal be abandoned and the Fourth Circuit's decision be allowed to stand.²⁶⁶ Compliance with this request, of course, would have meant that there was no legal impediment to execution. After Rees's attorney, Rhyne, consulted with Rees, his father, and his spiritual advisor, Rhyne concluded that he could not comply because he doubted his client's competency to make this "most serious election."²⁶⁷ In connection with the federal trial, Rees had received a psychological evaluation that concluded Rees suffered from a "Personality Pattern Disturbance, Schizoid personality with prominent paranoid trends," exhibited poor judgment, and was unable to distinguish between fact and fantasy.²⁶⁸ Nevertheless, the report concluded his impairments were not so severe as to make him unable to assist counsel in his defense.²⁶⁹ Rhyne noted that Rees had given "indications of mental disability" throughout the course of his representation and that over the past few years he had become more detached from reality and less interested in efforts to save his life.²⁷⁰ After notifying the Supreme Court, Rhyne wrote to Reno Harp, III, Assistant Attorney General of Virginia, asking for a psychiatric evaluation.²⁷¹

When Rhyne did not withdraw the petition, Rees wrote

Stoner v. California, 376 U.S. 483 (1964), a position that Rees's own petition also took. *Id.*; Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, with Appendix A, *supra* note 171, at 24–25.

266. Letter from S. White Rhyne Jr., Attorney for Defendant, to John F. Davis, Clerk, U.S. Supreme Court (Aug. 3, 1965) (on file with author). The letter read:

Dear Mr. Rhyne,

It is my mature & considered decision to withdraw from before the U.S. Supreme Ct., as well as from all further consideration, the petition you recently filed, & that Mr. Crismond, the clerk of Spotsylvania county ct. be notified that all legal proceedings have been abandoned.

I would express my appreciation to you & gratitude.

In Dostoyevsk[y]'s novel, "The Bros. Karamazov" Father Zossimas elder Brother lay dying, sick, & handicapped in many ways but there was joy in His heart & to those that attended him he asked how it was that we could go on holding grudges against one another & always trying to out do one another when we could be entering the Garden in a Spirit of Love & Friendliness & brotherhood to live a new & happy life in the Name of Jesus Christ.

Sincerely & Cordially,

M.D. Rees

Id. at 1–2.

267. *Id.* at 2.

268. *Id.*

269. *Id.*

270. *Id.* at 3.

271. Crocker, *supra* note 5, at 897, 900–02.

again, expressing regret that Rhyne had not withdrawn the petition and requesting that he withdraw from representation.²⁷² Rhyne again notified the Court of Rees's request and reiterated that unless ordered by the Court to withdraw or assured that Rees was competent, he would not withdraw the petition.²⁷³ Rees then wrote directly to the Supreme Court Clerk.²⁷⁴

Rees was examined by psychiatrist Dr. Oscar Legault who concluded that Rees was psychotic and suffering from schizophrenia with paranoid characteristics.²⁷⁵ In his opinion, Rees was unable to assist in his own defense because "he is under the influence of a delusional system which influences his judgment, and also because the disorganization of his thought and his preoccupation with psychotic matters prevents his giving sufficient attention to his defense."²⁷⁶ Although Dr. Legault recommended a more extensive evaluation to eliminate the possibility of malingering, his conclusion was clear.²⁷⁷

Armed with Dr. Legault's report, Rhyne asked the Court to come up with an appropriate disposition.²⁷⁸ Using *Anderson v. Kentucky*²⁷⁹ and a military case, *United States v. Washington*,²⁸⁰ as precedents, Rhyne proposed that the Court grant certiorari and then continue the case indefinitely.²⁸¹ He argued that the Court could grant certiorari despite Rees's incompetency, as it had done for Anderson, but that it could not properly deny the petition unless Rees was competent to understand the proceeding.²⁸² If the Court granted certiorari,

272. Letter from Melvin Davis Rees to S. White Rhyne Jr., *supra* note 262.

273. Letter from S. White Rhyne Jr. to John F. Davis, *supra* note 266.

274. Letter from Melvin Davis Rees Jr., Attorney for Defendant, to John F. Davis, Clerk, U.S. Supreme Court (received Sep. 27, 1965) (on file with author).

275. Letter from Oscar Legault, M.D., to S. White Rhyne Jr., Attorney for Defendant (Sept. 29, 1965) (on file with author).

276. *Id.* This diagnosis is not unlike that of Henry Anderson. However, Anderson did not suffer the same disorganized thought process as Rees and was more able to maintain basic contact with reality. This contact with reality is probably what led Anderson's psychiatrists to pronounce him fit to stand trial and assist counsel in his defense. Had he been preoccupied with God and evil rather than human actors, Anderson may not have been held competent to stand trial.

277. *Id.*

278. Motion for Stay of Proceedings or Other Appropriate Relief at 2, 6-8, *Rees v. Peyton*, 516 U.S. 802 (1995) (S-2).

279. *Anderson v. Kentucky*, 371 U.S. 886 (1962).

280. *United States v. Washington*, 19 C.M.R. 240 (1955).

281. *See* Motion for Stay of Proceedings or Other Appropriate Relief at 2-5, *supra* note 278, at 6-7.

282. *Id.* at 7.

Rhyne's preference was for an indefinite continuance, but if the Court proceeded on the merits, he requested appointment of a guardian.²⁸³

Virginia answered Rees's Motion for a Stay of Proceedings on March 22, 1966, more than five months after it was filed.²⁸⁴ The answer opposed an *Anderson*-type indefinite continuance because Virginia did not concede incompetency and requested an order for psychiatric observation.²⁸⁵ If the Court was not forthcoming with such an order, Harp suggested the Court act promptly and let Rees have his sanity tested prior to execution, should the Court uphold his conviction.²⁸⁶ The alternative of a continuance, argued Harp, would deprive the people of Virginia of their rights.²⁸⁷

In May of 1966, the Supreme Court ordered the district court to hold a hearing on Rees's competency.²⁸⁸ Rees was committed to the Medical Facility for Federal Prisoners in Springfield, Missouri for examination.²⁸⁹ He was then transferred back to Central State Hospital in Petersburg, Virginia and, at the request of Harp, was evaluated by Central State Hospital's superintendent.²⁹⁰ After examining the reports and hearing testimony, Judge Lewis concluded that "Melvin Davis Rees, Jr. cannot at this time make a rational choice with respect to continuing or abandoning further litigation in his behalf."²⁹¹ Judge Lewis described it as "schizophrenic reaction, chronic undifferentiated type."²⁹²

Rhyne filed a memorandum with the Court, exploring the

283. *Id.* at 7–8.

284. Answer, *Rees v. Peyton*, 516 U.S. 802 (1995) (S-2).

285. *Id.* at 3–5.

286. *Id.*

287. *Id.* at 4.

288. *Rees v. Peyton*, 384 U.S. 312, 313–14 (1966) (per curiam). The opinion directed the district court to determine "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.*

289. Letter from Judge Oren R. Lewis, U.S. Dist. Court of the E. Dist. of Va., to Chief Justice Earl Warren, U.S. Supreme Court (Nov. 28, 1966) (on file with author).

290. *Id.*

291. Report on Petitioner's Mental Competence, No. 2970-M (E.D. Va. 1967). The reports from the Springfield psychiatrist stated that, at times, Rees refused to wear clothes or leave his room for meals. *Id.* at 4–5. He was described as having "many delusions of grandeur. He feels in an exalted state because he feels he has had certain special revelations from God. He has allowed his fantasies to supersede a rational assessment of reality and has developed a marked inappropriateness of thought, feeling and behavior." *Id.* at 5.

292. *Id.* at 1–2.

dispositional alternatives for the case.²⁹³ He urged the Court to grant review of the case and then stay proceedings.²⁹⁴ In contrast, Harp argued that the Court should act either to grant or deny review and thereby avoid “a legal limbo which could continue until the petitioner’s demise by natural causes.”²⁹⁵ Evidently, the Court was inclined to hold the case without decision; John F. Davis spoke with counsel for both sides by phone, to gauge their reaction. He reported that the parties would prefer a decision; “[i]n summary, counsel for both parties do not really present any objection to the procedure proposed in the case, but neither of them accepts it with enthusiasm.”²⁹⁶ On April 10, 1967, the Court continued the case indefinitely as it had done with *Anderson* four years before. The order in its entirety states: “This case is held without action on the petition for certiorari until further order of the Court.”²⁹⁷ Rees was then transferred back to the Medical Facility for Federal Prisoners in Missouri. Except for two years in Virginia custody, he would remain in the federal prison system until his death.²⁹⁸

On April 16, 1971, Clerk E. Robert Seaver drafted a memorandum stating that Rees’s case had been reconsidered and disposed of in the same way as *Anderson* based on the April 2, 1971 Conference—“held indefinitely, on a suspension docket having a special series of numbers separate from the active cases.”²⁹⁹ Seaver’s draft order, which represented a path not taken by the Court, would have remanded the case on the condition that Rees not be executed unless he was found competent and had an opportunity to present his certiorari petition.³⁰⁰ The draft notes that the “function of maintaining a continuing surveillance over his condition is that of the state, rather than this [C]ourt.”³⁰¹ But that view did not prevail.

After the suspension, Rees’s case remained substantially

293. Memorandum Re Proper Procedure Following Judicial Finding of Petitioner’s Mental Incompetence, *Rees v. Peyton*, 516 U.S. 802 (1995) (S-2).

294. *Id.* at 3–6.

295. John P. MacKenzie, *Supreme Court Is Urged to Rule on Rees’s Plea*, WASH. POST, Mar. 25, 1967, at A11.

296. Memorandum from John F. Davis, Clerk of the Supreme Court, to Chief Justice Earl Warren, U.S. Supreme Court 2 (received Mar. 31 1967).

297. *Rees v. Peyton*, 386 U.S. 989 (1967).

298. Progress Report from United States Department of Justice, Bureau of Prisons 2, 4 (Mar. 18, 1987).

299. Memorandum for the Files, from E. Robert Seaver, Clerk of the Supreme Court (Apr. 16, 1971) (on file with author).

300. *Id.*

301. *Id.*

lower-profile than *Anderson*; notwithstanding his initial letters to the Clerk, Rees was not a jailhouse lawyer of *Anderson*'s caliber.³⁰² In a 1985 interview with the *Richmond Times-Dispatch*, he admitted that he was responsible for the murders—the circumstantial case was solid after all.³⁰³ Ironically, he, like *Anderson*, remained under a death sentence; he had not benefited from the Supreme Court's post-*Furman* round of vacations of illegal death sentences, most or all of which were commuted in the states.

In a May 1987 psychiatric evaluation, Rees indicated that he wanted to live; the experts also concluded that his mental condition had substantially improved.³⁰⁴ The staff psychologist wrote: "It is this examiner's opinion that Mr. Rees'[s] mental condition has substantially improved from the time of the 1965 Virginia State Court ruling that the defendant was unable to make a rational choice with respect to continuing or abandoning further litigation."³⁰⁵

Also in May 1987, Laura Little wrote her memorandum to Chief Justice Rehnquist regarding *Rees* and *Anderson*.³⁰⁶ She reported that the Virginia Attorney General's Office told the Clerk's Office that a commutation might be proposed.³⁰⁷ Indeed, in January 1988, the Governor of Virginia commuted Rees's death sentence "to treat Rees consistently with other similarly situated death row inmates whose sentences were commuted."³⁰⁸

In the spring of 1988, Frank Lorson of the Clerk's Office followed up.³⁰⁹ He drafted orders vacating the death sentences in this case and *Anderson*, and remanding based on *Furman*. A preliminary memorandum was prepared for the conference, assessing the *Rees* case.³¹⁰ The Memorandum's author, Rob Werner, concluded that if the Court proceeded on the petition, it

302. The Court received a psychiatric update on Rees's progress in 1987, but apparently no further action was taken until 1998. Letter from Jerry P. Slonaker, Assistant Attorney Gen. for the Commonwealth of Va. to Frank Lorson, Clerk, U.S. Supreme Court (June 3, 1987) (on file with author). The late Professor Wilfred Ritz of Washington & Lee School of Law inquired about the case, but it appears he did not write on it.

303. Bill McKelway, *Time Stands Still for Family's Killer Who Was Condemned 23 Years Ago*, RICHMOND TIMES-DISPATCH, Feb. 24, 1985, at 1.

304. Psychological Report from David L. Reuterfors, Ph.D., Staff Psychologist 2-3 (May 20, 1987).

305. *Id.* at 3.

306. See Memorandum from Laura Little to William Rehnquist, *supra* note 134.

307. *Id.* at 6.

308. Letter from Sandra D. Bowen, Sec'y of the Commonwealth of Va., to S. White Rhyne Jr. Attorney for Defendant (Jan. 4, 1988) (on file with author).

309. Memorandum from Francis J. Lorson, Clerk of the Supreme Court, to the Supreme Court Conference (Spring 1988) (on file with author).

310. Preliminary Memorandum from Robert W. Werner, Clerk of the Supreme Court, to the Supreme Court Conference (Apr. 1, 1988).

should probably be denied (although supplemental briefing might be necessary), but because he assumed Rees's mental condition was unchanged, he would be no more able to comprehend the Court's action than he had been twenty years ago.³¹¹ "I recommend that the Court confirm that petitioner is still mentally incompetent. If so, then it would appear best to hold the case on the special docket. I can think of no procedure the Court might establish for monitoring the case that might not establish an unwarranted precedent."³¹² A handwritten document in the *Anderson* file listing all of the Special Docket cases had two apparent references to this memo: "circulate memo re commutation per CJ 3/29/88" and "strike from 4/1 conf." Again, apparently no action was taken. Rees died at the Medical Facility for Federal Prisoners in 1995.

C. In re Disbarment of Powell (S-3)

Diana Kearny Powell's bar discipline case was pending before the Supreme Court from 1967 until 1994, four years after her death. Ms. Powell was born in 1910 and seems to have lived in Washington, D.C. for all of her life. She was a member of a notable family. Powell was the great-granddaughter of Civil War Union General Philip Kearny,³¹³ granddaughter of a New Jersey judge,³¹⁴ daughter of a U.S. Marine Corps Brigadier General,³¹⁵ and cousin of William Bullitt, U.S. Ambassador to the USSR and France in the 1930s.³¹⁶ Powell attended George Washington University and later received her law degree from Catholic University.³¹⁷ Admitted to the D.C. bar in 1940,³¹⁸ she earned an LL.M. in 1942.³¹⁹

Although active in some bar activities,³²⁰ Ms. Powell was

311. *Id.* at 11–13.

312. *Id.* at 13.

313. *Mrs. Diana K. Powell Dead*, WASH. POST, Dec. 1, 1904, at 7. A historical novel was written about the romance of Gen. Kearny and his wife, Diana Bullitt. MICAELA GILCHRIST, *THE FIERCER HEART* (2005).

314. *See Weddings of a Day: Powell–Joline*, N.Y. TIMES, Feb. 9, 1902, at 7 (detailing the marriage of Diana Kearney Powell's parents, the daughter of Judge Charles Van Dyke Joline of the District Court in Camden to U.S. Marine Corps Lieutenant William G. Powell).

315. *Obituary of William Glasgow Powell*, WASH. POST, May 18, 1955, at 20.

316. Diana K. Powell, Letter to the Editor, *Against Recognition*, WASH. POST, Nov. 19, 1958, at A14.

317. Diana K. Powell was listed as a lost alumna from 1940 on the Catholic University of America website (archived site on file with author).

318. *308 Applicants Pass Test to Practice in U.S. District Court*, WASH. POST, Aug. 29, 1940, at 3.

319. *Columbus U. Graduates Hear Jurist*, WASH. POST, June 12, 1942, at 21.

320. 38 WOMEN'S L. J. 33, 33 (1952) (noting her membership on the Administrative

perhaps best known for her literary accomplishments.³²¹ Her poetry was published in the *Washington Post*,³²² the *New York Times*,³²³ and in a collection in 1986.³²⁴ She helped create the first literary magazine in the Washington, D.C. area.³²⁵ Her legal career ended in 1967 when she was disbarred by the U.S. District Court for the District of Columbia.³²⁶ As a matter of course, her membership in the U.S. Supreme Court bar was called into question. However, although she was given an order to show cause in 1967, she was not actually disbarred until 1994.

Although she briefed and argued some criminal cases in the U.S. Court of Appeals for the District of Columbia Circuit and the District of Columbia Court of Appeals, most of her legal efforts were devoted to her personal claims, and her legal difficulties arose from her own cases.³²⁷ Powell was employed as a clerk by the *Washington Post* and, in the late 1950s, sued the paper for firing her after she complained about failure to comply with the Fair Labor Standards Act. The district court and a D.C. Circuit panel including then Judge Warren Burger rejected her claims, and the Supreme Court denied certiorari.³²⁸ In 1960, she lost an appeal involving an inheritance from an aunt; again, then Judge

Law Committee of the National Association of Women Lawyers).

321. Theodore Hall, *No End of Books*, WASH. POST, Dec. 29, 1933, at 13. Hall asserted that Powell's "published verse entitles her to a definite place among the younger poets." *Id.*

322. Diana Kearny Powell, *Pegasus*, WASH. POST, Oct. 16, 1932, at M6; Diana Kearny Powell, *Admiral Byrd*, WASH. POST, June 20, 1930, at 6; Diana Kearny Powell, *Winter Has Come*, WASH. POST, Jan. 5, 1930, at S10.

323. Diana Kearny Powell, *Cacti*, N.Y. TIMES, Apr. 9, 1958, at 32.

324. DIANA KEARNY POWELL, *SELECTED POEMS* (1986).

325. Hall, *supra* note 321.

326. Brief for Respondent in Opposition, Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 2, *Powell v. Comm. on Admissions & Grievances*, 389 U.S. 924 (1967) (No. 1528).

327. She prevailed in *Awkard v. United States*, 352 F.2d 641, 645-46 (D.C. Cir. 1965), which reversed a conviction for allowing cross-examination of character witnesses on prior arrests of which they would have had no reason to know. Other cases in which she acted as counsel were less successful. *Harley v. United States*, 198 A.2d 745, 746 (D.C. 1964) (per curiam); *Reigle v. United States*, 194 A.2d 660, 661 (D.C. 1963); *Turner v. Early*, 301 F.2d 557 (D.C. Cir. 1962) (per curiam); *Smith v. United States*, 173 A.2d 739, 740 (D.C. 1961). She was also appointed counsel in misdemeanors under the Criminal Justice Act. *Hearings on Appropriations for 1968: Before the Subcomm. on Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies of the H. Comm. on Appropriations*, 90th Cong. 127, 141 (1967).

328. See *Powell v. Wash. Post Co.*, 168 F. Supp. 41, 42 (D.D.C. 1958) (dismissed as to *Washington Post* for lack of jurisdiction; summary judgment granted as to defendant *Mitchell*), *aff'd*, 267 F.2d 651 (D.C. Cir. 1959) (per curiam), *cert. denied*, 360 U.S. 930 (1959). This case is mentioned in Janet S. Lindgren, *Social Theory and Judicial Choice: Damages and Federal Statutes*, 28 BUFF. L. REV. 711, 716, 722, 759 n.174 (1979).

Warren Burger was on the panel.³²⁹ Also in that year, a much more consuming suit came to the fore, which would involve no fewer than eight separate certiorari petitions and many petitions for rehearing and other motions before the Court.³³⁰

1. *Powell v. National Savings & Trust Co. (No. 61-521)*. Diana Kearny Powell was named for her grandmother, and ultimately her grandmother's will was her legal undoing. Upon her death in 1904,³³¹ the elder Diana Kearny Powell's will created a trust for her children, naming her youngest child as the trustee and the National Savings and Trust Company as the successor trustee.³³² The elder Powell had five children: Aimee, George, Lucy, Owen, and William, the only one who died with a surviving child (Diana herself).³³³ When Lucy Powell passed away in 1958, she was presumed to be the last of the elder Powell's children to pass away and the trustee, by this time National Savings and Trust Co., moved to disburse her estate under the terms of the will.³³⁴ Diana Powell was convinced the estate was hers. The core of Diana Powell's claim was that under a palpably confusing provision,³³⁵ as the sole surviving child or grandchild, she was entitled to the entire trust. The alternative view was that she was entitled to a fifth, and the estates of the deceased children (i.e., her aunts and uncles) were entitled to the other four-fifths.

Unsure of how to proceed, the trustee requested instructions from the court on whether Powell was entitled to the entire corpus of the trust.³³⁶ Representing herself, Powell fought National Savings's actions as trustee from the beginning and,

329. *Powell v. Ogden*, 278 F.2d 451, 451–52 (D.C. Cir. 1960).

330. Also in 1960, she filed a lawsuit regarding another bequest.

331. *Mrs. Diana K. Powell Dead*, *supra* note 313.

332. *Powell v. Nat'l Sav. & Trust Co.*, 296 F.2d 412, 413 (D.C. Cir. 1961).

333. *Id.*

334. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3–4, *Powell v. Nat'l Sav. & Trust Co.*, 296 F.2d 412 (D.C. Cir. 1961) (No. 521), *cert. denied*, 368 U.S. 946 (1961), *reh'g denied*, 368 U.S. 1005 (1962).

335. The testatrix's will provided that the trust's income was to be split between her two daughters until the death or marriage of both, at which time the property was to be divided:

[A]bsolutely and in fee . . . equally between my children now living, . . . the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified.

Powell, 296 F.2d at 413 (emphasis in original).

336. *Powell*, 296 F.2d at 413.

despite adverse court rulings, she continued to pursue her claims for the next two decades. The amount at stake was apparently in the neighborhood of \$50,000, around \$363,000 in 2008 dollars.³³⁷

U.S. District Court Judge Alexander Holtzoff³³⁸ construed the will to give each of the testatrix's children a one-fifth vested interest.³³⁹ Thus, it awarded one-fifth of the estate to Powell (as heir to her father), and one fifth each to the successors in interest of the other children.³⁴⁰

Powell objected to the decision, stating in open court that she was "quite appalled that there [had] not been a very careful study" in accordance with her request.³⁴¹ She appealed to the U.S. Court of Appeals for the D.C. Circuit, which affirmed the district court's decision, 2–1, in a decision written by then Judge Warren Burger.³⁴² Powell again argued that she was entitled to the entire corpus of the estate because she was the only living descendent of any of the testatrix's children. However, the majority concluded that the testatrix's intent could not be ascertained by divining what she would have said had she known how the situation would turn out.³⁴³ Furthermore, they concluded, because there was no provision to keep the contents of the estate within the family beyond the testatrix's grandchildren, the "blood line" argument was insufficient to overcome what it regarded as the specific, technical words used in the will.³⁴⁴

There was evidently some basis for Powell's position, because Judge E. Barrett Prettyman dissented, concluding that the testatrix's intent was clear from the words she used and was,

337. See Lawrence H. Officer & Samuel H. Williamson, *Purchasing Power of Money in the United States from 1774 to 2009*, MEASURINGWORTH, <http://www.measuringworth.com/ppowerus/> (last visited Jan. 29, 2011) (providing a calculator that reveals \$363,000 in 2008 is equivalent to \$50,000 in 1960).

338. Co-author of a predecessor to the Federal Practice and Procedure treatise now known as Wright and Miller. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2027 n.144 (1989).

339. *Powell v. Powell*, No. 4051-55 (D.D.C. 1960), in *Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*, *supra* note 334, app. at 2a.

340. *Powell*, 296 F.2d at 413.

341. *Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*, *supra* note 334, at 2a. Judge Holtzoff stated there were four children named in the will, when in fact there were five. *Petition for Rehearing En Banc apps. A–B, Powell v. Nat'l Sav. & Trust Co.*, 296 F.2d 412 (D.C. Cir. 1961) (No. 521), *cert. denied*, 368 U.S. 946 (1961), *reh'g denied*, 368 U.S. 1005 (1962).

342. See *Powell*, 296 F.2d at 413–14 (noting the judges presiding and dissenting).

343. *Id.*

344. *Id.* at 414.

therefore, controlling.³⁴⁵ He stated:

The purport of that emphasis upon her intention seems to me indisputable. She had in mind, and attempted to make clear, that at the time when the division was appointed to take place . . . her property should go to her own children and their descendants, and to no one else. Since that intention is clear, that ends the matter.³⁴⁶

Unsatisfied with the majority's reading, Powell petitioned for a writ of certiorari, which was denied, as was her petition for rehearing.³⁴⁷ Not only did she not get her trust, but the bank successfully sought an order requiring her to return part of the funds she had already received, which now appeared to be excessive. Ordinarily, this would seem to have been the end of the road. In this case, however, it was merely the beginning of Ms. Powell's uniformly unsuccessful and legally doubtful lawsuits. Despite her claimed abject poverty,³⁴⁸ she pursued litigation related to the will. Achieving what she regarded as justice became an obsession.

2. *Powell v. National Savings & Trust II (No. 64-458)*, III (*No. 65-1154*), IV (*No. 67-1033*) & V (*No. 69-316*). Undaunted, Powell began deploying a series of increasingly unlikely legal strategies. First, she sought to have letters of administration issued to herself, but because the court had held she was entitled to less, not more, from the estate, this outcome was unlikely.³⁴⁹ She also asked that the estate be distributed to her stepmother, Emilia, the widow of her late father.³⁵⁰ Both of these requests were denied by the trial court, affirmed by the D.C. Circuit, and

345. *Id.* (Prettyman, J., dissenting).

346. *Id.*

347. *Powell v. Nat'l Sav. & Trust Co.*, 368 U.S. 946 (1961), *reh'g denied*, 368 U.S. 1005 (1962).

348. She prepared a financial affidavit to proceed without prepayment of costs in which she stated that she had \$0.75 in cash and two checking accounts, which in total contained \$7.10. Affidavit in Support of Application to Proceed Without Prepayment of Costs at 1, *Powell v. Katzenbach*, No. 207-65 (D.D.C. Feb. 4, 1965). In addition, she averred that she was owed \$3,000 in delinquent payments from clients and was awaiting \$30,000 from her grandmother's estate, which, of course, was indirectly the subject matter of the complaint. *Id.* at 2. In 1950, *The Washington Post* reported that her purse was stolen by a mugger; she claimed it had no money in it. *Artist Sketches Bicyclist Who Grabbed Purse*, WASH. POST, Jan. 2, 1951, at B1. She won honorable mention in a writing contest where competitors were asked "to invent a novel magical feat" for the entry "Turn my rent bills into hundred dollar bills." J. Baxter Newgate, *Competition*, WASH. POST MAG., June 11, 1978, at 44.

349. *Powell v. Nat'l Sav. & Trust Co.*, 314 F.2d 274, 274 (D.C. Cir. 1963) (per curiam).

350. *Id.* at 274-75.

the Supreme Court denied certiorari and rehearing.³⁵¹ A memo on the certiorari petition survives; it describes this petition as “frivolous.”³⁵²

A third iteration of her suit against National Savings & Trust sought a writ of quo warranto claiming that the bank had no right to possess the assets. The Court denied the petition, as well as a petition for rehearing raising the new but not obviously relevant question of whether the trust assets were insured by the Federal Deposit Insurance Corporation.³⁵³ In the fourth suit, Ms. Powell unsuccessfully raised Contract Clause and Takings Clause claims.³⁵⁴

The fifth suit sought to enjoin the bank’s fraudulent conversion of her assets and also claimed that her First Amendment rights were violated when Judge Sirica threatened to hold her in contempt if she called people “frauds” or failed to stop talking when he told her to.³⁵⁵ She sought rehearing of the Supreme Court’s denial of certiorari on the ground that Warren Burger, by then the Chief Justice of the United States, recused himself.³⁵⁶ He should not have evaded participation in the case; instead, she contended:

[I]t should be a matter of grave concern and soul-searching on the part of the Chief Justice that because of errors which he made, which no one else is in a position to correct, and because of neglect of his judicial duty to be the first to correct, . . . irreparable damage and fraud has been perpetrated.³⁵⁷

She also noted that the Chief Justice was probably unaware that “associates of those profiting by his decision and the suppression of the evidence of error and fraud were active in excluding Petitioner from presenting testimony and other evidence at the

351. *Id.*; see *Powell v. Nat’l Sav. & Trust Co.*, 379 U.S. 920 (1964) (denying certiorari); *Powell v. Nat’l Sav. & Trust Co.*, 379 U.S. 984 (1965) (denying rehearing).

352. Memorandum to Supreme Court (Oct. 14, 1964).

353. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Powell v. Nat’l Sav. & Trust Co.*, (No. 65-1154), *cert. denied*, 384 U.S. 938, *reh’g denied*, 384 U.S. 1027 (1966).

354. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Powell v. Nat’l Sav. & Trust Co.*, (No. 67-1033), *cert. denied*, 390 U.S. 957, *reh’g denied*, 390 U.S. 1037 (1968).

355. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Powell v. Nat’l Sav. & Trust Co.*, (No. 69-316) at 8–9, *cert. denied*, 396 U.S. 849, *reh’g denied*, 396 U.S. 950 (1969).

356. Petition for Rehearing of Denial of Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3, *Powell v. Nat’l Sav. & Trust Co.* (No. 69-316), *reh’g denied*, 396 U.S. 950 (1969).

357. *Id.*

hearing on his confirmation.”³⁵⁸ She had lost in the D.C. Circuit in 1961; these cases extended into late November 1969.

3. *Powell v. Katzenbach*. While the several cases against the bank were filed and dismissed, Powell sought a writ of mandamus to compel Attorney General Nicholas deBelleville Katzenbach to prosecute criminally those who took her trust. The trust attorneys, she argued, conspired to obstruct justice, defraud her personally, and embezzle the testatrix’s estate “by means of misrepresentation of the facts of record and perverting the law.”³⁵⁹ Judge Holtzoff, she claimed, “knowingly and deliberately misstated and perverted the facts and law . . . knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation . . . described in [the previous allegation].”³⁶⁰ Finally she claimed:

[Judge Warren Burger, while on the D.C. Circuit,] knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of judge to pervert justice and aid and abet fraud and the commission of [a] crime . . . by deliberately falsifying the facts of record and the case law corruptly to obstruct and impede the due administration of justice [and thereafter refused to correct these misstatements and falsities].³⁶¹

A mandamus action was proper, she said, because Attorney General Katzenbach refused to investigate these people based on their “wealth and high office.”³⁶²

The Department of Justice moved to strike the allegations against Judges Holtzoff and Burger and to dismiss the complaint for failure to state a claim.³⁶³ Katzenbach argued that the allegations were “scandalous, vituperative, and irrelevant to the relief sought.”³⁶⁴ Furthermore, he argued, Powell’s

358. *Id.* at 6.

359. Plaintiff’s Complaint in the Nature of Petition for Mandamus at 1–2, *Powell v. Katzenbach*, No. 207-65 (D.D.C. Jan. 26, 1965).

360. *Id.* at 2.

361. *Id.* at 2–3.

362. *Id.* at 3.

363. Compare *id.* at 2–3 (providing allegations against Judges Holtzoff and Burger in paragraphs three and four), with Defendant’s Motion to Strike Two Paragraphs of the Complaint and to Dismiss, *Powell v. Katzenbach*, No. 207-65 (D.D.C. Jan. 26, 1965) (moving to strike paragraphs three and four of the complaint, as well as dismiss the remainder of the case).

364. Memorandum of Points and Authorities in Support of Defendant’s Motion to Strike and to Dismiss at 1, *Powell v. Katzenbach*, No. 207-65 (D.D.C. Feb. 4, 1965).

arguments were impossible because the judges were faced with cross-motions for summary judgment on a pure issue of law; therefore, there could be no facts for the judges to “pervert” or “misstate.”³⁶⁵ Thus, the allegations amounted to little more than personal attacks and, for that reason alone, they should be stricken.³⁶⁶

Powell insisted that nothing she wrote about Judges Holtzoff and Burger was inappropriate in the least.³⁶⁷ After repeating the two paragraphs verbatim, her response explored the legal definition of “scandalous” and the general definition of “vituperative,” neither of which she found to be applicable to what she had included in her complaint.³⁶⁸ In her mind, this measure was necessary to “prevent gross and shocking corruption of the processes of justice.”³⁶⁹ Although willing to change a few phrases, particularly changing “pervert” to “misstate,” she qualified this change by giving the definition of a “perverse verdict” and asserted that, although she would change it, perverse was the more technically correct word to use to convey her meaning.³⁷⁰

She also listed four “misstatements” in Katzenbach’s answer, including some hyper-technical issues that she admitted were immaterial to a court’s determination of the relevant issues.³⁷¹ However, she included them to “put[] the defendant on notice” that they were false and to show the court that the motion’s conclusion was based on erroneous information and should therefore be denied.³⁷²

365. *Id.* at 2.

366. *Id.* The rest of the memo argued that the U.S. Attorney General cannot, through a writ of mandamus, be forced to prosecute criminal actions. *Id.* at 2–6.

367. Plaintiff’s Opposition to Defendant’s Motions to Strike Two Paragraphs of the Complaint and to Dismiss at 1–3, Powell v. Katzenbach, No. 207-65 (D.D.C. Feb. 8, 1965).

368. *Id.* at 1–3. She defined scandalous matter as “Unnecessary matter criminatory of the defendant or any other person . . . Matter which is relevant can never be scandalous . . .” *Id.* at 2. Vituperative, on the other hand, “connotes profanity, or at least excessive abusive language.” *Id.*

369. *Id.*

370. *Id.* at 2–3.

371. *Id.* at 3–5. These misstatements included: (1) the designation of the bank as “successor trustee” rather than “former trustee,” because the trust technically ceased to exist when Lucy Powell died; (2) the motion’s statement that anyone other than she could represent the estate of the elder Diana Kearny Powell; (3) the fact that the motion confused which of her two suits against National Savings and Trust gave rise to the misstatements and perversion of facts; and (4) the sole issue for the court was not the will’s language, because the will’s language was clear and unambiguous, and the only reason the question of interpretation was entertained was to give “color of interest to fraudulent claims” made by National Savings and Trust. *Id.*

372. *Id.* at 5.

While conceding Katzenbach's observation that mandamus was rarely appropriate, she concluded that her case was serious enough to warrant drastic action.³⁷³ The case law cited by Katzenbach, she explained, involved "merely statutory offenses," while her allegation "involve[d] robbing the estates of the widowed, orphaned, and [i]mpoverished, violat[ing] . . . the responsibilities of those in positions of trust and confidence, and corruption in the administration of justice"³⁷⁴ Further, "[e]ach of these crimes has outraged decent people, even from ancient times right down to the present," and as support for this statement, she cited seven separate passages from the Bible.³⁷⁵ The response concluded with a recitation of the high esteem in which she held both her relatives and the judiciary, apparently intending to demonstrate that she was not attacking two judges with a cavalier attitude, but was actually acting out of a sense of responsibility to protect the judiciary from itself.³⁷⁶ Katzenbach's motions were granted on March 8, 1965,³⁷⁷ and Powell filed her notice of appeal the next day.³⁷⁸

Her appeal included each of the documents that had been filed with the district court, with no new arguments or evidence in her favor.³⁷⁹ The court of appeals affirmed.³⁸⁰

4. Powell v. Henry Paige and John Powell, Attorneys at Law. Her suits against the bank proved futile, so Diana Powell sued the bank's attorneys personally demanding \$100,000 for:

[L]oss, damage, and irreparable hardship caused by . . . fraud and deception . . . by deliberate misrepresentation of the facts and record [and] . . . by misquoting the terms of the grant of the estate administered therein . . . for the fraudulent purpose of depriving plaintiff of her property.³⁸¹

373. *Id.* at 6–10.

374. *Id.* at 8.

375. *Id.* A few sentences later, she also cited to the Catechism of Christian Doctrine to prove the heinous nature of the crimes that have been visited upon her.

376. *Id.* at 10.

377. Order of the United States District Court for the District of Columbia, Powell v. Katzenbach, No. 207-65 (D.D.C. Mar. 8, 1965).

378. Notice of Appeal, Powell v. Katzenbach, No. 207-65 (D.D.C. Mar. 9, 1965).

379. *See generally* Appeal from a Final Judgment of the U.S. District Court for the District of Columbia, Powell v. Katzenbach, No. 19,285 (D.C. Cir. Feb. 26, 1966) (providing only copies of trial motions and orders, but no new arguments for appellate review).

380. Powell v. Katzenbach, 359 F.2d 234, 235 (D.C. Cir. 1965).

381. Complaint for Fraud, Powell v. Paige, No. 296-65 (D.D.C. Feb. 4, 1965).

The defendants detailed the several ways Powell had previously attacked the district court's construction of the will,³⁸² asserted that the matter was barred by res judicata, and successfully moved to dismiss.³⁸³ Powell moved for rehearing and called the court's order "arbitrary and capricious, and without foundation in fact or law" and asserted that matters of fraud can never be barred by res judicata.³⁸⁴ The defendants again opposed,³⁸⁵ and the court denied Powell's motion.³⁸⁶

She appealed this case to the D.C. Circuit as well. That court noted that the case had been before it on several previous occasions, not including petitions for rehearing, and that nothing new suggested a mistake had been made.³⁸⁷

5. *Certiorari Petitions in Powell v. Katzenbach, Paige, and Powell (No. 65-1063)*. Because they shared a similar factual background, Powell sought certiorari in *Katzenbach*, the mandamus action, and *Paige*, the damages action against the trust attorneys, in the same petition.³⁸⁸ Powell advanced two issues for the Court's consideration—the Attorney General's discretionary power to prosecute and the application of res judicata to fraud and misrepresentation claims arising out of Fifth Amendment violations of the right not to be deprived of property without due process of law.³⁸⁹

As to the first issue, Powell argued that she did not have to make out a full criminal case against National Savings and Trust to obtain a writ of mandamus.³⁹⁰ Instead, she submitted, the foundation necessary to prosecute was in the "plain facts of record," and because of the serious nature of the alleged crimes, it was not within *Katzenbach's* discretion to choose not to prosecute.³⁹¹ Her second claim repeated her prior complaints about the factual

382. See generally Reply of Defendants to Plaintiff's Opposition to Motion to Dismiss, *Powell v. Paige*, No. 296-65 (D.D.C. Mar. 25, 1965).

383. Reply of Defendants to Plaintiff's Opposition to Motion to Dismiss at 5, *Powell v. Paige*, No. 296-65 (D.D.C., filed Feb. 4, 1965); Order of the United States District Court for the District of Columbia, *Powell v. Paige*, No. 296-65 (D.D.C. Apr. 6, 1965).

384. Motion for Rehearing of Motion to Dismiss, *Powell v. Paige*, No. 296-65 (D.D.C. Apr. 12, 1965).

385. Opposition to Motion for Rehearing of Motion to Dismiss, *Powell v. Paige*, No. 296-65 (D.D.C. Apr. 13, 1965).

386. Order of the United States District Court for the District of Columbia, *Powell v. Paige*, No. 296-65 (D.D.C. May 28, 1965).

387. *Powell v. Paige*, 335 F.2d 108, 108-09 (D.C. Cir. 1965) (per curiam).

388. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *supra* note 353, at 5.

389. *Id.* at 8-19.

390. *Id.* at 6.

391. *Id.*

misrepresentations made by Paige and Powell and the lower courts' reliance upon them.³⁹² She called her "divestment" of property rightfully owned a "mockery of due process of law" and contended that it "does irreparable damage to the dignity and confidence in the Courts as vehicles of justice."³⁹³ However, the Court denied certiorari.³⁹⁴ Thurgood Marshall was then Solicitor General, and he filed an opposition in which he was the only attorney listed.³⁹⁵ This likely explains why he often recused himself in related cases involving Ms. Powell after he joined the Court.³⁹⁶

Powell petitioned for a rehearing on the basis of intervening circumstances and grounds not previously presented.³⁹⁷ She argued that decisions in two of her other cases were relevant to the case currently before the Court and should be taken into consideration when rendering the decision.³⁹⁸ She further alleged, *inter alia*, that new, overt acts in furtherance of the alleged conspiracy had occurred and that the courts' continued "arbitrary and capricious refusal to consider her complaints" violated her First Amendment rights to petition the government for redress.³⁹⁹ The Court was again not persuaded, and her petition for rehearing was denied.⁴⁰⁰

6. *Powell v. Committee on Admissions and Grievances*. Because of her accusations against Judges Holtzoff and Burger, Powell was referred to the Committee on Admissions and

392. *Id.* at 7–8. Specifically, she stated:

Detailed analysis of patent misstatements in the Opinion of the Court below upon which Respondents rely . . . extends to twenty printed pages, and therefore is not included. This does not include numerous Orders drawn by Mr. Paige misstating the facts of record by which petitioner has been deprived of vested property.

Id.

393. *Id.* at 8.

394. *Powell v. Katzenbach*, 384 U.S. 906, *and reh'g denied*, 384 U.S. 967 (1966).

395. *Id.*

396. *See, e.g., In re Powell*, 390 U.S. 1021 (1968) ("Mr. Justice Marshall took no part in the consideration or decision of this motion."); *Powell v. Nat'l Sav. & Trust Co.*, 390 U.S. 1037 (1968) (same).

397. Petition for Rehearing of Petition for Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *supra* note 353, at 3–5.

398. *Id.* at 3.

399. *Id.* at 3–5. The petition alleged that Mr. Paige and Mr. Dulany again deceived the lower court by stating that the original complaint was filed by them for assistance in constructing the will, when in fact, Powell filed the first complaint. *Id.* at 4. She also accused Judge Holtzoff of perjury during his testimony regarding her disbarment complaint because he said that the statements in her complaint were "absolutely false," when, in fact, they were completely substantiated by the record. *Id.*

400. *Powell v. Katzenbach*, 384 U.S. 967 (1966).

Grievances.⁴⁰¹ A complaint was filed by the Committee on Admissions and Grievances in late 1965 or early 1966 charging that Powell made “false and scandalous statements” in a legal document.⁴⁰² At issue were the two paragraphs of Powell’s complaint for mandamus which alleged that Judge Holtzoff and Judge Burger committed fraud.⁴⁰³ The complaint charged that the allegations were “false and scandalous and were made . . . without justification or foundation in fact.”⁴⁰⁴

Powell submitted a thirty-four page answer to the Committee, admitting to writing the paragraphs but denying that their inclusion in the complaint violated any ethical rules.⁴⁰⁵ She stated her belief that, “in the spirit of doing a distasteful but necessary duty,” she was required to press these claims, and she used the bulk of the thirty-four pages to reargue her position on the distribution of her grandmother’s will while criticizing the judges’ interpretations and holdings on the various issues.⁴⁰⁶

Her case was tried before three district court judges. Her defense was unsuccessful, and Diana Powell was disbarred from the District Court for the District of Columbia on April 7, 1966.⁴⁰⁷ The court gave her ten days to produce mitigating evidence; instead, she moved to set aside the guilty verdict, and when the motion was denied, she appealed.⁴⁰⁸ Her appeal to the D.C. Circuit was denied, but in an opinion that indicated some sympathy, the court noted:

[Counsel for the Grievance Committee] stated in argument that this case is an unfortunate one, that appellant seems to have developed an obsession, but that since appellant has declined to recant, notwithstanding opportunities to do so, and since there is plain departure from professional

401. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 5, *Powell v. Comm. on Admissions & Grievances*, *Powell v. Holtzoff*, 386 U.S. 1035 (1967) (No. 66-1258).

402. *Id.*

403. Brief for Respondent in Opposition at 3–5, *Powell v. Comm. on Admissions & Grievance*, No. 1258 (U.S. Apr. 24, 1967).

404. *Id.* at 4.

405. Answer of Diana Kearny Powell to Letter of Complaint Dated January 25, 1965 from Committee on Admissions and Grievances, *Powell v. Comm. on Admissions & Grievances*, No. 1258 (D.D.C. Feb. 8, 1965).

406. *See generally id.* (arguing that the judges’ previous rulings regarding her grandmother’s will were incorrect).

407. Order of Disbarment (D.D.C. Apr. 7, 1966), *in* Joint Appendix at 10 *Powell v. Holtzoff*, No. 20,544 (Sept. 1966).

408. Brief for Respondent in Opposition, *supra* note 403, at 9–10; Notice of Appeal (D.C. Cir. Apr. 11, 1966), *in* Joint Appendix at 11, *Powell v. Holtzoff*, No. 20,544 (Sept. 1966).

standards, it must press for affirmance. To avoid any possible misapprehension, it should be noted that this court's affirmance of the disbarment order does not affect the inherent authority of the district court to reinstate the attorney . . . upon appropriate showing.⁴⁰⁹

7. *Powell v. Holtzoff*. While the disbarment proceeding was pending,⁴¹⁰ Powell sued Judge Holtzoff, the trial judge who deprived her of her inheritance, for \$500,000 because his testimony to the Committee on Admissions and Grievances caused her "irreparable loss, damage, humiliation and grief, and disbarment."⁴¹¹ Judge Holtzoff had testified that her complaints were "deliberate falsehoods."⁴¹² She filed requests for admissions going into great detail about Holtzoff's construction of the will and the alleged fraud perpetrated by National Savings and Trust Co., Paige, and Dulany.⁴¹³ Powell evidently hoped that Holtzoff would admit that he assisted in the furtherance of National Saving and Trust Co.'s fraud, which would prove her

409. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at A-2, *Powell v. Comm. on Admissions & Grievances* (D.C. Cir. Jan 12, 1967) (S-3); *Powell v. Holtzoff*, No. 1258 (D.C. Cir. Apr. 11, 1967).

410. See Appeal from a Final Order of the United States District Court for the District of Columbia Circuit, *Powell v. Holtzoff*, No. 1258 (U.S. Dec. 9, 1966).

411. *Id.* at 1.

412. *Id.* at 2. He stated:

I will make this comment, however: That the statements made by the respondent . . . in her complaint are absolutely false . . . Well, I will make the same comment: That the entire paragraph is a statement of falsehoods except the statement that I rendered an oral decision in that action . . . I might add this: That it is a statement of deliberate falsehoods.

Id.

413. *Id.* at 4–8. The requested admissions included admissions

m) That these facts, and the patent inconsistency of the representations of National Savings and Trust Company and the Executors of the Estate of Lucy Powell, deceased were before you each time you made a ruling in the case, and each time you ruled in their favor and refused to consider protest, well knowing that their contentions were spurious and designed to perpetrate fraud on the Court and on the estate of Diana Kearny Powell, widow, deceased . . . [and]

2) [t]hat one of the two following alternatives is true:

a) Defendant [Holtzoff] knew that the representations of Henry H. Paige as attorney for the National Savings and Trust Company . . . and of Benjamin W. Dulany as attorney for the executors of the Estate of Lucy Powell, deceased, were made with the intent to defraud the Court and the estate, and knowingly sustained them knowing their arguments were based upon false statements for the purpose of perpetrating fraud; OR

b) Defendant was at first misled by the misrepresentations of Henry H. Paige . . . and Benjamin W. Dulany . . . , but when the falsity and fraudulent purpose of the misrepresentations was brought to his attention, defendant chose to sustain appointed fiduciaries in defrauding an estate under the protection of the Court rather than admit to his error.

Id. at 7–8.

original allegations and leave the ethics complaint without foundation. However, Holtzoff admitted nothing, moving for summary judgment based on judicial and witness immunity.⁴¹⁴ The court granted the motion, and Powell unsuccessfully appealed.⁴¹⁵

8. *Certiorari Petition in Powell v. Committee on Admissions & Holtzoff (No. 66-1258)*. Powell sought certiorari with respect to her discipline action and her suit against Holtzoff in the same petition, presumably because they involved the same facts. Powell argued that her rights of free speech, petition, and due process had been unconstitutionally denied by the lower courts⁴¹⁶ and that the disbarment proceeding was being used as “blackmail,” and she accused Judge Holtzoff of lying during his testimony.⁴¹⁷ She asserted that “[t]he record conclusively shows the courts below flouted basic principles of justice and honesty to reach a preconceived, false conclusion, without supporting facts, to conform to their prejudices.”⁴¹⁸ She claimed that her analysis of misrepresentations constituted “irrebuttable” evidence of the allegations in her complaint against Attorney General Katzenbach and, therefore, the false statements for which she was disbarred could not possibly have been corroborated.⁴¹⁹ She characterized the evidence presented at her disbarment hearing as without corroboration and suggested that the factual errors she found in Judge Holtzoff’s Answer to her petition demonstrated his “mental deterioration and incompetence.”⁴²⁰

The Supreme Court denied certiorari.⁴²¹ Powell’s petition for reconsideration analogized her case to a recent criminal case in which the Court held that the defendant was entitled to due process and a fair trial despite overwhelming evidence of guilt.⁴²² In Powell’s eyes, this meant that the courts were more concerned with protecting the rights of criminals than of innocent

414. See *id.* at 12–13 (responding to Judge Holtzoff’s motion for summary judgment by denying he could assert judicial privilege or immunity).

415. *Id.* at 13, 19.

416. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *supra* note 409, at 7–9.

417. *Id.* at 6–7.

418. *Id.* at 8–9.

419. *Id.* at 10–11.

420. *Id.* at 13.

421. *Powell v. Comm. on Admissions & Grievances*, 386 U.S. 1035 (1967).

422. Petition for Reconsideration of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 2, *Powell v. Comm. on Admissions & Grievances*, 388 U.S. 924 (1967) (No. 1258).

individuals who have been falsely deprived of valuable property.⁴²³ The Court again denied her petition.⁴²⁴

9. *Powell v. Committee on Admissions (II) and In re Powell (67-974)*. In the appeal of her disbarment by the district court, the D.C. Circuit had been sympathetic, noting that its decision did not preclude the district court from reinstating her. The district court had evidently taken the circuit's hint and intimated that Ms. Powell could be reinstated if she apologized. She applied for reinstatement, but offered no contrition, instead, reiterating the legal wrongs that she felt had been done to her. The district court denied her petition and the D.C. Circuit affirmed.⁴²⁵

On June 15, 1967, the court of appeals initiated its own disciplinary proceedings.⁴²⁶ Ms. Powell defended herself—not surprisingly—by reiterating the claim that because her criticisms of Judges Holtzoff and Burger were correct, she was “entitled to unconditional and unqualified reinstatement.”⁴²⁷ The D.C. Circuit disbarred her on October 4, 1967, with Judges Burger and Bazelon not participating.⁴²⁸ Her petition for rehearing was denied, this time with Judge Danaher also not participating.⁴²⁹ Her petition for certiorari was denied, as was a petition for rehearing.⁴³⁰

10. *Powell v. Mitchell and Powell v. Committee on Grievances (III) (No. 69-1508)*. After Warren Burger was nominated to the Chief Justiceship, Ms. Powell concluded that the time was right to reopen *Powell v. Katzenbach*, the lawsuit against the Department of Justice for failing to prosecute those who had taken her trust. Solicitor General Erwin Griswold characterized the basis of the argument as “that the Chief Justice of the United States (then a judge of the Court of Appeals for the District of Columbia Circuit), [and] Mr. Justice Marshall . . . had obtained personal reward for their part in an alleged conspiracy against petitioner.”⁴³¹ The district and circuit courts denied relief.⁴³²

423. *Id.*

424. *Powell v. Comm. on Admissions & Grievances*, 388 U.S. 924 (1967).

425. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 1a, *In re Powell*, No. 974 (U.S. Dec. 29, 1967).

426. *Id.*

427. *Id.* at 4a.

428. *Id.* at 13a.

429. *Id.* at 15a.

430. *In re Powell*, 392 U.S. 930, *and reh'g denied*, 393 U.S. 902 (1968); *see In re Powell*, 390 U.S. 1021 (1968) (denying motion to consolidate).

431. Memorandum for the Respondent, John Mitchell, Attorney General of the United States, in Opposition at 3, No. 69-1508 (May 1970).

432. *Powell v. Katzenbach*, 359 F.2d 234, 234–35 (D.C. Cir. 1965) (*per curiam*).

Also joined in this petition was a third action for reinstatement to the bar of the U.S. District Court for the District of Columbia.⁴³³ That the patience of the district court was running out was reflected by Ms. Powell's description of the proceeding: "Motion filed May 13, 1969, and summarily denied without a hearing, by Order striking the motion for reinstatement and directing its physical return to the movant."⁴³⁴ Just as Justice Black refused to accept mail from Anderson, this court refused to even look at Powell's filings.

The Court denied certiorari⁴³⁵ and Powell petitioned for rehearing, reiterating that Chief Justice Burger should have participated: "Petitioner points out that the abstention of the Chief Justice leads to the inference that the errors and the refusal to review and correct them were and still are intentional."⁴³⁶ This time, the Chief Justice and Justices Marshall and, for some reason, Blackmun, did not vote.⁴³⁷

11. *In re Disbarment of Powell (S-3)*. By fall of 1967, Powell had been disciplined by the U.S. district court and the court of appeals, and her flurry of apparently meritless certiorari petitions continued. On November 6, 1967, the Court suspended Ms. Powell and gave her forty days to show cause why she should not be disbarred from the Supreme Court bar.⁴³⁸ Powell was not actually disbarred from the Supreme Court until 1994, four years after her death in June 1990.⁴³⁹

Unlike the other cases, the Supreme Court files in S-3 remain unavailable to researchers, but some facts are clear. The Supreme Court disbarment case was first delayed because she requested a continuance in connection with her filing of related certiorari petitions. Also, various petitions challenging the district court or court of appeals disbarments were pending until 1970. The Court seems to have held the case until the flurry of petitions settled, but even then the case was not decided. At some point, the case was transferred to the Special Docket.

433. Pet. at 5, *Powell v. Comm. on Admissions & Grievances*, 398 U.S. 951 (1970) (Burger, C.J., not participating).

434. *Id.*

435. *Powell*, 398 U.S. 951.

436. Pet. for Rehearing at 3, *Powell v. Comm. on Admissions & Grievances*, 400 U.S. 857 (1970).

437. *Powell*, 400 U.S. 857.

438. *In re Disbarment of Powell*, 389 U.S. 924 (1967).

439. *In re Disbarment of Powell*, 512 U.S. 1202 (1994); see *Legal Notices*, WASH. POST, Aug. 23, 1990, at DC9 (reporting that "Diana Kearny Powell, a/k/a/ Diana K. Powell" had died on June 5, 1990).

Powell was disbarred from practicing before the district and appellate courts, although even disbarment could not stop her from pursuing claims pro se. She continued to litigate her claims against National Trust and Savings Co. and the Committee into the early 1970s,⁴⁴⁰ and she pursued litigation in her name, but on behalf of the public, against the Washington Metropolitan Area Transit Commission through 1973.⁴⁴¹

Her legal disappointments apparently left her unbowed. When the *American Bar Association Journal* published an article praising unsung Revolutionary War commander George Rogers Clark,⁴⁴² Diana Powell wrote to thank the journal for remembering her “great-great-great-great-uncle on the two hundredth anniversary of the Ohio River Valley campaign.”⁴⁴³ “George Rogers Clark will be, I trust,” she wrote, “an inspiration to all those who have been unjustly maligned that greatness will in time be recognized.”⁴⁴⁴

III. WHY SPECIAL TREATMENT FOR THESE CASES?

Why did the Supreme Court reach out to treat these cases differently from other hard, sympathetic, or erroneous lower court rulings? Why was the usual route of granting or denying relief unsatisfactory here? The legal context is suggestive.

A. *The Death Penalty Controversy*

Anderson and *Rees* wended their way through the court system at a unique moment in American jurisprudential history. Since colonial times, capital punishment had been part of the American criminal justice system.⁴⁴⁵ The death penalty was once broadly applied for crimes ranging from murder to theft. But in the early twentieth century, social sciences began to understand criminality as “a consequence of biological or social forces beyond the criminal’s control, as certain people came to be understood as

440. *E.g.*, *Powell*, 400 U.S. 857. When National Savings and Trust Co. changed its name to South Jersey National Bank, she pursued a claim against them as well. *See Powell v. S. Jersey Nat’l Bank*, 410 U.S. 930 (1973) (denying certiorari).

441. *D.C. Transit Sys., Inc. v. Wash. Metro. Area Transit Comm’n*, 466 F.2d 394, 396 (D.C. Cir.), *and enforced sub nom. Powell v. Wash. Metro Area Transit Comm’n*, 466 F.2d 466 (D.C. Cir. 1972), *and aff’d*, 485 F.2d 1080 (D.C. Cir. 1973).

442. Rowland L. Young, “*Great Things Have Been Affected by a Few Men Well Conducted*,” 64 A.B.A. J. 863 (1978).

443. Diana Kearny Powell, *Views of Our Readers, Tribute to George Rogers Clark*, 64 A.B.A. J. 1318, 1324 (1978).

444. *Id.*

445. STUART BANNER, *THE DEATH PENALTY* 5 (2002).

genetically or environmentally predisposed to commit crimes.”⁴⁴⁶ And as the voluntariness of criminal conduct came into question,⁴⁴⁷ so too did the death penalty.⁴⁴⁸ This new understanding of criminality reached beyond professional research and seeped into the American consciousness. According to a survey conducted in 1966, “most Americans believe that crime [was] curbed better by positive measures that attack the environmental and psychological roots of criminal activity than by great employment of police force.”⁴⁴⁹ It may have been no coincidence then, that 1966 was the first and only year in which opponents of the death penalty outnumbered supporters.⁴⁵⁰

The legal system reflected these general social attitudes. During the 1950s and '60s, the actual imposition of the death penalty dramatically declined; between 1968 and 1976, there were no executions in the United States.⁴⁵¹ Thus, when Anderson's jury sentenced him to death in 1960, and Rees's jury did the same in 1962, they did so when the legal system was increasingly less inclined to impose capital punishment when

446. *Id.* at 208–09.

447. *See* *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (reflecting a hint of this). In an opinion invalidating the crime of “being” a drug addict in the absence of any specific conduct, the Court explained:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily.

Id. at 666–67 (internal citations omitted). *See also* *Powell v. Texas*, 392 U.S. 514, 535–37 (1968) (Marshall, J., majority) (voting 5–4 and refusing to hold that conviction of alcoholics for public drunkenness violated Constitution, but leaving open possibility that it might: “It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.”).

448. *BANNER*, *supra* note 445, at 210–11, 216–17; *see* *JAN GORECKI, CAPITAL PUNISHMENT*, 88–89 (1983) (questioning the validity of the death penalty if the criminal's behavior is caused by society).

449. *GORECKI*, *supra* note 448, at 89 (quoting Am. Inst. of Pub. Op. & Harris Survey, *Public Opinion and the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 236, 240 (Hugo Adam Bedau ed., 2d ed. 1968)).

450. *BANNER*, *supra* note 445, at 240.

451. *JOHN D. BESSLER, KISS OF DEATH* 55–56 (2003). “American juries imposed 158 death sentences in 1935 but only 79 in 1950.” *BANNER*, *supra* note 445, at 227. In 1947 alone, 153 people were executed. *BESSLER*, *supra*, at 55. This number dropped to fifty-six in 1960, one in 1966, and two in 1967. *Id.*

presented with death-eligible crimes.⁴⁵² And when their cases reached the Supreme Court in 1962 and 1964, respectively, the death penalty was no longer the inevitable feature of criminal justice it previously had been; its continued viability was subject to some doubt.⁴⁵³ In 1963, Justice Goldberg, joined by Justices Brennan and Douglas, dissented from a denial of certiorari in an opinion expressing plain doubts about the validity of the death penalty.⁴⁵⁴ Even Judge Warren Burger, in a 1965 D.C. Circuit opinion, wrote that “[i]n common with most, if not all, members of the court, I have grave reservations concerning capital punishment.”⁴⁵⁵ Of course the basic validity of the death penalty was called into doubt by the fractured decision in *Furman v. Georgia* in 1972, where the plurality voted to invalidate all existing death penalty statutes.⁴⁵⁶ However, the validity of the death penalty was then reaffirmed in *Gregg v. Georgia* in 1976,⁴⁵⁷ which upheld statutes responding to the concerns raised by *Furman*.

B. Mental Illness

The record shows that Rees and Anderson were severely mentally ill. It is impossible to diagnose Diana Powell across time and space, but her repeated, apparently compulsive accusations and futile, implausible certiorari petitions certainly suggest the possibility of mental illness. It may be possible to understand the Special Docket as a method of providing mercy to those whose mental illness warranted some consideration.⁴⁵⁸

Just as the 1960s brought reconsideration of capital punishment, the Court re-evaluated the treatment of the mentally ill. There was, of course, a eugenicist, authoritarian tradition exemplified by *Buck v. Bell*, the 1927 case upholding forced sterilization in which Justice Holmes explained:

452. See BANNER, *supra* note 445, at 244–45 (noting the trend in the 1960s to abolish the death penalty).

453. See *id.* at 244–47, 253 (reviewing the declining number of executions and increasing number of appeals questioning the constitutionality of the death penalty).

454. *Rudolph v. Alabama*, 375 U.S. 889, 889, 891 (1963) (Goldberg, J., dissenting); see MICHAEL MELTSNER, CRUEL AND UNUSUAL 28 (1973) (noting that the dissenting opinion in *Rudolph* spurred the debate concerning the death penalty’s constitutionality).

455. *Fraday v. United States*, 348 F.2d 84, 111 (D.C. Cir. 1965) (Burger, J., concurring in part and dissenting in part). He did vote to uphold the convictions at issue, however. *Id.*

456. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

457. *Gregg v. Georgia*, 428 U.S. 153, 168–69, 180, 207 (1976).

458. Now, a number of jurisdictions provide that mental illness is a mitigating factor in capital sentencing. See, e.g., NEB. REV. STAT. § 29-2523(2)(g) (2008); UTAH CODE ANN. § 76-2-305(1)(b) (LexisNexis 2008).

[E]xperience has shown that heredity plays an important part in the transmission of insanity

. . . .

. . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.⁴⁵⁹

The Supreme Court was not immune to post-World War II changes in public perception about mental illness. Prior to the 1960s, the Supreme Court had not substantially weighed in on either the civil or criminal rights of the mentally ill.⁴⁶⁰ That started to change. In *Lynch v. Overholser*, in 1962, the Court held that a defendant found not guilty by reason of insanity could not be confined to a mental institution without a formal commitment hearing if the defendant professed his own sanity.⁴⁶¹ *Baxtrom v. Herold*, a unanimous decision authored by Chief Justice Warren, held that prisoners confined in mental hospitals under the department of corrections were entitled, under the Equal Protection Clause, to a hearing before the state could confine them in such institutions after the expiration of their prison sentences.⁴⁶² The following year, a unanimous Court held that a person convicted under a criminal statute, the maximum penalty of which was ten years, was entitled to notice and an opportunity to be heard before being sentenced under a commitment statute for habitual, dangerous sexual offenders, which authorized confinement for an indeterminate period of one day to life.⁴⁶³

459. *Buck v. Bell*, 274 U.S. 200, 205–07 (1927). For a recent critique of the case, see generally PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 240–43, 256–61 (2008), describing both the first challenges and contemporary reactions to the legitimacy of *Buck* and the eugenics movement.

460. Laura R. Biddle, Note, *Heller v. Doe: Freedom from Bodily Restraint and Associated Stigma—A Fundamental Interest*, 12 J. CONTEMP. HEALTH L. & POL'Y 239, 257 (1995). In *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 26 (1872), the Supreme Court held that a power of attorney executed by an insane person is void and not merely voidable. And *Simon v. Craft*, 182 U.S. 427, 436–37 (1901), held that before an insane person could be involuntarily committed, she was entitled to notice and an opportunity to defend.

461. *Lynch v. Overholser*, 369 U.S. 705, 711–12, 719–20 (1962).

462. *Baxstrom v. Herold*, 383 U.S. 107, 114–15 (1966). In *Baxtrom*, the defendant had been convicted of assault and while incarcerated had been “certified as insane by a prison physician.” *Id.* at 108. He was then transferred to a state hospital used for confining mentally ill inmates while they served their sentences. *Id.* However, as the expiration of his sentence neared, he was determined to still be in need of institutional care but that he was not suitable for placement in a civil hospital. *Id.* at 108–09. He thus remained in the hospital run by the Department of Corrections after the expiration of his sentence and subsequently filed a writ of habeas corpus, arguing he was entitled to a hearing and transfer to a civil facility, which was denied. *Id.* at 109–10.

463. *Specht v. Patterson*, 386 U.S. 605, 606–10 (1967).

The new legal studies of punishment and mental illness intersected in the *Rees* and *Anderson* cases. If the Court had decided the cases on the merits, it might have had to address questions that, as it turned out, took decades to solidify. For example, the U.S. Supreme Court did not expressly hold that it was unconstitutional to execute the insane until *Ford v. Wainwright* in 1986, and the holding on that point was 5–4.⁴⁶⁴ Although in 1960 the Supreme Court issued a landmark ruling on competence to stand trial (albeit in a two-paragraph per curiam reversal),⁴⁶⁵ it was not until *Godinez v. Moran*, in 1993, that it held that the test for competence to stand trial and competence to waive counsel were the same.⁴⁶⁶ In 2008, the Court held that a defendant who was competent to stand trial, but severely mentally ill, could be compelled to be represented by counsel over his objection.⁴⁶⁷ From where we sit today (but only with the benefit of over 40 years of decisional law), it appears that the Court's implicit holdings were right: These men could not be executed, but could have lawyers appointed over their objections.

C. Chivalry

Powell's case is different. Her disbarment presented no complex legal issues. Nor did disbarring her from the Supreme Court present the same kind of consequences as did executing a human being—her Supreme Court practice was, to say the least, not successful and she had been disbarred from the lower courts where she actually practiced. Accordingly, what was at stake was probably more symbolic than anything else.

A possible but unlikely factor is the number of judges who recused themselves from participation in one or more of her cases. Around the time of her disbarment case, Chief Justice Burger⁴⁶⁸ and Justices Douglas,⁴⁶⁹ Blackmun,⁴⁷⁰ and Marshall⁴⁷¹

464. See *Ford v. Wainwright*, 477 U.S. 399, 401, 409–10, 418, 427, 431 (1986) (illustrating the various viewpoints of the Justices).

465. *Dusky v. United States*, 362 U.S. 402, 402–03 (1960) (per curiam); see *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975) (relying on the test of competence established by *Dusky*).

466. *Godinez v. Moran*, 509 U.S. 389, 391, 397–98 (1993).

467. *Indiana v. Edwards*, 554 U.S. 164, 172–79 (2008).

468. See *supra* notes 356–57, 428 and accompanying text (illustrating Justice Burger's recusal); *supra* note 435 (showing that Chief Justice Burger declined to participate).

469. *Powell v. Nat'l Sav. & Trust Co.*, 384 U.S. 1027 (1966) (Douglas, J., not participating).

470. See *supra* text accompanying note 437 (affirming that Justice Blackmun declined to participate).

471. See *supra* note 396 (showing that Justice Marshall declined to participate); *supra* text accompanying note 437 (affirming that Justice Marshall did not vote).

did not participate in one or more decisions. Yet lack of action on the disbarment probably cannot be explained by a lack of a quorum,⁴⁷² because her certiorari petitions were denied throughout this period.

All roads lead to Chief Justice Burger. By the time he got to the Court in 1969, he knew—he must have known—who Diana Kearny Powell was. He might have forgotten the several cases he decided as her judge, but it is unlikely that he forgot about testifying against her before the Committee on Admissions and Grievances, and maybe he knew that she had tried to appear before the Senate Judiciary Committee to offer some helpful thoughts at his confirmation hearing.⁴⁷³ And Burger was the inventor of the Special Docket, as reflected in the 1971 Seaver Memos,⁴⁷⁴ although admittedly the cases had already been held for an unusually long period when the practice was formalized.

If Burger knew Diana Kearny Powell, he might have felt some pity or even responsibility. To state the case starkly, he had been involved, over time, in the ruination of Ms. Powell's life. It began with his denial of her employment claim in 1958, followed by his deprivation of her trust in 1961, and her disbarment by the U.S. district court and court of appeals later in the 1960s. To be sure, it appears that all of those decisions were right, or at the very least, reasonable. But Powell was not a killer seeking leniency based on insanity; she was a lawyer who was apparently a perfectly decent, intelligent, and accomplished person, with the glaring exception of her overwhelming obsession with getting her hands on her grandmother's estate.

Other characteristics might have made her appear to establishment Washingtonians as a misguided eccentric rather than a knowing wrongdoer who had to be sanctioned. First, as noted before, she was from a well-known family; indeed, in her youth, she appeared several times in the *Washington Post's* coverage of social events.⁴⁷⁵ In 1942, she attended a District Women's Bar Association banquet attended by many current and future D.C. judges and justices, including Chief Justice Vinson,

472. See SUP. CT. R. 4.2 ("Six Members of the Court constitute a quorum.").

473. See *supra* note 358 and accompanying text (noting that Powell attempted to present evidence of Chief Justice Burger's errors admitting evidence in her case, during Chief Justice Burger's confirmation hearing).

474. See *supra* notes 123, 128, 299 and accompanying text (illustrating the initiation of the Special Docket).

475. *Poetry Circle Hears 3 Original Songs*, WASH. POST, Dec. 2, 1934, at S04; *News and Notes of D.A.R.*, WASH. POST, July 2, 1933, at S8; *Pen Women's Ball Has Author Motif*, WASH. POST, Dec. 19, 1928, at 10.

Judge Wiley Rutledge, and Judge E. Barrett Prettyman who later joined the D.C. Circuit and dissented in her favor.⁴⁷⁶ In addition, she served as a Republican precinct chair in the District⁴⁷⁷ and published letters in the *Washington Post* suggesting that she was, in other respects, a sensible, civic-minded individual.⁴⁷⁸ While Powell was neither impoverished, in the traditional sense, nor advancing claims of sex discrimination, she was a female lawyer in the 1960s, a time when women lawyers were few. Chief Justice Burger might have thought that a gentleman does not injure ladies who have gone mad. By the time her disbarment reached the Supreme Court, her intellectual deterioration was apparent, at least in the context of the distribution of her grandmother's trust.

IV. THE FAILURE OF THE SPECIAL DOCKET

The Court's heart might well have been in the right place in these cases; executions in light of *Furman*, which was at least on the distant horizon, would have been unjust, and if Powell was going to be disciplined based on the actions of other courts it was probably reasonable to let the dust settle completely on the other cases. Yet, even assuming that Rees and Anderson should not have been executed, that the Supreme Court should correct wrongs in individual cases, and that it is not essential that every action they engage in lead to valuable precedential opinions, the Special Docket must still be adjudged a failure. There is a good argument that the disposition of each of these cases was wrong; in any event, there is substantial doubt.

A. *Anderson v. Kentucky (S-1)*

If the Court did not want Henry Anderson to be executed, that goal was likely achieved when his sentence was commuted after *Furman*. There is dicta in some recent Kentucky cases suggesting that a commutation is like a deed that must be

476. *Attorneys Admonished to Study Latin-American Laws*, WASH. POST, Mar. 1, 1942, at 10; *Powell v. Nat'l Sav. & Trust Co.*, 296 F.2d 412, 414-15 (D.C. Cir 1961) (Prettyman, J., dissenting).

477. Stuart Auerbach, *Bus Firm and Citizens Appeal Fare Ruling*, WASH. POST, Feb. 27, 1968, at A10; *City GOP Elects Precinct Chairmen in Shift from Appointive Process*, WASH. POST, May 29, 1965, at B1.

478. See Diana Powell, Letter to the Editor, WASH. POST, Apr. 15, 1961, at A9 (writing on the fairness of the Eichmann trial); Diana K. Powell, Letter to the Editor, *Against Recognition*, WASH. POST, Nov. 19, 1958, at A14 (regarding Red China); Diana K. Powell, Letter to the Editor, *Color of Law*, WASH. POST, Aug. 18, 1958, at A10 (regarding bar membership).

accepted to be effective⁴⁷⁹ and, therefore, his “refusal” rendered it ineffective, although the logic of a unanimous U.S. Supreme Court opinion to the contrary seems inescapable.⁴⁸⁰

Even assuming that a Kentucky corrections official might carry out an execution after a Kentucky governor ordered that the inmate not be executed, there were two other bars to Anderson’s execution. The first was *Furman*. Anderson was sentenced under a pre-*Furman* statute, so his death sentence was unconstitutional. Every proposed draft order in the Supreme Court file over the years includes a *Furman* vacation of the death sentence.⁴⁸¹ Because Anderson was still on direct appeal when *Furman* came down, he was entitled to the benefit of the decision, even under restrictive modern views of retroactivity.⁴⁸² And although the Supreme Court held that a new death penalty statute could be retroactively applied to someone whose conduct occurred under an old unconstitutional statute,⁴⁸³ Kentucky cases made clear that their post-*Furman* statutes applied to conduct committed after their effective date.⁴⁸⁴ In short, the unconstitutional death sentence had been commuted, meaning the risk of capital punishment had probably ended, but even if the commutation was ineffective, there was no statute under which Anderson could be re-sentenced to death. Keeping the case protectively in the office of the Clerk was not necessary to save Anderson’s life. But it is not clear that anyone at the Supreme Court was aware of the commutation or the developments in Kentucky law; the Laura Little memorandum suggests that the Court believed the death sentence was still in effect.⁴⁸⁵

The rationale for not reviewing the claims of error, at least after 1972, cannot have been that the Court was powerless to go forward if Anderson was insane. First, Anderson’s own separate

479. *Fletcher v. Graham*, 192 S.W.3d 350, 361–62 (Ky. 2006) (explaining that although acceptance of a pardon is required, it is presumed).

480. *Biddle v. Perovich*, 274 U.S. 480, 485–88 (1927). The short version of the argument is that an individual should be able to refuse conditional relief if the conditions are unacceptable, but if the chief executive says a prisoner must leave prison unconditionally, the convict has no right to insist on free room and board. *Id.* at 487.

481. See *supra* note 127 and accompanying text (noting the attachment of a draft order staying the execution of the petitioner); *supra* note 140 (illustrating an attached draft order).

482. *Griffith v. Kentucky*, 479 U.S. 314, 316 (1987).

483. *Dobbert v. Florida*, 432 U.S. 282, 284, 300–01 (1977).

484. *Hudson v. Commonwealth*, 597 S.W.2d 610, 611 (Ky. 1980) (“We hold as a matter of statutory construction that the death penalty sentence for a capital offense . . . [is] applicable only to capital offenses committed after the effective date [of the act].”).

485. See *supra* text accompanying note 137–38 (establishing that the Supreme Court was unaware that Anderson’s death sentence had been commuted).

certiorari petition had been denied even though the Court was aware of his situation. Second, the Court did act over Anderson's vigorous objection, specifically, by staying the case. If the Court was going to inflict an outcome on Anderson that he did not want, through Frank Haddad, at least the Court should have gotten it right. If Haddad had enough authority to agree to an indefinite stay, he had enough authority to pursue the claim that the conviction was invalid.

Assume for the moment that the death sentence had been vacated under *Furman* and that Anderson was not hopelessly mentally ill. Of the twenty-three inmates on death row in Kentucky in 1972, seventeen were paroled following the commutation of their capital sentences.⁴⁸⁶ If his case had been handled in the ordinary course, for example, by vacating the sentence after the commutation and remanding to the state court, Anderson might have been released, perhaps to some better institutional situation. Assuming that Anderson was hopelessly insane, there was no reason not to review the claims of error. If there was a basis for reversal, then he could have been freed, at least for the moment, of criminal responsibility and handled by the mental health system; there was no suggestion that civil commitment was unavailable. If there was no reversible error, then the conviction, without the invalid death sentence, could have been affirmed.

Seaver, the Clerk of Court, contended that monitoring the case was not the function of the Court. The record shows he was right. The case was reexamined in 1971 at Seaver's insistence and again in 1987 because of a letter from a prison visitor. In a final irony, the case was carried on the books for a year after Anderson was dead, and the Court learned of his death only through an inquiry from a prison inmate. If the Court actually thought that by continuing the case indefinitely, it could be revisited in the event of some important development, it set up no system—such as reports by counsel every five years—to determine if there were reasons for reconsideration. If the Court meant to save Anderson's life but leave the conviction in place, it could have imposed such an order in 1964.

B. *Rees v. Peyton (S-2)*

The death sentence in the *Rees* case was commuted in 1988, eliminating the possibility of execution. The record also shows

486. Vito & Wilson, *supra* note 138, at 102–06. “The mean time served between commutation and parole was 77 months.” *Id.* at 105.

that Rees might well have regained his sanity. Indeed, he expressed interest in the commutation, which suggested at least some awareness of the circumstances, and prison psychologists suggested in 1987 that he was much improved since 1965. Accordingly, after 1987, the Court might have been able to dispose of the case based on Rees's wishes. If Rees was competent and still wanted to withdraw the petition, it could be withdrawn. If he wanted to challenge the conviction and potentially obtain a reversal, the petition could have been decided on the merits. But there was evidently no regular monitoring or evaluation of Rees's situation to determine if the case could now proceed.

If the Court was convinced that Rees was permanently incompetent, once death was precluded it is not clear what the Court thought might be gained by holding the case. If the Court thought there was a generalized procedural problem presented by the case, such as when a lawyer may pursue a case on behalf of an incompetent petitioner, perhaps the Court should have addressed it.

If there was no general rule likely to emerge from the case, then it is not clear what interests of Rees or anyone else were advanced by delaying decision on the certiorari petition. As with *Anderson*, it cannot be that the Court determined it could not act at all on a petition from an incompetent defendant; they did act to stay the case based on arguments by counsel. There were difficult problems that, given the facts, could well have arisen in the future—such as what happens if a person's time to file a certiorari petition runs while they are incompetent and after the deadline they regain competency and have good issues.⁴⁸⁷ But delaying resolution of this petition did not forestall such questions or give any hint how they should be resolved.

C. In re Disbarment of Powell (S-3)

The Court's disbarment of Diana Powell in 1994 after spending all or part of four decades on hold was surprising and unfair. One problem is the power of a court to decide a case involving a deceased attorney—it is not clear that it presents a case or controversy. Almost certainly, a disbarment action abates upon death;⁴⁸⁸ in at least one case, the Supreme Court had

487. See *supra* text accompanying note 300 (explaining that Seaver's 1971 draft order attempted to address this problem).

488. See *List v. Pennsylvania*, 131 U.S. 396, 396 (1888) (per curiam) (abating criminal prosecution with defendant's death); *Lund v. Dep't of Health*, 708 So. 2d 645, 646–47 (Fla. Dist. Ct. App. 1998) (holding that a professional discipline case was moot after the physician died).

vacated as moot a disbarment order it issued when the attorney was dead.⁴⁸⁹ If attorney discipline is “designed to protect the public,”⁴⁹⁰ it is difficult to see what danger was presented by a deceased lawyer.

Had she been alive, there would have been a due process question. After the passage of many years, there was no reason for her to think that the case would ever be decided and much reason for the Court to think that the situation might have changed since 1967. Accordingly, it is hardly fair for the Court to have made a decision, out of the blue in 1994, without inquiring whether there had been any developments. Of course, given that the Supreme Court’s disciplinary records are not public, it may be that they would reveal an inquiry of bar authorities that showed she had not been readmitted or the disciplinary actions undone. But if they made inquiries, it is likely that they would have discovered her passing and dismissed the case as moot. If the case had been stayed as a symbolic gesture of chivalry, disbarring her in 1994 was a gratuitous insult to the dead. Ironically, then, the only case involving Diana Kearny Powell where the Court reached the merits, was decided in a way that was arguably legally improper and unfair to her.

V. CONCLUSION

Most law from courts comes from their opinions. In these cases, because the important decisions were made in conferences that were not memorialized in opinions, we do not know for sure what motivated the Court to do what it did. From the circumstances, it must be assumed that the Court acted on humane impulses to stay these cases for decades. The wheels of justice ground slowly here, but they did not grind fine. They sacrificed decision on the merits, and it is difficult to see whether anything was achieved thereby.

489. *In re Wolbert*, 64 S. Ct. 198, 198 (1943) (vacating order of disbarment as moot).

490. *In re Ruffalo*, 390 U.S. 544, 550 (1968).