State Court Defiance and the Limits of Supreme Court Authority: *Williams v. Georgia* Revisited

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Note on Original Source Material: The Tom C. Clark Papers are at the Tarlton Law Library, University of Texas at Austin. The Felix Frankfurter Papers are at the Harvard Law School and are available on microfilm at the Library of Congress and elsewhere. The Hugo L. Black Papers, Harold H. Burton Papers, William O. Douglas Papers, and Earl Warren Papers are in the Manuscript Division of the Library of Congress. The Georgia State Archives are in Atlanta. Wherever possible, citations to archival materials include the file or location number and the box or container number.

Fiat Justitia Ruat Caelum

—Do Justice Though The Heavens Fall. *Inscription above the bench of the Georgia Supreme Court.*

I. INTRODUCTION

States have on many occasions refused to comply with United States Supreme Court decisions; rarely, however, have they overtly defied the Court.[1] It is even more unusual for such defiance to come from the state judiciary, the branch of government most closely tied to the federal courts. In *Williams v. Georgia*,[2] however, a state supreme court bluntly refused to recognize the U.S. Supreme Court's prior finding of jurisdiction, precipitating one of the most remarkable confrontations between state and federal judges in the annals of American justice.

Aubry Williams, a black man, was accused of having murdered a white liquor store clerk in downtown Atlanta in 1952. He was tried, convicted, and condemned by a jury that had been selected using procedures that all parties later agreed were racially discriminatory and unconstitutional. The Georgia Supreme Court, however, refused to grant a new trial, ruling that Williams had

1. The most intensively studied episodes of state evasion and noncompliance involve school prayer, desegregation, and *Miranda* rights. On school prayer, see, e.g., Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, *in* THE IMPACT OF SUPREME COURT DECISIONS 110 (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973); Ellis Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. PUB. L. 396 (1965); Frank J. Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777 (1959). On state noncompliance with *Brown* and its progeny, see, e.g., HOWARD I. KALODNER & JAMES J. FISHMAN, LIMITS OF JUSTICE (1978); J.W. PELTASON, FIFTY-EIGHT LONELY MEN (1961); Albert P. Blaustein & Clarence C. Ferguson, Jr., *Avoidance, Evasion and Delay*, *in* THE IMPACT OF SUPREME COURT DECISIONS, *supra*, at 100; Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, *in* THE IMPACT OF SUPREME COURT DECISIONS, *supra*, at 77. On state resistance to Miranda v. Arizona, 384 U.S. 436 (1966), see, e.g., Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, *in* THE IMPACT OF SUPREME COURT DECISIONS, *supra*, at 139.

2. *Williams v. Georgia* began as Williams v. State, 78 S.E.2d 521 (Ga. 1953) (affirming trial court conviction), *extraordinary motion denied*, 82 S.E.2d 217 (Ga. 1954), *cert. granted*, 348 U.S. 854 (1954), *rev'd sub nom.* Williams v. Georgia, 349 U.S. 375 (1955). On remand, the Georgia Supreme Court refused to recognize the U.S. Supreme Court's jurisdiction over the case and reaffirmed its earlier decision. Williams v. State, 88 S.E.2d 376 (Ga. 1955), *cert. denied*, 350 U.S. 950 (1956).

irrevocably waived his constitutional rights by failing to assert them in a timely fashion.

On appeal, the U.S. Supreme Court accepted jurisdiction and remanded the case, stating that Williams was entitled to a new trial and hinting that if the state court refused to order one, the U.S. Supreme Court would do so as a matter of federal constitutional law. On remand, a unanimous Georgia Supreme Court angrily reaffirmed its earlier decision. In an extraordinary opinion, it held that the U.S. Supreme Court had no jurisdiction to consider the case. The state court declared that it was not bound by any federal court judgment on the matter and implied that any further federal attempts to interfere in the case would be ignored. Despite this direct challenge to its authority, the U.S. Supreme Court refused to grant certiorari a second time and Aubry Williams was executed.

To the extent that this case is remembered at all, it is generally regarded as an unfortunate but historically insignificant footnote from the early years of the Civil Rights movement.[3] This Article challenges that perception. Far from inconsequential, *Williams* represented a critical moment in the Warren Court's struggle to undo the effects of Jim Crow in the South.

The first part of this Article presents a complete narrative of *Williams v. Georgia*, using unpublished primary sources (Georgia and U.S. Supreme Court archival materials, as well as numerous interviews with former U.S. Supreme Court clerks and other Court personnel, and interviews with sources close to the Georgia Supreme Court) to reconstruct and analyze the courts' attempts to resolve this case. The Warren Court knowingly allowed Georgia to execute an "innocent" man,[4] and the reasons why it did so reveal an interesting but troublesome side of Court decisionmaking. Considered solely on its own terms, *Williams* offers an excellent case study of the problems of Supreme Court policymaking at the limits of the Court's authority.

The second part of this Article examines the larger legal and political significance of the case. *Williams*' role in defining the Warren Court's troubled relationship with the South has never been well understood or appreciated. The case came to the Court at a crucial time—less than a year after *Brown v. Board of Education* and *Bolling v. Sharpe* and at virtually the same time as *Brown II*.[5] Faced with growing Southern intransigence over the Court's school

3. By far the best previously published account of the case is in a chapter of E. BARRETT PRETTYMAN, DEATH AND THE SUPREME COURT 258-94 (1961). C. Herman Pritchett and Walter F. Murphy offer an excerpt of the U.S. Supreme Court's remand order and the Georgia Supreme Court's response, but do not attempt to provide additional insight or analysis. WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES AND POLITICS 302-04 (4th ed. 1986).

4. Arthur Goldberg persuasively argues that criminal defendants must be considered innocent either if they in fact did not commit the crime or if their convictions were improperly secured. Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 362 (1973).

5. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

desegregation rulings, the Warren Court sought to protect its own authority and the integrity of *Brown* by attempting to avoid potentially damaging confrontations with Southern governments over ancillary racial issues, even when serious individual injustices resulted. The Court followed this strategy in its refusal to review Williams' conviction a second time.

Instead of placating its Southern critics, however, *Williams* helped to spark a Southern backlash against the Warren Court and inspired increased opposition to the Court's desegregation policies. The Court's failure to respond to the Georgia court's assault on its authority was widely seen throughout the South not as a principled concession in the name of comity, but as an outright capitulation in the face of determined state resistance. Even as the Court announced its conciliatory "all deliberate speed" standard in *Brown II*, *Williams* was making it clear that this approach was not going to work.

Most legal scholars attribute the Court's problems in enforcing *Brown* either to the lack of effective support from the executive and legislative departments[6] or to the inherent limitations of judicial power.[7] If they hold the Warren Court accountable at all, they blame only the vagueness of its "all deliberate speed" pronouncement.[8] This Article suggests that the Court's public retreat and rout in *Williams* foreclosed any chance the Court might have had to secure Southern compliance with *Brown*.

II. THE CASE OF AUBRY WILLIAMS

A. *White Cards and Yellow Cards*

On October 4, 1952, a white sales clerk named Harry Furst was shot and killed during a daylight robbery at Simon's Liquor Store in downtown Atlanta.[9] Thirteen days later, a twenty-seven-year-old black man by the name of Aubry Lee Williams was arrested and charged with Furst's murder.[10] After being interrogated and placed in a line-up, Williams signed a written

6. ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 14-15 (1965); TONY A. FREYER, HUGO BLACK AND THE DILEMMA OF LIBERALISM 128-31 (1991); MURPHY & PRITCHETT, *supra* note 3, at 323-24, 327-28; BENJAMIN MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT'S 1954 DECISION 73-77 (1964); STEVEN L. WASBY, THE IMPACT OF THE SUPREME COURT 172-73 (1970).

7. BICKEL, *supra* note 6, at 4-5; MURPHY & PRITCHETT, *supra* note 3, at 327; MUSE, *supra* note 6, at 73.

8. CHARLES S. BULLOCK III & CHARLES M. LAMB, IMPLEMENTATION OF CIVIL RIGHTS POLICY 56-57 (1984); FREYER, *supra* note 6, at 127-31; WASBY, *supra* note 6, at 175-76; Board of Student Editors, University of Illinois Law Forum, ". . . *With All Deliberate Speed*", *in* WITH ALL DELIBERATE SPEED: CIVIL RIGHTS THEORY AND REALITY 1, 30-31 (John H. McCord ed., 1969).

9. PRETTYMAN, *supra* note 3, at 258-63.

10. True Bill, Williams v. State, 78 S.E.2d 521 (Ga. 1953) (No. 18348), *reprinted in* Bill of Exceptions at 1-2, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548).

confession.[11] He was indicted four days later[12] and scheduled to be tried by a Fulton County jury on March 10, 1953.

At the time, jury panels in Fulton County were selected on a weekly basis by a superior court judge, who drew tickets from a wooden box containing the names of all qualified men in the jurisdiction.[13] The wooden container was called a traverse jury box, and those who were selected were called traverse jurors. The drawing was not a random process: white prospective jurors had their names written on white tickets, while everyone else had their names placed on yellow tickets. This allowed state officials to monitor—and presumably limit—the number of racial minorities allowed to serve as jurors in Fulton County. The yellow cards that were drawn were generally assigned to the criminal calendar, at least in part because the state could challenge black jurors more easily in criminal trials than in civil cases.[14]

On February 18, 1953, Superior Court Judge Jesse M. Wood drew the names of more than 120 traverse jurors to be summoned on March 9, the week that Williams' trial was to begin. After granting excuses for good cause, Judge Wood divided the remaining names into ten panels of twelve. He assigned the first five panels to hear civil cases and the remaining five to the criminal calendar.

Only four of the traverse jurors were black. All four were assigned to the criminal array and were among the panel of forty-eight men assigned to Aubry

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11. *See Police Solve Slaying of Liquor Clerk*, ATLANTA CONST., Oct. 18, 1952, at 13; *Admits Slaying Liquor Dealer*, ATLANTA J., Oct. 18, 1952, at 14. At first, Williams admitted participating in the robbery, but he later claimed that a man named Robinson killed Furst. When Robinson proved to have been in jail at the time of the murder, Williams admitted to shooting Furst but said that the gun had gone off accidentally. PRETTYMAN, *supra* note 3, at 263. FBI ballistics experts testified, however, that they could not conclusively link the bullet that killed Furst to a handgun Williams allegedly pawned for $15 with an empty shell still its chamber. *Liquor Store Rob-Slayer Gets Chair Sentence*, ATLANTA J., Mar. 11, 1953, at 11.

12. The Fulton County grand jury consisted of eighteen white men, led by foreman W. Chess Smith. True Bill, *Williams* (No. 18348).

13. GA. CODE ANN. § 59-106 (Harrison 1933). The board of jury commissioners was charged to select from the tax receiver's books "upright and intelligent citizens" to serve as jurors. The jury commissioners were required to revise the jury lists every two years, or every three years with the permission of the presiding judge of the superior court. Commissioners were appointed by the judges of the superior court. GA. CODE ANN. § 59-101 (Harrison 1933). At the time of Williams' trial, no black person had ever served as a commissioner. Petition for Certiorari at 2-3, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

14. Potential jurors were assigned either to the civil or to the criminal calendar. Georgia procedure did not allow peremptory challenges in civil cases. Prosecutors were allowed ten peremptory challenges in capital cases or in cases carrying a maximum penalty of not less than four years imprisonment, and six challenges in other felony trials; criminal defendants were allowed twenty and twelve, respectively. GA. CODE ANN. § 59-805 (Harrison 1933). The use of differently colored tickets and the systematic use of peremptory challenges to challenge black traverse jurors ensured that few, if any, blacks served as jurors. The Solicitor General of one county publicly admitted that his office systematically used the state's peremptory challenges to exclude all blacks from jury service. Watkins v. State, 33 S.E.2d 325 (Ga. 1945), *cited in* Extraordinary Motion for a New Trial at 8, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548).

Jury commissioners also used their knowledge of the city to exclude the residents of poor and minority neighborhoods on the grounds that such persons were "unsuitable" jurors. *See* Extraordinary Motion for a New Trial at 6, *Williams* (No. 18548).

Williams the morning of March 10. The trial judge, E.E. Andrews, excluded three of them for cause, leaving the prosecutor to use his first peremptory challenge to remove the fourth.[15] Williams' court-appointed lawyer, Carter Goode, objected neither to the jury array nor to the selection procedures, even though the Georgia Supreme Court had criticized Fulton County's use of colored tickets to select jury panels a year earlier in *Avery v. State*,[16] and the U.S. Supreme Court had granted certiorari in that case only the day before.[17]

The prosecution introduced Williams' signed confession and called twenty-three witnesses to testify against him.[18] Williams' sole defense was a single, unsworn statement that he did not commit the crime and that he had been "afraid" when he signed the confession.[19] After deliberating for an hour and twenty minutes, the jury convicted Aubry Williams of murder, without a recommendation for mercy.[20] The entire trial, including jury selection, lasted less than a day. The following morning, Judge Andrews sentenced Williams to die in the electric chair.[21] Carter Goode filed a motion for a new trial on March 27, which he substantially amended on June 29.

In the meantime, on May 25, the U.S. Supreme Court ruled in *Avery v. Georgia* that Fulton County's colored jury tickets violated the Equal Protection Clause of the Fourteenth Amendment.[22] (Table 1 shows a partial comparative chronology of *Avery* and *Williams* and is useful to clarify some of the issues raised in the various motions for a new trial.) Despite the obvious parallels between *Avery* and *Williams*, Goode did not mention *Avery* in either the original or the amended motion for a new trial. Judge Andrews denied the motion for a new trial on the same day that the amended motion was filed,[23]

15. Judge Andrews also excused ten other white jurors for cause. Petition for Certiorari at 4-5, *Williams* (No. 54-110); Extraordinary Motion for a New Trial at 9-10, *Williams* (No. 18548); PRETTYMAN, *supra* note 3, at 265.

16. The Georgia Supreme Court criticized Fulton County's use of white and yellow tickets, calling it "prima facie evidence of discrimination." Avery v. State, 70 S.E.2d 716, 722 (Ga. 1952). The court nonetheless affirmed James Avery's rape conviction, ruling that there was "no harm in this instance" and citing the testimony of the judge who drew the jurors that no actual discrimination had occurred in selecting the jury.

17. Avery v. Georgia, 345 U.S. 903 (1953).

18. PRETTYMAN, *supra* note 3, at 267. According to Carter Goode, however, 22 witnesses testified against Williams. Bill of Exceptions, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548).

19. His full statement was, "The only thing I know about this case is what the officers told me. I was on that side of town that morning, and when I signed the papers I was afraid. I did not do it and don't know who did it." PRETTYMAN, *supra* note 3, at 272.

20. Jury Verdict, Williams v. State, 78 S.E.2d 521 (Ga. 1953) (No. 18348), *reprinted in* Bill of Exceptions at 3, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548); *see also Is Doomed as Liquor Shop Slayer*, ATLANTA CONST., Mar. 11, 1953, at 15. The jury foreman's name was Lee A. Ethridge. Jury Verdict, *Williams* (No. 18348).

21. *Liquor Store Rob-Slayer Gets Chair Sentence*, *supra* note 11, at 11. Williams was scheduled to die between the hours of 10 a.m. and 2 p.m. on May 1, 1953. PRETTYMAN, *supra* note 3, at 272-73.

22. Avery v. Georgia, 345 U.S. 559, 562 (1953).

23. PRETTYMAN, *supra* note 3, at 273.

and the judgment was affirmed by the Georgia Supreme Court on October 14.[24] Five weeks later, Aubry Williams was again sentenced to death.[25]

It was not until December 1, more than six months after the U.S. Supreme Court decision in *Avery v. Georgia* and less than two weeks before Williams was scheduled to be executed, that Carter Goode filed a second, extraordinary motion for a new trial.[26] For the first time, Goode claimed that the use of white and yellow tickets violated Williams' rights to equal protection and due process.[27] Goode, his law partner Ellis Creel, and Aubry Williams each attached an affidavit to the motion, each explaining why he had not objected earlier: Goode's affidavit stated that he had not known about the facts underlying this constitutional claim and that he had exercised due diligence in defending the case,[28] Creel swore that he did not participate in any way in preparing for Williams' trial,[29] and Williams' affidavit simply said that he had reasonably assumed that the jury had been properly constituted.[30] On January 18, 1954, Judge Andrews denied the extraordinary motion for a new trial.[31]

24. Williams v. State, 78 S.E.2d 521 (Ga. 1953).

25. On November 23, Williams was sentenced to die on December 11, 1953, again between the hours of 10 a.m. and 2 p.m. Bill of Exceptions at 16, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548).

26. By statute, an ordinary motion for a new trial had to be made within thirty days of the end of the trial. GA. CODE ANN. § 70-301 (Harrison 1933). In contrast, an extraordinary motion for a new trial could be made at any time after the term in which the trial occurred. GA. CODE ANN. § 70-303 (Harrison 1933).

27. Extraordinary Motion for a New Trial at 8, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548).

28. Affidavit of Carter Goode at 12, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548), *reprinted in* Petition for Certiorari at 7, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

29. Affidavit of Ellis M. Creel at 14, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548), *reprinted in* Petition for Certiorari at 7-8, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

30. Affidavit of Aubry Williams at 11, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548), *reprinted in* Petition for Certiorari at 6, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

31. Order Dismissing Motion, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548), *reprinted in* Petition for Certiorari at 16, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

TABLE 1. *Chronology of* Avery *and* Williams

Date	*Avery*	*Williams*
September 20, 1951	James Avery convicted of rape in Fulton County Superior Court.	
April 14, 1952	Georgia Supreme Court affirms Avery's conviction. Avery v. State, 70 S.E.2d 716 (Ga. 1952).	
July 28, 1952	Petition for writ of certiorari filed with U.S. Supreme Court.	
October 4, 1952		Harry Furst murdered.
October 17, 1952		Aubry Williams arrested.
October 21, 1952		Williams indicted for murder.
February 18, 1953		Jury panel drawn.
March 9, 1953	Certiorari granted by U.S. Supreme Court. Avery v. Georgia, 345 U.S. 903 (1953).	
March 10, 1953		Trial and conviction.
March 27, 1953		Motion for new trial filed.
April 30, 1953	Oral argument before U.S. Supreme Court.	
May 25, 1953	U.S. Supreme Court reverses Avery's conviction. 345 U.S. 559 (1953).	
June 29, 1953		Amended motion for new trial filed. Motion denied.
October 14, 1953		Georgia Supreme Court affirmed Williams' conviction. Williams v. State, 78 S.E.2d 521 (Ga. 1953).
December 1, 1953		Extraordinary motion for new trial filed mentioning *Avery* for first time.
January 18, 1954		Extraordinary motion denied by Judge E.E. Andrews.
February 15, 1954		Bill of Exceptions filed with Georgia Supreme Court.
May 10, 1954		Dismissal of extraordinary motion affirmed by Georgia Supreme Court. Williams v. State, 82 S.E.2d 217 (Ga. 1954).
October 18, 1954		U.S. Supreme Court grants certiorari. Williams v. Georgia, 348 U.S. 854 (1954).

Goode filed a Bill of Exceptions with the Georgia Supreme Court on February 24, 1954,[32] which the court rejected on May 31.[33] Writing for a unanimous court, Presiding Justice Lee Wyatt noted that Williams had expressly abandoned his due process claim and that he had waived any equal protection claim by not making a timely challenge to the array.[34] While Wyatt acknowledged that the defendant's extraordinary motion rightly identified a practice that had been found unconstitutional by both the Georgia and United States Supreme Courts, the failure to raise a timely objection meant that Williams had waived his constitutional claims:

> It is settled law in this State that, when a panel of jurors is put upon the prisoner, he should challenge the array for any cause . . . [and] if he fails to do so, the objection is waived and can not thereafter be made a ground of a motion for new trial. . . .
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> . . . .
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> [The use of different colored tickets is a practice] which has been condemned by this court and the Supreme Court of the United States. However, any question to be considered by this court must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State. We can not simply overlook the rules made for the purpose of providing a fair and orderly procedure in the conduct of trials . . . and permit the defendant to stand negligently or purposefully by, taking his chances of an acquittal, and then, upon his conviction . . . be heard to say that the panel of jurors put upon him was not fairly and properly selected and empaneled. When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all.[35]

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32. Bill of Exceptions, Williams v. State, 82 S.E.2d 217 (Ga. 1954) (No. 18548).

33. Williams v. State, 82 S.E.2d 217 (Ga. 1954).

34. *Id.* at 218-19. Three statutes were at issue in the question of whether the Georgia Supreme Court had discretion to grant a new trial in this case:

GA. CODE ANN. § 70-208 (1933): "In all applications for a new trial on other grounds, not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts."

GA. CODE ANN. § 70-301 (1933): "All applications for a new trial, except in extraordinary cases, shall be made during the term at which the trial was had; and when the term shall continue longer than 30 days, the application shall be filed within 30 days from the trial . . . ."

GA. CODE ANN. § 70-303 (1933): "In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term . . . . Whenever a motion for a new trial shall have been made at the term of trial . . . and overruled, . . . no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case . . . ."

35. *Williams*, 82 S.E.2d at 218-20 (citing Lumpkin v. State, 109 S.E. 664 (Ga. 1921); Cornelious v. State, 17 S.E.2d 156 (Ga. 1941); Cumming v. State, 117 S.E. 378 (Ga. 1923); Moon v. State, 68 Ga. 687 (1882); Williams v. State, 120 S.E. 131 (Ga. Ct. App. 1923)). Georgia law distinguishes the exclusion of certain classes of persons from the jury panel (*propter defectum*) from questions going to the qualifications of individual jurors (*propter affectum* or *propter delictum*). The State of Georgia argued that while the latter categories can be grounds for new trial where problems are not discovered until after the verdict, the former category of objections are not subject to this more lenient rule. *See, e.g.*, Brief on Behalf of Defendant in Error at 2-3, Williams v. State, 78 S.E.2d 521 (Ga. 1953) (No. 18348).

Justice Wyatt dismissed the affidavits on three grounds. First, Goode's claimed ignorance about the way in which the array was selected was insufficient to excuse his failure to object when the panel was put upon him.[36] Second, Goode's claim that he had exercised due diligence was "merely opinion" and did not attempt to prove with supporting evidence that a reasonably competent lawyer could not have discovered the defect in the array.[37] Third, Wyatt found that the facts and circumstances of the case contradicted the statements made in the affidavits.[38] While admitting that the state jury selection procedures were discriminatory and that ordinarily Aubry Williams would be entitled to a new trial, the court ruled that Williams had waived his rights.[39]

The judgment was made official on May 10, 1954, and Williams' motion for rehearing was denied on May 31.[40] On July 9, Carter Goode filed a petition for certiorari and a motion to proceed *in forma pauperis* in the U.S. Supreme Court.[41] Justice Hugo L. Black granted an indefinite stay of state proceedings pending possible Supreme Court review.[42]

B. *The Certiorari Petition: From Two-and-a-Half to Four Votes*

At the U.S. Supreme Court, the clerks' certiorari memoranda unanimously urged the Court to refuse the case. Harvey Grossman, Justice William O. Douglas' clerk, argued that the case below had been decided on adequate and independent state grounds. He also felt that the Georgia court had reasonably ruled that Aubry Williams had waived his federal rights, whether because of ignorance or calculation.[43]

Gerald Gunther, one of Chief Justice Earl Warren's clerks, also circulated a detailed memorandum advising the Court to reject Williams' petition. Gunther acknowledged the apparent parallel with *Avery*, but he argued that the

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36. *Williams*, 82 S.E.2d at 219.

37. *Id.*

38. *Id.* The court was careful to note that *Avery* was tried in Fulton County, and that the opinion in that case thoroughly explained the methods and practices of selecting and empaneling juries in Fulton County. "Due diligence would certainly have required the defendant and his attorney to make themselves familiar with the opinions of this court on the question now raised." *Id.*

39. *Id.* at 219-20.

40. *Id.* at 217.

41. Goode and Creel remained Williams' attorneys of record. Goode's petition was unquestionably slipshod work. In claiming violations of Williams' equal protection rights, Goode simply repeated an identical series of allegations and arguments, substituting "equal protection" for "due process." The petition also repeats the same unsubstantiated, conclusory claims that the defense team had exercised due diligence in presenting the motion for a new trial. Petition for Certiorari at 4-12, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

42. Order Granting Stay, Williams v. Georgia, 348 U.S. 854 (1954) (No. 54-110).

43. Memorandum from Harvey M. Grossman, Law Clerk for Justice Douglas, to Justice William O. Douglas (Sept. 25, 1954) (available in William O. Douglas Papers, cont. 1159, Oct. Term 1954).

two cases were distinguishable.[44] The key issues in *Williams* involved the waiver of rights and federal jurisdictional questions, not racial discrimination. Gunther noted that both the State of Georgia and the Georgia Supreme Court had conceded that the use of yellow and white cards was discriminatory; they had based their decisions on the claim that Williams had waived any right to protest the discrimination by failing to make a timely objection. While Williams may have had a substantial case on the merits, Gunther continued, the matter had already been decided on adequate and independent state procedural grounds. All of the petitioner's claims could have been raised earlier, and the state court's decision seemed reasonable.[45] Gunther added, however, that while the state decision was probably unassailable through a petition for certiorari, Williams might have greater success with a federal habeas corpus claim.[46]

A copy of Gunther's memorandum was sent to Justice Harold Burton's chambers. There, Thomas O'Neill, one of his clerks, added a brief note: "It appears that [petitioner's] lawyer has been guilty of almost criminal negligence . . . . It is a hard case, but I don't see how we can do other than DENY."[47]

At first, Chief Justice Earl Warren was prepared to go along with his clerk's recommendation, although he still had doubts about the case. In a note to himself, Warren initially wrote that he was "inclined to DENY," citing adequate and independent state grounds. He later crossed this out, and scribbled in "Grant?"[48] Justice Douglas and Justice Hugo Black felt no such ambivalence; both quickly decided that Aubry Williams' constitutional rights had been violated and that a new trial should be ordered.

At the October 7 certiorari conference, the Court voted to deny certiorari by a vote of two-and-a-half to six. Justices Douglas and Black voted to hear the case, and the Chief Justice joined them only tentatively. Justices Sherman Minton, Tom Clark, Harold Burton, Felix Frankfurter, Stanley Reed, and Robert Jackson all voted to deny certiorari.[49] This failure to garner the four

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44. In *Avery*, Gunther noted, there had been no blacks on a panel of 60 traverse jurors, whereas in *Williams* there had been four blacks on a panel of 100, and all four had been named to the criminal array. Gerald Gunther, Certiorari Memorandum 1 (Sept. 25, 1954) (available in Tom C. Clark Papers, box B155, file no. 6).

45. *Id.* at 1, 4.

46. *Id.* at 4. On the question of certiorari, Gunther cited Jennings v. Illinois, 342 U.S. 104, 109, 110 (1951); Brown v. Allen, 344 U.S. 443, 486 (1953); and Yakus v. United States, 321 U.S. 414, 444 (1944). In support of his habeas corpus theory, Gunther cited Frankfurter's dissenting opinion in Brown v. Allen, 344 U.S. at 503 (Frankfurter, J., dissenting).

47. Note from Thomas O'Neill, Law Clerk for Justice Harold Burton, to Justice Harold H. Burton (attached to Gunther, *supra* note 44, at 1) (available in Harold Burton Papers, cont. 270).

48. Justice Earl Warren, Certiorari Memorandum (available in Earl Warren Papers, cont. 117).

49. In a tally in the margins of his copy of Gunther's memorandum, Justice Burton placed a question mark by Chief Justice Warren's vote. Gerald Gunther, Certiorari Memorandum (Sept. 27, 1954) (available in Harold H. Burton Papers, cont. 270) (margin notes by Justice Burton). A subsequent memorandum from Gerald Gunther also suggested that the Chief Justice's initial vote was tentative. Bench Memorandum from Gerald Gunther, Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 7 (available in Earl Warren Papers, cont. 160, Oct. Term 1954).

votes needed to grant certiorari ordinarily would have meant the end of the case. But Douglas was determined not to let the matter drop.

Immediately upon returning to his chambers, Douglas wrote a note to the Chief Justice asking him to hold *Williams* over until the next conference.[50] He then asked Grossman, his clerk, to prepare a memorandum based on *Hormel v. Helvering*,[51] a federal tax case involving the waiver of federal rights. Using this memorandum as a starting point, Douglas wrote a three-page, handwritten dissent from the Court's decision to deny certiorari. On October 11, he sent the dissent to Black, asking whether it was "adequate for the Georgia case."[52] Black returned it with a single correction and a brief handwritten note: "OK. The C.J. voted with us, but may hesitate about writing in [unintelligible] denial of certiorari. This is worth considering I think."[53] Douglas was apparently satisfied and circulated the opinion.[54]

Douglas noted that the Court had recently ruled that the Constitution prohibited the systematic use of colored tickets to identify the race of prospective jurors; he also noted that Williams had been convicted only two months before *Avery*[55] was decided. The Georgia courts had wrongly denied Williams' motion for a new trial, Douglas wrote. As a result, "[p]etitioner now goes to his death, though the constitutional rights guaranteed every citizen have been denied him. In cases far less serious than this we have applied a more liberal rule."[56]

Douglas reminded the other Justices of the Court's ruling in *Hormel*, a case in which a party to a federal tax liability dispute tried to raise an issue before the Court of Appeals that had not been presented to the Board of Tax Appeals. The issue was brought to the party's attention by the Supreme Court's decision in *Helvering v. Clifford*,[57] which was handed down after the Board of Tax Appeals made its initial ruling. The Supreme Court allowed the petitioner to raise the new issue, even though it was technically too late to do so, on the ground that the "'[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them.'"[58]

Douglas acknowledged that *Hormel* arose in the federal courts rather than the state courts, but he countered that *Hormel*, *Avery*, and *Williams* all had

50. Note from Justice William O. Douglas to Chief Justice Earl Warren (Oct. 7, 1954) (available in Earl Warren Papers, cont. 350).

51. 312 U.S. 552 (1941).

52. Note from Justice William O. Douglas to Justice Hugo L. Black (Oct. 11, 1954) (attached to Justice William O. Douglas, Draft Dissent from Denial of Certiorari) (available in William O. Douglas Papers, cont. 1159, Oct. Term 1954).

53. *Id.*

54. The draft was circulated on October 14. Justice William O. Douglas, Draft Dissent from denial Of Certiorari (available in William O. Douglas Papers, cont. 1159, Oct. Term 1954).

55. Avery v. Georgia, 345 U.S. 559 (1953).

56. Douglas, *supra* note 54, at 1.

57. 309 U.S. 331 (1940).

58. Douglas, *supra* note 54, at 2 (quoting *Hormel*, 312 U.S. at 557).

involved federal questions: *Hormel* was based on federal statutory law, while *Avery* and *Williams* involved federal constitutional rights.[59] If justice demanded that the Court adopt a liberal waiver rule in a case involving "only tax liability," Douglas argued, it assuredly demanded the same in a life-or-death criminal case. "Certainly when *human life* is at stake, we should not apply a stricter procedural standard," he wrote. "When *human life* is at stake, courts should be as alert as lawyers to protect the constitutional rights of the accused."[60]

After reading Douglas' dissent, Warren decided to vote to hear the case. Justice Tom Clark also began to lean in favor of granting certiorari. In a handwritten note on his conference list, Clark pencilled in "Grant?" next to the *Williams* listing.[61]

Justice Clark had a reputation among his clerks for making decisions based on intuition, especially when it came to certiorari votes. While Clark rarely discussed these votes with his clerks, he freely admitted that if he had a gut feeling that a case needed a closer look, he would not hesitate to vote to grant certiorari, regardless of what he thought about the merits of the case. This was especially so if a person's life was at stake.[62] As a former Texas trial lawyer, Clark prided himself on being sensitive to the problems of Southern justice. He also strongly believed that cases were won or lost on the facts rather than on abstract legal principles, and he took very seriously allegations that brought into question the basic integrity of the fact-finding process. In this case, Clark saw ample evidence of unconstitutional interference with the fact-finding process in the state policy of excluding blacks from trial juries. The appearance of a serious injustice in a capital case, combined with the apparent conflict with *Avery*, prompted Clark to vote to grant certiorari.[63]

Shortly before the October 16 conference, Thomas O'Neill wrote a brief memorandum to Justice Burton summarizing Douglas' dissent from the decision to deny certiorari. O'Neill conceded that while Douglas' reasoning was persuasive, *Hormel* was a federal case and thus distinguishable from *Williams*, which was decided solely on the basis of state law. O'Neill then posed a new question: "[W]hen a federal question is not timely raised in the state ct. [sic] according to state law, does the untimeliness preclude [Supreme Court] jurisdiction completely or does it merely cause us to decline

59. *Id.* at 2.
60. *Id.*
61. Conference List (Oct. 16, 1954) (available in Tom C. Clark Papers, box A33, file no. 4).
62. Telephone Interview with Robert W. Hamilton, Law Clerk for Justice Clark (May 30, 1991); Telephone Interview with unattributable source (July 1992).
63. Telephone Interview with Robert W. Hamilton, *supra* note 62; Telephone Interview with unattributable source (July 1992).

jurisdiction? If the latter, I think cert. should be granted here."[64] But Burton was not yet ready to be persuaded to grant certiorari.

On October 16, *Williams* came back before the conference. This time Justices Douglas, Black, Warren, and Clark voted to grant certiorari—the necessary number for granting the petition and hearing the case. Two days later, the petition for certiorari and the motion to proceed *in forma pauperis* were formally granted, and the case was transferred to the appellate docket.[65]

In early March, clerk Thomas O'Neill wrote a bench memorandum in response to the conference vote arguing that the Court did not have jurisdiction to hear the case and that certiorari should be dismissed as improvidently granted.[66] O'Neill thought that, while Williams might once have had a valid constitutional claim under *Avery*, that claim had been waived under valid state procedural law, and the case was now beyond the power of the Supreme Court to review:

> "[T]his Court is *without power* to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law." . . . [W]e do not merely decline to take jurisdiction; we are without jurisdiction.[67]

O'Neill disagreed with Gunther's proposal that federal habeas corpus proceedings might serve as an alternative form of relief. Citing the majority opinion in *Brown v. Allen*[68] as barring federal habeas relief here, O'Neill advised against even hinting that federal habeas corpus proceedings might be available. This was a "sad" case, he wrote, but "there is nothing we can do about it."[69]

Gunther also wrote a memorandum after the conference vote, agreeing for the most part with O'Neill's conclusions. Despite his personal sympathy for Williams' situation, Gunther could not escape the conclusion that under ordinary standards the decision rested on adequate and independent state grounds and that the Court lacked jurisdiction:

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64. Memorandum from Thomas O'Neill, Law Clerk for Justice Burton, to Justice Harold H. Burton (available in Harold H. Burton Papers, cont. 270).

65. Miscellaneous Docket Book Vide 110 Misc. (available in Tom C. Clark Papers, box C71, file no. 2); Miscellaneous Docket No. 110 IFP (available in Tom C. Clark Papers, box C71, file no. 4). Clark lists Justice Robert Jackson as having voted to refuse certiorari at the October 16 conference—a difficult feat, since Jackson died on October 9. Joining Jackson's absentee vote against granting certiorari were Justices Burton, Frankfurter, Minton, and Reed. *Id.* After the vote to grant certiorari the case was renumbered as No. 412, Appellate Docket.

66. Bench Memorandum from Thomas O'Neill, Law Clerk for Justice Burton, to Justice Harold H. Burton 5 (available in Harold H. Burton Papers, cont. 270).

67. *Id.* at 3 (quoting Edelman v. California, 344 U.S. 357, 358 (1953)).

68. 344 U.S. 443, 458, 482-87 (1953).

69. Bench Memorandum from Thomas O'Neill to Justice Harold H. Burton, *supra* note 66, at 4-5.

> I think the Georgia courts were cruel in not modifying their rules to permit consideration of petitioner's claim on the merits. . . . [But] the only way [for the Supreme Court] to reach the merits is to find that the Georgia procedural scheme is such an arbitrary bar to the assertion of federal rights that it itself violates due process.[70]

Gunther thought it would be difficult to find Georgia's strict waiver rule per se unconstitutional. *Hormel* proved only that the federal waiver rules were more liberal than those of Georgia; it did not support Justice Douglas' proposition that the federal waiver rule could be constitutionally required in capital cases.[71] Gunther also recognized that reversing the Georgia Supreme Court might have some serious negative consequences:

> One can have little patience with states such as Georgia when they claim unwarranted interference with states' rights whenever this Court seeks to redress a clear violation of the Constitution; but a reversal in a case such as this would provide them with ammunition. . . [to argue] that this Court has overstepped recognized limitations, congressionally or self-imposed.[72]

Having said this, he suggested another way out for the Justices:

> [The defendant] may die though tried by an unconstitutionally selected jury, primarily because of the carelessness of his attorneys. Should the Court want to correct this injustice, I do not at this time see a way to explain its action without revising or rejecting long-established rules and adopting a frankly *ad hoc* rationale on jurisdictional questions. Should the Court want to reverse, [it should] REVERSE SUMMARILY.[73]

But despite the clerks' best arguments, the writ of certiorari was not dismissed, and oral argument in the case was scheduled for March 3, 1955.[74]

C. *Oral Argument*

On February 14, the Attorney General's Office in Atlanta contacted Harold Willey, the Clerk of the U.S. Supreme Court, to say that Carter Goode had notified them that he probably would not participate in oral argument.[75] Willey immediately contacted Goode, who confirmed that it was likely he

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70. Memorandum from Gerald Gunther, Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 5-6 (available in Earl Warren Papers, cont. 160, Oct. Term 1954).
71. *Id.* at 7-8.
72. *Id.* at 9.
73. *Id.*
74. Williams v. Georgia, 349 U.S. 375, 380 n.4 (1955).
75. *Id.*

would not appear. Willey wrote to Goode a second time on behalf of Chief Justice Warren to say that the Court "would appreciate your presenting oral argument if at all possible, particularly in view of the fact that this a [sic] capital case." Goode responded two days later, repeating his intention not to appear. He explained that he had been appointed to the case before the Georgia General Assembly enacted legislation authorizing appointed counsel to be paid from the county treasury. "This petitioner has no money," he wrote, "any expense connected with a trip to Washington will be out-of-pocket to me." Goode complained that he was scheduled to appear in a divorce suit that week and that being forced to travel to Washington might cost him a paying client.[76]

Faced with a recalcitrant defense attorney, the Chief Justice invited Eugene Gressman, a young but highly respected Washington lawyer,[77] to submit a brief and present oral argument as amicus curiae on behalf of Aubry Williams.[78] Oral argument was postponed until April 18, giving Gressman a scant five weeks to prepare his case. Meanwhile, the Court asked the Georgia Supreme Court to deliver the state trial record, for which the Georgia court charged the U.S. Supreme Court twenty cents per hundred words for the transcript, plus a certification fee of a dollar and twenty-five cents—a total of twenty-six dollars.[79]

Gressman filed his brief on April 3.[80] He built his case on two main arguments: first, that discretionary state court rulings regarding the waiver of federal claims were not binding on the United States Supreme Court,[81] and second, that Williams' constitutional claims should not be considered waived due to the extraordinary circumstances of the case. This case was exceptional, he argued, because it was a capital case,[82] it involved a fundamental constitutional claim going "to the very essence of a fair trial,"[83] and there was

76. *Id.*

77. Gressman turned 38 on the same day that he argued *Williams* before the Supreme Court. He had served as Justice Murphy's law clerk and had co-authored a widely respected textbook on Supreme Court practice. PRETTYMAN, *supra* note 3, at 278.

78. Williams v. Georgia, 348 U.S. 957 (1955) (miscellaneous order inviting Eugene Gressman to present oral argument). The invitation was issued on March 7. This is an excellent example of the way in which an amicus can at least occasionally serve as a true friend of the Court, rather than merely representing an intervening special interest.

79. Letter from K.C. Bleckley, Clerk, Georgia Supreme Court, to Harold B. Willey, Clerk, U.S. Supreme Court (Mar. 15, 1955) (available in Georgia State Archives, Case No. 18548, location 148-08, box no. 500).

80. Amicus Brief for Petitioner, Williams v. Georgia, 349 U.S. 375 (1955) (No. 54-412).

81. *Id.* at 6-7 (citing Parker v. Illinois, 333 U.S. 571 (1948); Patterson v. Alabama, 294 U.S. 600 (1935); Davis v. Wechsler, 263 U.S. 22 (1923); Truax v. Corrigan, 257 U.S. 312 (1921)).

82. In capital cases, Gressman argued, the defendant's constitutional rights should be considered waived only for the most grave and substantial reasons, especially where there is an admitted violation of those rights. Amicus Brief at 7, 12-13, *Williams* (No. 54-412) (citing Glasser v. United States, 315 U.S. 60, 70 (1942); Pierre v. Louisiana, 306 U.S. 354, 358 (1939)).

83. Amicus Brief at 7, *Williams* (No. 54-412) (citing Strauder v. West Virginia, 100 U.S. 303 (1880), *overruled by* Taylor v. Louisiana, 419 U.S. 522, 537 (1975)).

persuasive evidence that a timely challenge to the jury panel would have been futile.[84]

Significantly, Gressman did not ask the Court to decide the substantive question of whether Williams deserved a new trial as a matter of federal law. Instead, he only asked the Court to remand the case so that the state court could rule on Williams' *Avery* claims. The Georgia Supreme Court's ruling, of course, would then be subject to further Supreme Court review.[85]

Law clerks Gunther and O'Neill both wrote supplemental bench memoranda sharply critical of Gressman's brief. Gunther thought that Gressman's argument was unclear and illogical. Gressman had not asked the Court to decide the real issue in the case and had not even argued that the state waiver rule was arbitrary or unconstitutional. The brief asked the Court to go well beyond established law to resolve the case and barely touched on the possible effects of the Court's decision should the case be remanded or a new trial ordered.[86] Gunther also disliked Gressman's idea of remanding the case. Even if all of Gressman's claims were true, Gunther noted, the state court still had adequate and independent state grounds for its decision: the Georgia Supreme Court had specifically ruled that the affidavits supporting the extraordinary motion were defective and inadequate.[87]

If the Court wished to remand the case, Gunther thought that *Patterson v. Alabama*[88] and *Norris v. Alabama*[89] provided a more plausible justification than that provided by Gressman.[90] These were twin cases stemming from a common indictment: both defendants had raised constitutional objections to the systematic exclusion of blacks from their juries, but only Norris' objection had been timely. The Alabama Supreme Court had denied Norris' claim on the merits[91] and had dismissed Patterson's appeal as untimely.[92] The United States Supreme Court consequently had reversed Norris' conviction outright and then remanded *Patterson* to allow the Alabama court to reconsider its procedural ruling in the light of an "important intervening factor" (that is, the Court's decision in *Norris*). Gunther cautioned, however, that these two cases were distinguishable from *Williams* and *Avery*. While an important intervening

84. Several years later, the Fifth Circuit Court of Appeals noted that "[a]s Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries." United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir. 1959).

85. Amicus Brief at 27, *Williams* (No. 54-412).

86. Supplemental Bench Memorandum from Gerald Gunther, Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren 1-2 (available in Earl Warren Papers, cont. 160, Oct. Term 1954).

87. *Id.* at 4.

88. 294 U.S. 600 (1935).

89. 294 U.S. 587 (1935).

90. Supplemental Bench Memorandum from Gerald Gunther to Chief Justice Earl Warren, *supra* note 86, at 7-8.

91. Norris v. State, 156 So. 556 (Ala. 1934).

92. Patterson v. State, 156 So. 567 (Ala. 1934).

factor actually existed in *Norris* and *Patterson*, there was no real intervening factor to justify remanding *Williams*. *Avery* had been decided five months before the Georgia Supreme Court's decision in *Williams*, and the Georgia Supreme Court obviously knew all about the case while considering its decision.[93]

Gunther continued to believe that a federal habeas corpus petition was a much better way to resolve the case—although even this would require a "considerable straining" of precedent.[94] He thought, however, that the mere threat of federal habeas corpus relief might be enough to persuade the Georgia courts to grant Aubry Williams a new trial without requiring the Supreme Court to reverse on the merits.[95] "[T]he Court will, quite properly, be anxious to find a way to help [the] petitioner," he wrote, but this should be done "in the manner least damaging to traditional principles of jurisdiction and federal-state relations."[96]

Initially, Thomas O'Neill found nothing more to add to his earlier bench memorandum beyond a brief note of regret that "[i]t seems quite lamentably clear that we do not have jurisdiction."[97] Justice Burton wrote in the margin next to O'Neill's short note, "Dismiss for lack of jurisdiction, because Supreme Court of Georgia relied on no federal ground. Dismiss as improvidently granted."[98] Later, however, O'Neill wrote a supplemental bench memorandum criticizing Gunther's habeas corpus idea. O'Neill relied on the majority opinion in *Brown v. Allen*,[99] which had denied a federal habeas corpus petition after an appeal of a federal question had been precluded by state court procedures. In that case, the state had refused to hear the federal constitutional claim because the statement of the case on appeal had been served on the respondents one day late. The Court ruled that the state was within its rights to enforce its procedural law strictly:

> Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction

93. Supplemental Bench Memorandum from Gerald Gunther to Chief Justice Earl Warren, *supra* note 86, at 7-8; *cf.* Williams v. Georgia, 349 U.S. 375, 394-95 (1955) (Clark, J., dissenting) (pointing out that Georgia Supreme Court had clearly stated that *Avery* would govern this case absent procedural objection).

94. Supplemental Bench Memorandum from Gerald Gunther to Chief Justice Earl Warren, *supra* note 86, at 4-5. Once again, Gunther cited Frankfurter's dissenting opinion in Brown v. Allen, 344 U.S. 443, 503 (1953), as possible support for a decision to grant Williams a new trial upon a petition for federal habeas corpus.

95. Supplemental Bench Memorandum from Gerald Gunther to Chief Justice Earl Warren, *supra* note 86, at 7.

96. *Id.* at 8.

97. Bench Memorandum from Thomas O'Neill, Law Clerk for Justice Burton, to Justice Harold H. Burton (Apr. 11, 1955) (available in Harold H. Burton Papers, cont. 270).

98. *Id.*

99. 344 U.S. at 482-87.

> or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.[100]

It would take a very persuasive oral argument from Eugene Gressman to recover from the problems with his written brief.

Oral argument for *Williams* took place on April 18. Despite Justice Burton's belief that the Court should dismiss the case, he was quite impressed by Gressman's oral presentation and rated his performance as "very good."[101] Burton thought Gressman especially effective in addressing the question of whether Georgia's summary denial of Williams' extraordinary motion was an abuse of due process.[102]

Justice Burton was also intrigued by an apparent weakness in the state's position that appeared during oral argument. Assistant Attorney General E. Freeman Leverett's written brief had maintained that there had been no violation of Williams' constitutional rights in this case because there had been no showing of actual discrimination. But under intense questioning at argument by Chief Justice Warren, Leverett backed away from this position and admitted that the use of yellow and white tickets was inherently unconstitutional regardless of whether actual discrimination was proved. Leverett agreed that had Williams' claims been made in a timely manner, Williams would have been entitled to relief under *Avery*. Still, he argued, Williams had waived whatever rights he had by not making a timely protest.[103] Burton paid close attention to this exchange and thought Leverett's admission significant.[104]

Both Leverett and his fellow Assistant Attorney General, Robert H. Hall, argued that Georgia's refusal to grant a new trial was reasonable and legally sound. Under long-established Georgia law and practice, they maintained, any attack on the jury array must be raised at the time the array is put upon the defendant. Even if it would have been futile to raise the issue at trial, the matter should have been raised on the first appeal. The state waiver rule clearly existed to promote the orderly administration of justice rather than to frustrate a federal right, and it was not unconstitutional—or even unusual—for a state to enforce such procedural rules rigorously.[105]

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100. Supplemental Bench Memorandum from Thomas O'Neill, Law Clerk for Justice Burton, to Justice Harold H. Burton 3 (available in Harold H. Burton Papers, cont. 270) (quoting Brown v. Allen, 344 U.S. at 486).

101. Justice Harold H. Burton, Personal Diary (Apr. 18, 1955) (available in Harold H. Burton Papers (microfilm), reel 4).

102. Justice Harold H. Burton, Notes on Oral Argument 1 (Apr. 18, 1955) (available in Harold H. Burton Papers, cont. 270).

103. PRETTYMAN, *supra* note 3, at 280-81.

104. In his notes on oral argument, Burton wrote that Leverett's admission was a significant departure from the State's original position, providing some evidence counter to the conventional wisdom that cases are never won on oral argument. Burton, *supra* note 102, at 1.

105. *Id.*

D. *"A Smelly Situation": Harlan's Solution*

Although Justice William Brennan would later call John Marshall Harlan "the only real judge" on the Warren Court—"the only Justice who weighed the legal issues with sufficient dispassion"[106]—Justice Harlan responded to this case according to his visceral sense of right and wrong. Four days after oral argument, Harlan circulated a memorandum for the conference based on some new research done by his clerk, E. Barrett Prettyman, Jr. Harlan had asked Prettyman to do the extra work "because of the aggravating facts of this case, which seem to me to call for our straining to vindicate the constitutional rights of the petitioner, so far admittedly thwarted."[107] Prettyman's investigation had revealed "another avenue" that could resolve this case.[108]

Although Williams had been convicted a month prior to the United States Supreme Court's decision in *Avery*, Harlan noted that the original ruling of the Georgia Supreme Court in *Avery* had come almost a year prior to Aubry Williams' trial. Both Avery and Williams had been tried in Fulton County, and Harlan believed that any decent Atlanta trial lawyer should have been aware of *Avery*. For Harlan, this fact alone was conclusive evidence of Goode's incompetence. "Although the petitioner had counsel," he said, "it looks to me as if his court-appointed lawyer [gave] him no more than a token defense."[109] Harlan was appalled by Goode's refusal to appear at oral argument and dismissed with contempt "the miserable brief which this lawyer wrote."[110] Goode's brief had completely avoided the central issue of the timeliness of the extraordinary motion,[111] and the only useful evidence that Carter Goode had provided, at least as far as Harlan was concerned, was ample proof of his own "dismal record of gross negligence."[112]

Harlan interpreted the Georgia Supreme Court's opinion to say that the trial court could have ordered a new trial had it believed the affidavits. This confirmed Gressman's contention that the state courts had discretion to grant a new trial, but had chosen not to do so.[113] Prettyman's hard work had uncovered a series of Georgia cases in which "untimely" motions for new trials had been granted, and under circumstances much less aggravated than in

106. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 223 (1979).

107. Justice John M. Harlan, Conference Memorandum 1 (Apr. 23, 1955) (available in Tom C. Clark Papers, box A39, file No. 1). While the memorandum is dated April 23, Justice Clark's copy is hand-dated April 22, indicating that the memorandum was circulated somewhat earlier.

108. *Id.* at 4.

109. *Id.* at 1; *see also id.* at 2-4.

110. *Id.* at 3.

111. *Id.* at 4. Harlan's judgment was reinforced by the fact that Goode's appellate brief had focused solely on Williams' rights under *Avery*, even though these claims had already been conceded by the State. *Id.* at 3-4.

112. *Id.*

113. *Id.* at 4.

the present case.[114] Harlan admitted that some of the cases were "pretty ancient," but there was nothing to indicate that extraordinary motions for new trials were not discretionary.[115]

It seemed clear that the state courts had the legal right to grant a new trial in extraordinary cases, and given the facts of this case, the trial court's refusal to do so here amounted to a clear abuse of discretion.[116] While the U.S. Supreme Court might hesitate to overrule a state court's discretionary judgment on a matter of state law, if the Georgia courts abused their discretion in order to evade a federal right—and Harlan was convinced that this was what had happened here—then the Supreme Court could properly reach the merits of the case.[117]

Having said this, however, Harlan proposed a different course in the interest of comity. Rather than reversing the state courts outright, the Court could remand the case to the Georgia Supreme Court for "another look":

> [I]nstead of taking the bit in our teeth at this stage, I would prefer a remand so as to give Georgia another opportunity to deal with the federal right. We can accompany the remand with a face-saving statement including Georgia's admission in this Court of a clear violation . . . under *Avery*, and defense counsel's record of inaction . . . . Surely on such remand there is some hope that the Georgia court would be constrained to reconsider its decision.

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114. *See, e.g.*, Wright v. Davis, 193 S.E. 757 (Ga. 1937). In *Wright*, a new trial was granted in a capital case three months after the defendant's conviction had been affirmed by the Georgia Supreme Court. The court granted the extraordinary motion for new trial because one of the jurors was an ex-convict and should have been excluded from jury service. The juror had impersonated his father, whose name was properly on the jury list. The court said that in the face of the extreme penalty, the defendant had been deprived of his vital right to a proper jury. *Id.* at 760.

Another extraordinary motion for a new trial was granted in Smith v. State, 59 S.E. 311 (Ga. Ct. App. 1907). Here, the defendant's conviction for arson was initially affirmed on appeal, but when it was found that one of the jurors was related to the deceased wife of the prosecutor in the *ninth* degree, the Georgia Court of Appeals granted a new trial. "There is no higher purpose [of criminal procedure] than that every defendant shall be accorded a trial by jury . . . not only impartial, but also beyond just suspicion of partiality." *Id.* at 313; *see also, e.g.*, Crawley v. State, 108 S.E. 238, 239-40 (Ga. 1921) (granting new trial because juror's wife was related to victim's wife); Harris v. State, 104 S.E. 902, 904-05 (Ga. 1920) (granting extraordinary motion because of unauthorized communication between court officer and deliberating jury); Doyal v. State, 73 Ga. 72, 73 (1884) (granting new trial because of evidence of juror's bias).

Even in cases where extraordinary motions were denied, Prettyman and Harlan found additional evidence that the state courts had discretion to grant extraordinary motions for new trials and that state appellate courts could overrule a trial court's refusal to grant the motion where there was abuse of discretion. *See, e.g.*, Glisson v. State, 77 S.E.2d 838, 838 (Ga. Ct. App. 1953); Echols v. State, 74 S.E.2d 474, 475 (Ga. Ct. App. 1953); Stembridge v. State, 65 S.E.2d 819, 821 (Ga. Ct. App. 1951); Moon v. State, 179 S.E. 589 (Ga. Ct. App. 1935); Towler v. State, 100 S.E. 787 (Ga. Ct. App. 1919). These cases are cited in Harlan, *supra* note 107, at 6-7.

115. *Id.* at 7.

116. *Id.*

117. *Id.* at 7-8 (citing Brown v. Western Ry. of Ala., 338 U.S. 294, 296 (1949); New York Cent. Ry. v. New York & Pa. Co., 271 U.S. 124, 126-27 (1926); Love v. Griffith, 266 U.S. 32, 33 (1924); Davis v. Wechsler, 263 U.S. 22, 24 (1923); Rogers v. Alabama, 192 U.S. 226, 230-31 (1904)).

> I submit that we should find a way out of this smelly situation which, if not remedied, will be a blotch on this Court's ability to protect constitutional rights admittedly violated. And in this *sui generis* case I think we could take the course suggested without making bad law . . . .[118]

This was the solution that the Justices would soon settle upon in conference.

E. *The Court in Conference: "Fixing It Up Burglary Proof"*

On April 23, the Justices met in conference. The Chief Justice opened the discussion on *Williams* by saying that he agreed with most of Harlan's memorandum. Goode's performance had been so poor that Williams "might as well have had no lawyer."[119] Warren doubted whether Goode had been aware of *Avery* before he wrote the extraordinary motion. Warren also knew that the Georgia courts had done nothing to protect black criminal defendants after *Avery*; here, the defendant's constitutional rights had clearly been violated, and yet instead of setting the problem right, the Georgia courts sought "to hide behind this lawyer."[120]

The Chief Justice thought that the two superior court judges involved in the case (Jesse Wood and E.E. Andrews) had knowingly violated the Constitution by continuing to use the white and yellow jury cards even though the practice had been condemned by the Georgia Supreme Court. The Georgia courts, he said, could not be allowed to use "the procedural dodge" to escape their constitutional responsibilities.[121] Warren told the conference that he could not stand by and let a man die as a result of Georgia's racist jury selection procedures. He "couldn't have this man's life on [his] conscience."[122]

Warren, however, rejected Harlan's idea of remanding the case to the Georgia courts. He proposed instead that the Court reverse and grant Williams a new trial, citing *Avery*. If the Court remanded without reversing, he warned, the Georgia Supreme Court would not live up to its constitutional obligations, but would again railroad Aubry Williams and this time "*fix it up* burglary proof."[123]

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118. Harlan, *supra* note 107, at 8.

119. Justice Tom C. Clark, Conference Notes 1 (Apr. 23, 1955) (available in Tom C. Clark Papers, box B155, file no. 6).

120. Justice Harold H. Burton, Conference Notes 1 (Apr. 23, 1955) (available in Harold H. Burton Papers, cont. 270).

121. Justice William O. Douglas, Conference Notes 1 (Apr. 23, 1955) (available in William O. Douglas Papers, cont. 1155, Oct. Term 1954).

122. Clark, *supra* note 119, at 1.

123. *Id.*

Justice Black spoke next, saying that the *Scottsboro* defendants had received better representation than Williams.[124] It was obvious that the state courts had ample discretion to grant new trials in extraordinary circumstances and that a new trial should have been granted here. Like Warren, Black was concerned that Harlan's remand idea would cause the Court further trouble down the road, noting his fear that the state court would "never fix it up."[125] As an Alabama native, Black was especially sensitive to the growing Southern discontent over the Court's desegregation decisions and knew that Southern governments were beginning to look for excuses to refuse to comply with Supreme Court decisions that touched on race. Black agreed with Warren that the Court should reverse the Georgia Supreme Court outright and be done with it.

Justice Stanley Reed noted that while Black's and Warren's comments had made him reconsider his own views, he favored dismissing the writ as improvidently granted. Under state law, the proper time to challenge the array was at the time of trial, and Reed thought that these rules were reasonable and served an important purpose. Such matters, he thought, should be left entirely to the discretion of the Georgia courts.[126]

Justice Felix Frankfurter then spoke at length, as was his custom when discussing jurisdictional issues. He began by observing that the federal implications of this case were extremely important,[127] and he voiced "*very strong views*"[128] about the Court's duty to guard against undermining a state's responsibility for enforcing its own criminal laws. Even where federal procedural standards might be preferable or local rules woeful, he argued, the Court should not impose federal standards of fair play on the states, nor should the Court let a hard case bring the federal judiciary "into violence" with state governments.[129] Not only did the Court have a constitutional duty to respect state autonomy, Frankfurter explained, but the Court could not run roughshod over state law enforcement without damaging its own prestige and authority.[130]

Having said this, Frankfurter saw compelling reasons not to allow the state court's order to stand in this case, where a human life was at stake. He thought that the Court should endeavor to write a courteous, considerate opinion, refraining from telling the Georgia courts what its own laws meant, but clearly

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124. *Id.*

125. *Id.*

126. Justice Reed thought that *Brown v. Allen* controlled this case. Clark, *supra* note 119, at 1; Douglas, *supra* note 121, at 2; Burton, *supra* note 120, at 2.

127. Clark, *supra* note 119, at 2; Douglas, *supra* note 121, at 2; Burton, *supra* note 120, at 3.

128. Clark, *supra* note 119, at 2.

129. *Id.*; Douglas, *supra* note 121, at 2; Burton, *supra* note 120, at 3.

130. Justice Burton's conference notes quote Frankfurter as saying that if Court decisions run counter to state traditions, states will "not be respectful of what we do." Burton, *supra* note 120, at 3. Justice Clark's conference notes report Frankfurter saying that the Court "*Should not run* counter to local enforcement bodies else loose [sic] their respect." Clark, *supra* note 119, at 2.

implying that any failure to order a new trial would violate due process. If the state courts had discretion to order a new trial on the extraordinary motion, then it was a clear violation of due process not to grant a new trial in this case. If, on the other hand, the state had a definite and strictly enforced time limit, then that decision must be respected. Frankfurter thought, however, that Harlan's memorandum fairly stated Georgia law: it seemed quite clear that the state courts had ample discretion to order new trials in exceptional cases.[131] Frankfurter considered Harlan's approach to be both pragmatic and respectful of state sovereignty, yet open-ended enough that the Supreme Court could still order a new trial in the name of due process if the state courts refused to do so.[132]

If the Georgia courts refused to order a new trial on remand, however, Frankfurter thought that the Supreme Court would not be able to rely solely on *Avery* to reverse, especially given Warren's point that the real problem here was inadequate counsel. If the Court were forced to reverse the Georgia courts outright, Frankfurter thought, it would be better to reverse under *Powell v. Alabama* (the Scottsboro Boys case)[133] on the basis that Goode's incompetence deprived Williams of a fair trial. Frankfurter concluded by stating unequivocally that if the state courts refused to grant Williams a new trial, he would vote to reverse the Georgia Supreme Court outright the next time around.[134]

Justice Douglas then spoke out strongly against the Harlan-Frankfurter plan. The Georgia courts, he said, should not be allowed a second opportunity to "wash out" Williams' constitutional rights by denying on remand that the state courts had discretion to grant Williams a new trial. Douglas would join Warren and Black in reversing on due process grounds.[135]

Justice Burton then unexpectedly announced that he had changed his mind about the case and would vote with Harlan and Frankfurter to remand.[136] In view of the extraordinary facts in this case, Burton said, it seemed only fair to give the state courts a second chance to do what was right.[137]

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131. Clark, *supra* note 119, at 2; Douglas, *supra* note 121, at 2; Burton, *supra* note 120, at 2-3.

132. Clark, *supra* note 119, at 2-3; Burton, *supra* note 120, at 2-3.

133. Powell v. Alabama, 287 U.S. 45 (1932).

134. Clark, *supra* note 119, at 3; Burton, *supra* note 120, at 3.

135. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 3.

136. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 3. According to Barrett Prettyman, Burton had a reputation among the clerks for being an extraordinarily fair and open-minded Justice. During one of the debates held in the clerks' private lunch room during the 1954 Term, the question put to the clerks was, if you were on trial for your life and could have one Justice from the current Court decide your case, who would it be? Almost all of the clerks picked Burton, reflecting their common view that Burton was perhaps the most underrated Justice on the Court. Although none of the clerks considered Burton to be the smartest, most scholarly, or most charismatic Justice, most thought he listened very carefully to others' arguments, was scrupulously fair and nonideological, and would not hesitate to change his mind if given good reasons to do so. Telephone Interview with E. Barrett Prettyman (July 28, 1992).

137. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 3.

Justice Clark argued that Gressman had been wrong to claim that *Avery* was dispositive of this case. The use of different colored tickets did not necessarily violate the Constitution. *Avery* was not an absolute rule; it established a presumption of discrimination that could be rebutted by the state.[138] Unlike the jury in *Avery*, the panel put upon Aubry Williams included four blacks, meaning that the array was not necessarily unconstitutional. Clark thought that Harlan's analysis of the case was flawed, in that all of the "extraordinary motion" cases cited in Harlan's memorandum involved challenges to individual jurors rather than challenges to the array.[139] Neither Harlan nor Prettyman could find a single Georgia case allowing a new trial following a late challenge to a jury panel, while Clark's own research had uncovered a case holding that a failure to challenge the array in a timely way was an absolute waiver of the claim.[140] Clark believed that the Court had no choice but to affirm the judgment of the Georgia Supreme Court.[141] Justice Sherman Minton voiced his agreement but did not elaborate on his views.[142]

As the junior Justice, Harlan spoke last. In the face of a "muddy" Georgia Supreme Court decision, Harlan argued that the best recourse here was to remand the case. It seemed clear that no statute limited the time for making extraordinary motions for new trials, and under Georgia law the courts had ample discretion to permit or deny such motions as they saw fit. However, there remained sufficient doubt about the existence of a judicially imposed time limit to suggest that the Court should remand the case for a decision on that issue.[143]

At the end of the conference, the Court was divided into three distinct groups. Three Justices (Warren, Douglas, and Black) favored reversing the state court's judgment and ordering a new trial; three Justices (Harlan, Frankfurter, and Burton) wanted to remand the case while reserving the right to reverse later; and three Justices (Clark, Reed, and Minton) sought to dismiss the case and affirm the decision below.

The Chief Justice did not formally assign the majority opinion after the conference vote,[144] but Justice Frankfurter quickly set to writing and circulated a draft opinion less than a month later.[145] He had almost immediate success when Justice Black agreed to join the opinion on the

138. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 4.
139. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 4.
140. Cornelious v. State, 17 S.E.2d 156, 159-60 (Ga. 1941).
141. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 5.
142. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 5.
143. Douglas, *supra* note 121, at 3; Burton, *supra* note 120, at 5-6.
144. Prettyman lists April 23 as the date that Frankfurter was assigned the majority opinion. PRETTYMAN, *supra* note 3, at 285. Court records indicate, however, that Warren did not assign the case to Frankfurter until May 25. *See, e.g.*, Miscellaneous Docket Book Vide 110 Misc. (available in Tom C. Clark Papers, box C71, file no. 2).
145. Justice Felix N. Frankfurter, Circulated Opinion in Williams v. Georgia (May 20, 1955) (available in Earl Warren Papers, cont. 126, file no. 5).

condition that Frankfurter delete a single sentence conceding that if "the trial court had no power to consider Williams' constitutional objection at the belated time he raised it, the State's right to enforce such procedure could not be disputed."[146] On May 23, Justice Burton joined Frankfurter's opinion unconditionally, calling it a "conscientious and skillful treatment of a difficult situation resulting in substantial justice" and expressing the hope "that Georgia takes advantage of the opportunity thus afforded her to clear the record."[147] Chief Justice Warren officially assigned the case to Frankfurter on May 25,[148] and Frankfurter immediately circulated a second draft without the language Black had found objectionable. Black joined the opinion on May 30.[149]

In spite of his conference vote to dismiss the case, Justice Clark read both of Frankfurter's circulated draft opinions carefully, making editorial changes in the margins which hinted that he might still have been considering joining the majority.[150] Clark remained troubled by the case. There were long discussions in chambers about whether a man should go to his death because of his lawyer's error or negligence. Was it appropriate in a capital case to deprive a defendant of an important constitutional right if the defense lawyer had waived that right, unintentionally or due to incompetence? In Clark's view, the only real difference between *Avery* and *Williams* was the quality of the defendants' representation, and it seemed unfair that one man should die and the other should not solely because Avery was lucky enough to have had competent counsel.[151]

Justice Clark believed that the Supreme Court had two honest options: to allow the Georgia court to interpret its own state laws as it saw fit, or to overrule the Georgia court directly and be explicit about the reasons for doing so. Clark initially leaned toward the latter option, but eventually abandoned it as untenable. He just could not bring himself to join Frankfurter's opinion—it was too disingenuous.[152] Clark circulated his dissent on June 1, which

146. Black bracketed this sentence in his copy of the draft, and wrote in the margin, "I do not think we have to decide this point." Note from Justice Hugo Black to Justice Felix N. Frankfurter (May 20, 1955) (available in Felix N. Frankfurter Papers (microfilm), part II, reel 13).

147. Note from Justice Harold H. Burton to Justice Felix N. Frankfurter (May 23, 1955) (available in Felix N. Frankfurter Papers (microfilm), part II, reel 13).

148. Miscellaneous Docket Book Vide 110 Misc. (available in Tom C. Clark Papers, box C71, file no. 2).

149. Note from Justice Hugo L. Black to Justice Felix N. Frankfurter (May 30, 1955) (available in Felix N. Frankfurter Papers (microfilm), part II, reel 13); *cf.* Justice Felix N. Frankfurter, Circulated Opinion in Williams v. Georgia (May 25, 1955) (available in Earl Warren Papers, cont. 126, file no. 5).

150. Justice Felix N. Frankfurter, Circulated Opinion in Williams v. Georgia (May 25, 1955) (available in Tom C. Clark Papers, box A39, file no. 8) (margin notes by Justice Clark).

151. Telephone Interview with unattributable source (July 1992). After James Avery's conviction and death sentence were reversed, the court permitted him to plead guilty and sentenced him to 20 years in prison. PRETTYMAN, *supra* note 3, at 294.

152. Telephone Interview with unattributable source (July 1992).

Minton and Reed promptly joined.[153] On June 2, Minton circulated his draft dissent, which was joined in turn by Clark and Reed.[154]

Just as Clark had carefully read Frankfurter's opinion, the Chief Justice pored over Clark's dissent, drawing a line down each page as he went.[155] Warren then joined Frankfurter's majority on June 2.[156] Douglas and Harlan also signed on, making the final vote 6-3 in favor of remanding the case to the Georgia Supreme Court. The decision was announced on June 6, 1955.[157]

F. *The U.S. Supreme Court's Formal Pronouncement*

1. *The Majority Opinion*

Frankfurter organized his opinion for the Court into three issues: whether the Court had jurisdiction to decide the case, whether Williams' federal constitutional rights had been violated, and how best to dispose of the case.

To support his finding that the case was properly before the Court, Frankfurter offered two lines of argument. First, he hinted that Williams' *Avery* claim alone gave the Court jurisdiction. Second, he interpreted Georgia law as granting that state's courts discretion to order new trials on extraordinary motions.[158] Where such discretion exists but is not exercised, Frankfurter said, the Supreme Court has jurisdiction to intervene—presumably to prevent a state from using its discretionary powers to frustrate a defendant's federal rights.[159]

As to the first jurisdictional claim, Frankfurter relied heavily on Assistant Attorney General Leverett's admission during oral argument that Aubry Williams' constitutional rights under *Avery* had been violated. While the State's written brief claimed that Williams' constitutional rights had not been

153. Justice Tom C. Clark, Draft Dissent (June 1, 1955) (available in Earl Warren Papers, cont. 126, file no. 5).

154. Justice Sherman Minton, Draft Dissent (June 2, 1955) (available in Earl Warren Papers, cont. 126, file no. 5).

155. Clark, *supra* note 153.

156. Note from Chief Justice Earl Warren to Justice Felix N. Frankfurter (June 2, 1955) (available in Earl Warren Papers, cont. 427).

157. Williams v. Georgia, 349 U.S. 375 (1955). Clark asked Frankfurter to announce his dissent from the bench. Memorandum from Justice Tom C. Clark to Justice Felix N. Frankfurter (June 6, 1955) (available in Tom C. Clark Papers, box A39, file no. 8).

158. *Williams*, 349 U.S. at 389.

159. While a state procedural rule forbidding the raising of federal questions at late stages in the case "has been recognized as a valid exercise of state power . . . the unique aspects of the never-ending new cases that arise require its individual application to particular circumstances." *Williams*, 349 U.S. at 383. While the Court "would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection . . . where a State allows questions of this sort to be raised at a late stage . . . as a matter of discretion," the Supreme Court may assume jurisdiction and decide "whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.* at 383 (footnote omitted).

violated at trial,[160] Leverett, "with commendable regard for [his] responsibility," admitted during oral argument that the use of yellow and white tickets violated Williams' equal protection rights and that a new trial would be required but for Williams' failure to raise a timely challenge to the array.[161] Frankfurter seized upon this admission that Williams' constitutional rights had been violated as an important intervening factor that allowed the Court to decide Williams' substantive constitutional claims under *Patterson v. Alabama*.[162]

As for the second justification for accepting jurisdiction, Frankfurter acknowledged that while Georgia law did not favor extraordinary motions for new trials, state statutes did provide for such motions, and Georgia courts did grant these motions in exceptional or extraordinary circumstances. While under ordinary circumstances the decision of the trial court judge would not be questioned, "[i]n practice . . . the Georgia appellate courts have not hesitated to reverse [the trial judge's decision] and grant a new trial in exceptional cases."[163]

Frankfurter admitted that the state precedents he referred to all involved objections to individual jurors rather than challenges to the array, but he argued that the two different types of challenges could not logically be distinguished.[164] The state rules governing both types of challenges were virtually identical, and there was no reason why one rule would be flexible and the other not.[165] Nor had there ever been an authoritative decision precluding the use of an extraordinary motion to challenge a jury panel "*in a proper case*."[166] Besides, if the trial court had no discretion to consider Williams' extraordinary motion, then the affidavits filed by Goode, Creel, and Williams would have been irrelevant—yet the Georgia Supreme Court "felt called upon to question the reliability of the affidavits."[167]

If the trial court had discretion to consider the extraordinary motion, Frankfurter continued, then surely this was a proper case to exercise that discretion. The facts of this case were "extraordinary, particularly in view of

160. *Id.* at 381. The State distinguished *Avery* in that the array put upon James Avery included no blacks, while there were four blacks on the panel put upon Aubry Williams. As a consequence, the State argued, there was no conclusive proof that blacks had been systematically excluded in the latter case.

161. *Id.* at 382.

162. *Id.* at 382, 389-90 (citing Patterson v. Alabama, 294 U.S. 600, 605-07 (1935)). In that case, the Alabama courts ruled that Patterson, by failing to make a timely objection, had waived his right to argue that Alabama jury selection procedures were unconstitutional. The U.S. Supreme Court, however, remanded *Patterson* to the Alabama Supreme Court for reconsideration on the basis of the Court's intervening decision in Norris v. Alabama, 294 U.S. 587 (1935), which ruled that Alabama's jury selection procedures were unconstitutional. On remand, the Alabama courts granted Patterson a new trial. He was tried (for the fourth time), convicted, and sentenced to 75 years in prison. HAYWOOD PATTERSON & EARL CONRAD, SCOTTSBORO BOY 306 (1950).

163. *Williams*, 349 U.S. at 384.

164. *Id.* at 387.

165. *Id.* at 388-89.

166. *Id.* at 388.

167. *Id.* at 389.

the use of yellow and white tickets by a judge of the Fulton Country Superior Court almost a year after the State's own Supreme Court had condemned the practice."[168] Frankfurter was satisfied that the Georgia courts could have granted Williams' extraordinary motion had they desired to do so and ruled that a discretionary decision to refuse relief did not preclude a finding of jurisdiction:

> We conclude that the trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us.[169]

Having accepted jurisdiction, however, Frankfurter declined to rule on Williams' substantive claims. "[T]he fact that we have jurisdiction," he wrote, "does not compel us to exercise it."[170] At least for now, Frankfurter was content to decide only that "orderly procedure requires a remand to the State Supreme Court for reconsideration of the case."[171] He then offered two

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168. *Id.* at 391.

169. *Id.* at 389. This rule originated in Justice Frankfurter's dissent in Brown v. Allen, 344 U.S. 443, 498-500 (1953) (Frankfurter, J., dissenting) and was accepted as law for the first time in *Williams v. Georgia*. *See* James v. Kentucky, 466 U.S. 341 (1984) (defense lawyer's request for a jury "admonition" rather than a jury "instruction" telling jurors not to draw adverse inference from defendant's failure to testify at trial resulted in state decision that defendant's federal right to such an instruction had been waived; reversed on grounds that distinction between "admonition" and "instruction" was not consistently applied); Hathorn v. Lovorn 457 U.S. 255 (1982) (reversing Mississippi court ruling barring untimely claim of a federal right on grounds that state procedural rule not followed strictly or regularly); Sullivan v. Little Hunting Park, 396 U.S. 229, 232-34 (1969) (reversing Virginia courts' refusal to order a new trial on procedural grounds because state procedural rule was discretionary and not consistently applied); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (finding South Carolina procedural requirements found to be neither strictly nor regularly followed); *see also* Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 89 (1988). Other cases that bend the general rule that adequate and independent state grounds preclude Supreme Court review include Henry v. Mississippi, 379 U.S. 443 (1965) (holding that Mississippi's contemporaneous-objection rule did not necessarily bar Supreme Court review and remanding case to determine if defendant knowingly waived federal right); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964) (holding that substantial compliance with Alabama procedural rules allowed Supreme Court review of NAACP's federal claims); Michel v. Louisiana, 350 U.S. 91 (1955) (holding that untimely objection to exclusion of blacks from grand jury did not bar Supreme Court review to determine whether defendant had had a reasonable opportunity to have federal right heard and determined in Louisiana courts); Rogers v. Alabama, 192 U.S. 226 (1904) (holding that Alabama Supreme Court ruling that defendant's objection to exclusion of blacks from grand jury was untimely and prolix did not bar U.S. Supreme Court review where it was plain that the result of state decision was to deny a federal constitutional right); *cf.* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1139-40 n.47 (1986); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 965 n.372 (1986); Yosal M. Rogat & James O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1356-57 n.30 (1984).

170. *Williams*, 349 U.S. at 389 (citing Patterson v. Alabama, 294 U.S. 600 (1935)).

171. *Id.* at 391.

reasons why the Georgia Supreme Court might want to reverse its earlier decision.

First, the state supreme court's decision might have been influenced by the prosecution's original claim that there had been no constitutional violation in this case. Frankfurter argued that the assistant attorney general's later concession that there had in fact been a denial of equal protection in this case by itself "impelled" the Court to remand the case.[172] Second, Frankfurter implied that there might be other due process problems with the case. In particular, he noted that the Attorney General's appellate brief had mentioned the possibility of another, as-yet-undisclosed remedy open to Williams. Georgia's failure to reveal all possible avenues of relief, Frankfurter insinuated, might in itself have violated Williams' right to a fair trial. Remanding the case would give Georgia another opportunity to designate any alternative remedies.[173]

Frankfurter offered what was in effect an advisory opinion that Williams' constitutional rights had been violated. He strongly hinted that the Georgia Supreme Court must order either a new trial or an evidentiary hearing on the merits of Williams' substantive claims. This was backed by a thinly veiled threat of further Supreme Court action if the Georgia court refused to cooperate:

> Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled.[174]

2. *The Two Dissenting Opinions*

Justice Clark's dissent acknowledged that this case had required him to balance the "pleas of the condemned," to which he was not deaf, with the "long-established precedents of this Court," which he could not ignore.[175] The Texan came down squarely on the side of precedent. Not even the sympathetic facts of this case could make Clark lose sight of "the limitations on this Court's powers."[176] The opinion of the Court, he said, "just won't wash."[177]

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172. *Id.* at 390.
173. *Id.* at 390-91.
174. *Id.* at 391.
175. *Id.* at 393 (Clark, J., dissenting).
176. *Id.*
177. *Id.*

Clark's dissent was openly contemptuous of Frankfurter's opinion, which seems somewhat odd given his underlying sympathy with the result.[178] Clark strongly believed, however, that the stated reasons for remanding the case were foolish, and that Frankfurter's opinion was premised on the idea that the Georgia Supreme Court was incapable of interpreting its own laws, an assumption that Clark found both untenable and distasteful.[179] It bothered Clark that the majority had arrogated to itself the responsiblity of determining state law, rather than allowing the state courts to decide what their own laws meant. He thought that such matters should be left to the states, "without the pressure of a decision by this Court."[180] Even worse, Clark thought, the majority had badly misinterpreted state law. Frankfurter had not cited any specific authority to support the view that the Georgia courts had discretion to grant a new trial, and he had ignored evidence that Georgia's waiver rules were strictly and consistently applied.[181]

Georgia law was traditionally more tolerant of challenges to individual jurors (*propter affectum*) than of challenges to the array (*propter defectum*). State courts had always treated these two kinds of objections differently, yet the majority had failed—perhaps intentionally—to distinguish them.[182] Clark

178. Clark's initial drafts were even more openly hostile, accusing Frankfurter of "forging pretexts in order to by-pass long established precedents of this Court," and calling the majority opinion part of a new "iron fist" policy toward the states. Justice Tom C. Clark, Typed Draft Dissent 1, 11 (available in Tom C. Clark Papers, box A39, file no.8). Clark later softened the wording of the first part of this attack to read, "I cannot ignore the long-established precedents of this Court." *Williams*, 349 U.S. at 393. While the second line of attack originally appeared in the text of the first draft, it was reduced to a footnote in the second draft, and was dropped entirely from later drafts. Clark also deleted a passage accusing the majority of giving an "advisory opinion," and "permitting its sympathies to control its judgment." Justice Tom C. Clark, Draft Dissent Syllabus 3 (available in Tom C. Clark Papers, box A39, file no. 8).

If Clark's initial drafts more openly disdained Frankfurter's opinion, they also expressed somewhat more Clark's underlying sympathies toward Aubry Williams. An early draft opened by saying that this was "an extremely sympathetic case," where "the equities are so strongly in favor of petitioner that [the] Court should strain if possible to give him relief." But the Court's "tortuous reasoning," he wrote, overstepped "the boundaries of clear jurisdiction . . . to achieve its idea of justice." Justice Tom C. Clark, Second Typed Draft Dissent 1 (available in Tom C. Clark Papers, box A39, file no. 9).

179. Telephone Interview with unattributable source (July 1992). Some time later, Clark made similar remarks to Robert Hamilton. Telephone Interview with Robert W. Hamilton, *supra* note 62.

180. *Williams*, 349 U.S. at 396 (Clark, J., dissenting).

181. *Id.* at 396-98.

182. *Id.* at 397-98. Justice Clark attached an appendix to his early draft opinions, listing Georgia cases that dealt with late challenges to individual jurors and jury arrays. This was intended to rebut Frankfurter's argument that the Georgia courts frequently exercised their discretion to grant new trials. *See* Tom C. Clark, Handwritten Draft Dissent app. (available in Tom C. Clark Papers, box A39, file no. 9). The appendix, much of which was eventually incorporated into the main body of the dissent, set out a long line of cases, beginning with Jordan v. State, 22 Ga. 545 (1857), and Thomas v. State, 27 Ga. 287 (1859), holding that any challenge to the array must come at the time that the panel is put upon the defendant. Also listed were Cumming v. State, 117 S.E. 378 (Ga. 1923); Ivey v. State, 62 S.E. 565 (Ga. Ct. App. 1908); and Williams v. State, 120 S.E. 131 (Ga. Ct. App. 1923). In *Cumming*, the state supreme court ruled that the defendant had taken the chance of a favorable verdict and must accept the consequences of that decision. Clark noted that in *Ivey*, as in *Williams*, a challenge to the array was said to be the "sole remedy," indicating that there existed no other method of complaint to contest the deficiency of the panel. Clark, *supra*, app. 5-6. In Wilcoxon v. Aldredge, 15 S.E.2d 873 (Ga. 1941), the Georgia Supreme Court rejected a petition for habeas corpus where the petitioner alleged discrimination in the selection of jurors in post-verdict pleadings, ruling that objections must be made at the time of trial, or the right is irrevocably waived.

saw good policy reasons to allow more flexibility in challenges to the polls than in challenges to the array. A late challenge to an individual juror would affect only one trial, meaning that the state could afford to be tolerant without causing a major disruption in the administration of justice. On the other hand, a strict rule requiring early challenges to the array was reasonable—even necessary—for the orderly administration of state justice; these challenges could threaten a large number of trials, resulting in unreasonable delay, expense, and inconvenience, and serious disruptions of the state criminal justice system.[183]

Clark accused Frankfurter of trivializing *Patterson v. Alabama* to justify remanding *Williams* without a clear ruling on the merits. In Clark's view, *Patterson* was an honest opinion in which the remand order was based on a truly new and important intervening factor. In the present case, on the other hand, the so-called "important intervening factor" had simply been trumped up.[184] The Georgia Supreme Court had already "clearly stated that, but for the procedural objection, *Avery* would govern."[185] While Georgia would not be allowed to evade Williams' federal claim by claiming a phony "independent and adequate state ground," Clark saw no evidence that such was the case here. While the Georgia court's interpretation of state law was not "free from doubt," Clark could not say that the state was being unreasonable.[186]

Clark thought it clearly demonstrable that the lower court decision rested on adequate and independent state grounds.[187] The Georgia waiver rules were not unduly burdensome and were strictly and consistently applied. Any ruling that state court action in this case amounted to an evasion or avoidance of

183. *Williams*, 349 U.S. at 398.

184. *Id.* at 393-95.

185. *Id.* at 395.

186. *Id.* at 399-400.

187. *Id.* at 399-402. Clark outlined two limitations to the general rule that adequate and independent state grounds preclude Supreme Court jurisdiction. The first was when circumstances gave rise to an inference that the state court was attempting to evade or deprive a litigant of a federal right. Here, Clark thought that while the Georgia court's interpretation of state law "may not be free from doubt," the court had "fair support" for its decision. The second limitation was when state law—even honestly applied—created such obstacles that it unreasonably interfered with the vindication of a federal right, such as not providing a reasonable opportunity for the federal claim to be heard. *Id.* at 399. Clark noted that even the majority had conceded that waiver procedures like Georgia's that forbid raising federal questions at late stages of a case could be "valid exercise[s] of state power." *Id.* at 401. Clark went even further in a draft of his dissent, arguing that the majority had conceded that Georgia's actual waiver procedures were reasonable and afforded Williams sufficient opportunity to present his federal claims. Clark, *supra* note 182, at app. 14-15 (unnumbered footnote).

Clark's dissent in *Williams* is often cited as the authoritative statement of the independent and adequate state ground rule. *See, e.g.*, GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 69-80 (1975). While state grounds are not independent or adequate where circumstances indicate that the state court is trying to evade the federal right, this finding is considered so serious that it is used only in cases where the state decision lacks "fair support." *Williams*, 349 U.S. at 399 n.3. As a result of the Court's reluctance to rule that a state procedural law has been used to evade a federal right, surrogate doctrines are used to protect federal rights that do not require the Court to rule that state procedures were used dishonestly. *See* Robson & Mello, *supra* note 169, at 111-12.

Williams' federal rights must be based on a theory never before accepted by the Court.[188]

Even if Georgia's other arguments failed, Clark believed that there was another adequate and independent state ground to support the decision below—one "so unassailable that the majority [did] not even attack it."[189] Under Georgia law a showing of due diligence was a prerequisite to an extraordinary motion for new trial, and the state court had already ruled that due diligence had not been proven. Clark thought that the state court's findings regarding the inadequacy of Goode's pleading and diligence were reasonable, and he was convinced that Goode in fact had not exercised due diligence in preparing his case.[190] *Avery* had been well-publicized in Fulton County, and as far as Clark was concerned, even the most forgiving definition of due diligence would have required Goode to be familiar with it.[191]

Frankfurter's second stated reason for remanding the case—the alleged existence of another, undisclosed remedy—was even weaker, in Clark's view. If there were another remedy available, a remand would be pointless because any available remedy could be pursued regardless of whether or not the case was remanded. And if no other remedy existed, there would be nothing to be gained by a remand order.[192]

Clark attacked Frankfurter's implication that the Georgia Supreme Court had ruled as it had because of racial prejudice. He noted that Presiding Justice Wyatt, who wrote the majority opinion in *Williams v. State*, earlier had dissented in the Georgia Supreme Court's ruling in *Avery v. State*. In that dissent, Wyatt had argued that the racial discrimination evident in James Avery's trial was *conclusive*, rather than presumptive, evidence of discrimination.[193] In stating that Avery's conviction should be reversed outright, Wyatt had gone further toward defining and protecting James Avery's civil rights than even the U.S. Supreme Court proved willing to do.[194] Clark

188. *Williams*, 349 U.S. at 398-99.

189. *Id.* at 401.

190. *Id.*

191. *Id.* at 402-03. *Avery* had been publicized in the *Atlanta Constitution* and the *Atlanta Journal*. On May 26, 1953, the *Atlanta Constitution* ran a story on *Avery*, stating "that old cases . . . under the two-color jury selection system could not be reopened because objections must have been made at the time of the trial." *Webb Doubts Avery Ruling Means Upset*, ATLANTA CONST., May 26, 1953, at 6. Clark believed that any reasonably competent Atlanta trial lawyer would have known about the case, and bluntly said in a draft opinion what was strongly implied in his final dissenting opinion: that the Georgia Supreme Court had "ample justification" to find that Goode "was either playing coy with the Court or was grossly negligent." Clark, Typed Draft Dissent, *supra* note 178, at 14.

192. *Williams*, 349 U.S. at 395.

193. *Id.* at 400 (quoting *Avery*, 70 S.E.2d at 726 (Wyatt, J., dissenting)).

194. In reversing the state decision in *Avery*, the U.S. Supreme Court ruled only that the use of different colored cards amounted to a prima facie case of unconstitutional discrimination (one which the state failed to rebut in this case) rather than conclusive evidence of it. *Williams*, 349 U.S. at 400 (citing *Avery*, 345 U.S. at 562-63).

did not think that Wyatt could fairly be accused of trying to evade "the very federal right he had previously upheld so strongly."[195]

In Clark's judgment, Aubry Williams had been given a reasonable chance to present his federal claims. While it "might have been desirable to have permitted petitioner to adjudicate his substantial constitutional claim instead of sending him to his death because his attorney failed to take advantage of the usual opportunity afforded by the state law," this decision was the exclusive prerogative of the Georgia courts.[196]

In a separate dissent, Sherman Minton echoed Clark's conclusion that the Georgia waiver rule was clear, reasonable, and constitutional.[197] The Georgia Supreme Court had been clear enough: the state courts had no discretion to order a new trial.[198] Nor was there sufficient evidence of discrimination amounting to a denial of equal protection or due process.[199] While Minton supposed that the Georgia Supreme Court had the power to change the waiver rule and grant Williams a new trial, the state justices had not violated the defendant's constitutional rights by refusing to do so.[200] A more flexible waiver rule might threaten the orderly administration of justice in the state, allowing defendants to hold their objections in reserve with the knowledge that they had a built-in error for appeal if convicted. With no federal constitutional right at stake here, Minton saw no duty for the Court to perform.[201]

In spite of the spirited dissents, however, the message to the Georgia Supreme Court was clear. What happened in *Williams* violated the Court's equitable notions of justice and the requirements of the federal Constitution. The case was being remanded to the Georgia Supreme Court in the name of comity to allow the state a second opportunity to grant Aubry Williams a new trial. If the Georgia court refused, the Court retained jurisdiction to ensure that justice was done.

G. *The Message from Georgia: Go to Hell*

Williams v. Georgia was announced on June 6, 1955, and filed with the Georgia Supreme Court on July 13. Just two days later, the Georgia court issued a provocative response[202] reaffirming its earlier decision and, as Barrett Prettyman later put it, telling the U.S. Supreme Court to go to hell.[203]

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195. *Id.*
196. *Id.* at 403.
197. *Id.* at 403-04 (Minton, J., dissenting).
198. *Id.* at 404-05 (quoting Williams v. State, 82 S.E.2d at 217, 218-19).
199. *Id.* at 406.
200. *Id.* at 407.
201. *Id.* (citing Edelman v. California, 344 U.S. 357, 358-59 (1953)).
202. Williams v. State, 88 S.E.2d 376 (Ga. 1955).
203. PRETTYMAN, *supra* note 3, at 290.

Chief Justice W. Henry Duckworth, writing for a unanimous court, began by quoting the full text of the Tenth Amendment.[204] This was followed by a brief and contemptuous dismissal of the U.S. Supreme Court's judgment:

> Even though executives and legislators, not being constitutional lawyers, might often overstep the . . . unambiguous constitutional prohibition of Federal invasion of State jurisdiction [established by the Tenth Amendment], there can never be an acceptable excuse for judicial failure to strictly observe it. This court bows to the Supreme Court on all Federal questions of law but we will not supinely surrender sovereign powers of this State. . . . [N]o Federal jurisdiction existed which would authorize that court to render a judgment either affirming or reversing the judgment of this court, which are the only judgments by that court that this court can constitutionally recognize.
>
> . . . .
>
> Not in recognition of any jurisdiction of the [U.S.] Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court . . . we state that our opinion in Williams v. State, 210 Ga. 665, 82 S.E.2d 217 . . . stands as the judgment of all seven of the Justices of this Court.[205]

In ruling that the U.S. Supreme Court had no jurisdiction to consider any aspect of this case, the Georgia Supreme Court presented itself as the highest interpreter of the federal Constitution, at least as far as the Tenth Amendment was concerned. Chief Justice Duckworth ruled that the U.S. Supreme Court had issued an unconstitutional judgment that the Georgia courts were not bound to respect, and he promised continued defiance should the federal Court persist in interfering in the state's business.

The Georgia Supreme Court did not request any new briefs, nor did it hold any oral arguments before publishing its decision.[206] The assumption in Washington was that the Georgia Supreme Court's response was premeditated and that the U.S. Court had walked into an ambush.[207] William H. Duckworth, Jr., however, says that his father was both eloquent and blunt by

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204. *Williams*, 88 S.E.2d at 376-77. William H. Duckworth, Jr., says that it is possible that his father did not consult all of the other justices on the Georgia Supreme Court before publishing his "unanimous" opinion. The Chief Justice, Duckworth reports, knew that all of the other justices would have agreed with what he said, and he might have thought it unnecessary to get their formal consent to publish. Telephone Interviews with William H. Duckworth, Jr. (Oct. 21 and 22, 1993). Bob Brinson, Chief Justice Duckworth's legal assistant at the time, thought that all of the justices were present and did in fact agree with Duckworth's opinion. Telephone Interview with Robert Brinson, Legal Assistant to Chief Justice Duckworth (Oct. 24, 1993).

205. *Williams*, 88 S.E.2d at 377.

206. The State Attorney General's Office, however, submitted a five-page brief urging the court to adhere to its original decision. Brief on Behalf of Defendant in Error, Williams v. State, 88 S.E.2d 376 (Ga. 1955) (No. 18548).

207. Telephone Interview with Gerald Gunther, Law Clerk for Chief Justice Warren (Sept. 23, 1992); Telephone Interview with E. Barrett Prettyman, *supra* note 136.

nature and that he wrote the opinion in less than fifteen minutes after the U.S. Supreme Court had announced its decision.[208]

The Warren Court's alleged willingness to interfere in matters of traditional state concern had long been a favorite topic of discussion among the Georgia court justices, both in chambers and in conversation with other state court judges. The justices shared a common conviction that they could no longer tolerate the Warren Court's persistent meddling in their affairs. By 1955, the Georgia Supreme Court was waiting for—and even looking forward to—a showdown with the U.S. Supreme Court over the issue of states' rights.[209]

Duckworth was not necessarily looking for that confrontation here. He later told his son that he had anticipated being reversed in this case, and that the court would have complied quietly, if unhappily, with a Supreme Court order to grant Aubry Williams a new trial. But he "hit the roof" when he read Frankfurter's opinion, which he considered to be both illegal and cowardly.[210] Duckworth fully expected to be brought before the U.S. Supreme Court on contempt charges over his caustic response to the remand, and he planned to respond by issuing his own citations ordering Earl Warren and several other Justices to appear before the Georgia Supreme Court on state contempt charges.[211]

Several members of the Warren Court, especially Justice Black, had predicted resistance on the part of the Georgia Supreme Court, but the temper of Chief Justice Duckworth's opinion was unexpected. After all, Justice Harlan's worst-case scenario had been that the Georgia court would refuse to grant Aubry Williams a new trial in a well-reasoned, polite, and conciliatory decision.[212] On July 25, 1955, Charles Hallam, the Associate Librarian at the U.S. Supreme Court, wrote the Georgia Supreme Court to request a copy of the Georgia court's opinion. This time, Chief Justice Duckworth directed "that no charge be made for this copy, but that it be furnished free as a courtesy."[213]

On August 3, the Georgia Supreme Court ordered the Fulton County Superior Court "to enter final judgment in the case conforming to the remittitur from this Court."[214] On August 18, Justice Clark signed an order staying

208. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204; Telephone Interview with Robert Brinson, *supra* note 204.

209. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204; Telephone Interview with Robert Brinson, *supra* note 204.

210. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204; Telephone Interview with Robert Brinson, *supra* note 204.

211. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204.

212. Telephone Interview with E. Barrett Prettyman, *supra* note 136.

213. Letter from Deputy Clerk of the Georgia Supreme Court to Charles Hallam, Associate Librarian, U.S. Supreme Court (July 27, 1955) (available in Georgia State Archives, Case No. 18548, location 148-08, box no. 500).

214. Order of Georgia Supreme Court to Superior Court of Fulton County, Williams v. State, 88

execution until final disposition of the case. The Court clerk contacted the clerk of the Georgia Supreme Court to advise the state of the stay on August 18.[215] Even so, on August 26, 1955, the Fulton County Superior Court resentenced Williams to be electrocuted on an unspecified date.

H. *Back to the U.S. Supreme Court: The 1955 Term*

At the close of the 1954 Term, the mood at the U.S. Supreme Court was glum.[216] Most of the clerks who were leaving the Court later that summer thought that the Georgia Supreme Court had issued a challenge to its federal counterpart that could not be ignored.[217] Unfortunately for Aubry Williams, however, the incoming class of clerks viewed the case differently.[218] Among the Justices themselves, almost all talk of vindicating Williams' constitutional rights had ceased, and debate began to focus instead on how to limit the potential harm to the Court.

The November 18 conference was probably the decisive moment in the case. During discussion of another case,[219] Justice Black apparently delivered a spontaneous and impassioned speech to the conference, warning the Justices that they would be taking a serious risk if they decided to grant certiorari in

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S.E.2d 376 (Ga. 1955) (No. 18548).

215. Letter from Harold B. Wiley, Clerk of the U.S. Supreme Court, to K.C. Bleckley, Clerk of Georgia Supreme Court (Aug. 18, 1955) (available in Georgia State Archives, Case No. 18548, location 148-08, box no. 500). Handwritten notes on the bottom of the letter indicate that the state clerk in turn notified the governor's office, the Board of Pardons and Paroles, and the Fulton County Superior Court. *Id.* At the time the stay order was signed, Williams' petition for a stay had not yet been filed with the Court. *See also Griffin Grants Stay at Request of U.S. High Court*, SAVANNAH EVENING PRESS, Aug. 22, 1955, at 1.

216. Telephone Interview with E. Barrett Prettyman, *supra* note 136.

217. *Id.* Robert Hamilton, Justice Clark's clerk for the 1955 Term, says that when he arrived at the Court in early July, however, the clerks who remained from the 1954 Term were not noticeably glum about the case, and he was not aware of a single discussion of *Williams* between the new clerks and the clerks who were in the process of leaving the Court. Letter from Robert W. Hamilton to the author (Feb. 11, 1993) (on file with author).

218. Telephone Interview with E. Barrett Prettyman, *supra* note 136. Robert Hamilton does not remember any of the new clerks arguing strongly in favor of confronting the Georgia courts over this case, saying that "there was little sentiment [among the clerks] to take on frontally the Georgia court with its independent State ground." Letter from Robert W. Hamilton to the author, *supra* note 217.

219. Armstrong v. Armstrong, 350 U.S. 568 (1955). There are several reasons why Black might have picked this case to discuss *Williams*. The most likely reason is that both cases touched on the U.S. Supreme Court's right to intervene and override a state judgment. *Armstrong* was a so-called "divisible divorce" case, in which the husband obtained a divorce in his resident state of Florida, while his wife, a resident of Ohio (who was not personally served and did not appear at the Florida trial) later sued for divorce in Ohio. The Ohio court, citing the prior Florida ruling, denied the wife's request for an Ohio divorce, but did grant her alimony based on property held in Ohio. The U.S. Supreme Court held that because the Florida courts had not ruled on the issue of alimony, Ohio did not owe full faith and credit to the Florida decision. *Id.* at 569-72. Black, joined by Warren, Douglas, and Clark, concurred, but said that the Florida court *had* specifically denied the wife any alimony. Ohio was not compelled to give the Florida decree full faith and credit, however, because the Florida courts had no power to deprive the wife of all rights to alimony when she was not a resident of the state, was not personally served, and did not appear at trial. *Id.*, at 575-76 (Black, J., concurring).

Williams.[220] Black apparently thought that a direct confrontation with the State of Georgia over this case might precipitate a constitutional crisis that the Court could not win, causing considerable harm to the prestige and legitimacy of the Court.[221] Black, a man who prided himself as a strict defender of the Constitution regardless of the cost, was preparing to abandon his constitutional principles. The old majority was falling apart.

Like the Justices, most of the new clerks opposed granting certiorari a second time. P.J. DiQuinzio, one of Harold Burton's clerks, argued that the state waiver law was reasonable and that the Court had no jurisdiction in matters of state law where no constitutional rights were at stake. In his certiorari memorandum to Burton, DiQuinzio wrote that, "[W]hile the Georgia Sup. Ct.'s opinion is very sharp and amounts to a slap in the face, I feel that this Court can do nothing more than turn the other cheek."[222] Likewise, Graham Moody, one of Chief Justice Warren's three new clerks, found himself framing his arguments around what was best for the Court rather than what law or justice demanded, even though he was sympathetic to Williams' plight. Quoting the full text of the Georgia opinion as a self-evident reason for granting certiorari, Moody concluded that "[s]uch a direct challenge to the power of this Court to decide its own jurisdiction cannot pass unnoticed."[223]

When the clerks met in the lunch room to debate *Williams*,[224] virtually all of them agreed that certiorari should be denied. This view was especially strongly held among the Harvard contingent. Harvard at the time was the Mecca (or at least the Medina) of legal positivism, and the clerks for the most part were believers.[225] As a matter of objective law, they saw adequate and independent state grounds for the decision; the Supreme Court not only had no

220. Justice Clark told his clerk Robert Hamilton that Justice Black "had been extremely vehement about this case and its possible effect on the South." Letter from Robert W. Hamilton to the author, *supra* note 217. Chief Justice Warren told a similar story to Graham Moody. Telephone Interview with Graham B. Moody, Law Clerk for Chief Justice Warren (June 13, 1991).

221. Telephone Interview with Robert W. Hamilton, *supra* note 62; Telephone Interview with Graham B. Moody, *supra* note 220. Justice Frankfurter's later memorandum to the conference on *Williams* makes a direct reference to Justice Black's "deep feelings" about the case during the *Armstrong* conference. *See infra* text accompanying notes 232-33. However, Justice Burton's conference notes on *Armstrong* do not mention Black's speech. Justice Harold H. Burton, Conference Notes (Nov. 18, 1955) (available in Harold H. Burton Papers, cont. 280).

222. Memorandum from P.J. DiQuinzio, Law Clerk for Justice Burton, to Justice Harold H. Burton (Nov. 30, 1955) (available in Harold H. Burton Papers, cont. 285).

223. Memorandum from Graham B. Moody, Law Clerk for Chief Justice Warren, to Chief Justice Earl Warren (available in Tom C. Clark Papers, box B160). Robert Hamilton suggests that this may be reading too much into Moody's memorandum. It is probable, he argues, that Moody was simply explaining why the case should be scheduled for discussion at conference, rather than expressing his personal views about the case. Letter from Robert W. Hamilton to the author, *supra* note 217.

224. The clerks' lunch room was by tradition an exclusive reserve, a combination dining hall and inner sanctum where the clerks were free to say anything that was on their minds and debate any topic that they wished.

225. Telephone Interviews with two unattributable sources (May 1991, July 1992). Seven of 17 clerks that year had graduated from Harvard Law School. Justices' Clerk's List (1955 Term) (available in U.S. Supreme Court Library).

right to hear the case, it had no power.[226] This view was by no means confined to the Harvard clerks. William Norris, a Stanford graduate and Douglas' clerk that Term, wrote a memorandum agreeing that the Georgia court had adequate state grounds for its decision and arguing that any further action by the Court would only make matters worse. He recommended that "we had better deny [certiorari] before we get our fingers burned again."[227]

Williams was originally scheduled for conference on December 12, 1955, but discussion was postponed until January 6 after Warren discovered that three of the Justices had not yet seen the full record of the case.[228] The January 6 conference was also cut short because the Chief Justice had a mild case of pink-eye.[229] *Williams* was briefly discussed at the January 6 conference, but when Black and Warren passed,[230] further discussion was postponed until the next conference, scheduled for January 13, 1956.[231]

As he had done the previous Term, Justice Frankfurter again went quickly to work, this time composing a lengthy memorandum to the conference that spelled out his new views. He delivered a draft copy to the Chief Justice on January 6 and circulated copies to the rest of the Court on January 10.[232] Frankfurter referred to Justice Black's remarks during the November 18 conference on *Armstrong v. Armstrong* and acknowledged the deep feelings the other Justices had about this case. He thought that every effort should be made to heal the divisions on the Court. "I am a very strong believer in the fullest

226. Telephone Interviews with three unattributable sources (1991-1992).

227. Memorandum from William A. Norris, Law Clerk for Justice Douglas, to Justice William O. Douglas (Dec. 9, 1955) (available in William O. Douglas Papers, cont. 1155, Oct. Term 1955).

228. Eight other cases were postponed for the same reason. Note from Chief Justice Earl Warren to Justice Stanley Reed (Dec. 12, 1955) (available in Earl Warren Papers, cont. 357).

229. Justice Harold H. Burton, Personal Diary (Jan. 6, 1956) (available in Harold H. Burton Papers (microfilm), reel 4).

230. Justice Black's notes indicate that he passed on *Williams* at the January 6 conference, which would explain why Douglas' Administrative Docket Book had Black, Warren, and Harlan listed as tentatively voting in favor of granting certiorari, tagging their votes with question marks. Justice William O. Douglas, Administrative Docket Book, No. 328 IFP Misc. (available in William O. Douglas Papers, cont. 1162, Oct. Term 1955). Burton's conference list has Black and Warren as tentatively voting to grant certiorari, but again, both names were flagged with large question marks. Burton lists Harlan twice, voting both for and against granting certiorari, although this is probably because Burton recorded here Harlan's first vote to hear the case during the January 6 conference as well as his final vote to deny certiorari at the January 13 conference. After the conference, Burton placed a question mark by the case in his own list of cases to discuss at conference. Justice Harold H. Burton, Conference Sheets (Jan. 6, 1956) (available in Harold H. Burton Papers, cont. 286). Justice Clark was more confident: on his conference list for January 6, he wrote "Deny" in bold letters beside the entry for *Williams v. Georgia*. Justice Tom C. Clark, Conference Sheets (Jan. 6, 1956) (available in Tom C. Clark Papers, box A40, file no. 1).

231. Burton marked a "D" (for "Denied") next to all but one of the Miscellaneous Docket cases listed on his January 6 conference list. Burton, *supra* note 230. *Williams v. Georgia* was unmarked on the January 6 conference list and listed a second time on Burton's conference sheet for the January 13 conference. Justice Harold H. Burton, Conference Sheets (Jan. 13, 1956) (available in Harold H. Burton Papers, cont. 286).

232. Justice Felix N. Frankfurter, Memorandum to the Conference (Jan. 6, 1956, re-dated and circulated Jan. 10) (available in Earl Warren Papers, cont. 353). Multiple copies of draft versions and the final memorandum are in the Felix Frankfurter Papers (microfilm), reel 141.

possible discussion at conferences," he said. "I am all for arguing; I am all against quarreling."[233]

Justice Frankfurter then disavowed his earlier promise to reverse the Georgia Supreme Court if the case came back a second time. He now thought that the Court should concede the case on the merits but consider responding to the Georgia court's offensive interpretation of the Tenth Amendment and its refusal to recognize the U.S. Court's right to determine its own jurisdiction.[234] His argument consisted of three main points. First, he maintained that the Court had handled the case properly the first time around. Somewhat disingenously, he reminded the conference that the Court's course of action had been Justice Harlan's idea. Frankfurter added, however, that he had willingly gone along because it was a capital case and because he thought it his duty in such cases "to exercise every resource of [his] mind to find a rational basis in support of vindicating a federal claim. To ask the Georgia court to reconsider its position seemed clearly justifiable."[235]

Second, regardless of the temper of the Georgia court's opinion, the state court had now ruled definitively that under Georgia law Williams' constitutional claims had been irrevocably waived. Such strict procedural rules were not unique to Georgia or even to the South, and there was no conclusive proof that the policy disguised a discriminatory attitude toward blacks. Moreover, it was clear that Carter Goode, Williams' attorney, either knew or should have known about *Avery* and about jury selection procedures in Fulton County, which meant that the attorney's diligence was not really an issue, either.[236] Frankfurter's analysis directly contradicted his earlier views on the case: it conveniently overlooked the fact that the Georgia Supreme Court's initial ruling had clearly stated that Williams had irrevocably waived his constitutional claims.[237]

Third, while a state policy limiting challenges to the jury panel may not be subject to direct constitutional attack, the United States Supreme Court might still have a role to play if the Georgia courts applied a facially valid law in an unfair way.[238] Frankfurter took this last issue and tried to see whether an opinion reversing the Georgia Supreme Court would "write." Almost immediately, however, he concluded that it would not: "My desire to reverse affords a powerful momentum for reaching that result. But . . . desire . . . does not of itself justify a result."[239] Frankfurter considered and rejected four possible theories for reversing the Georgia Supreme Court: first, that the "jury

233. Frankfurter, *supra* note 232, at 1.
234. *Id.* at 6-7.
235. *Id.* at 1.
236. *Id.* at 2.
237. *See Williams*, 82 S.E.2d at 219; *cf. Williams*, 349 U.S. at 395-96 (Clark, J., dissenting).
238. Frankfurter, *supra* note 232, at 3.
239. *Id.*

panel was unconstitutionally constituted"; second, that Georgia procedures effectively "strangle[d] a federal right";[240] next, that state procedures were discriminatorily enforced, denying equal protection of the laws; and finally, that Carter Goode's incompetence amounted to a denial of due process under *Powell v. Alabama*.[241]

As to the first theory, Frankfurter thought that it stood out "like the Washington Monument" that Williams was convicted by a jury selection scheme that discriminated against blacks and was condemned in *Avery*. But, he said, "that fact is the beginning of our problem, not the end of it." The real question was whether Georgia could impose such an early cutoff period for making constitutional claims against the makeup of jury panels. Frankfurter thought that the Georgia law mandating an early cutoff period represented a common practice among the states, one based "on good and sufficient reason in the effective administration of criminal justice." Frankfurter was not willing to rule that the state waiver law on its face violated the federal constitution.[242] Nor was there any solid evidence that Georgia had manipulated its procedural rules to frustrate Williams' federal claim, the second possible ground for a reversal.[243]

The third theory—that state procedures were discriminatorily enforced—was also problematic. This claim seemed precarious, Frankfurter thought, especially given the Georgia Supreme Court's unqualified statement that the state courts had no discretion to grant a new trial even in exceptional cases. The U.S. Supreme Court could disregard this ruling only if it was spurious or dishonest, and proving such a charge would be virtually impossible. Frankfurter claimed that he "would not know how to make out a case based on the ground that what the court said was the law of Georgia was a pretense and not the law of Georgia."[244] Frankfurter also rejected the final theory, inadequate legal representation: "I do not believe that anyone would undertake to write an opinion bringing the circumstances of this case under the *Powell* doctrine by holding that Williams' lawyer was so incompetent that Williams was in effect denied the aid of counsel . . . . In any event I couldn't."[245]

Frankfurter concluded that he would be compelled to affirm the Georgia court's decision if the U.S. Supreme Court elected to rule on the merits of the case. While under normal circumstances, he tried not to determine the merits

240. "A State cannot devise a procedure which, though it formally respects a federal right, for all practical purposes frustrates its enforcement. A State cannot keep the word of promise to the ear and break it to the hope." *Id.* at 3-4 (citing American Ry. Express Co. v. Levee, 263 U.S. 19, 21 (1923); Davis v. Wechsler, 263 U.S. 22, 24-25 (1923)).

241. Frankfurter, *supra* note 232, at 3-4 (citing Powell v. Alabama, 287 U.S. 45 (1932)).

242. *Id.* at 4.

243. *Id.* at 4-5.

244. *Id.* at 5-6.

245. *Id.* at 6.

of a case before deciding how to vote on the issue of certiorari, this, he said, is "not an ordinary case."[246] Frankfurter no longer saw any reason for granting certiorari, except for the limited purpose of answering the Georgia Supreme Court's challenge to the Court's power to establish its own jurisdiction:

> I am no believer in answering a fool according to his folly. . . . The Georgia court was not merely childishly truculent. What really puts me in a quandary is the opening sentence of the Georgia opinion. The Supreme Court there challenged . . . our right to do what we did. I think it is both appropriate and desirable to explain that what we did we had a right to do. Reliance on the Tenth Amendment . . . is a recurring manifestation of obfuscation by members of the profession . . . who ought to know better. And resentment by States against employment by this Court of its jurisdiction in the protection of constitutional rights is nothing new."[247]

He was willing, however, to instruct the Georgia courts "by appropriately impressive language that the Fourteenth Amendment . . . is a qualification of the Tenth and not the other way around." That meant "doing what we did in last Term's *Williams* case, making assurance doubly sure in examining the claims of a federal constitutional right where life is at stake."[248]

But the other Justices balked at even this limited response. The Court met again in conference on January 13th. By this point the old majority had completely disappeared. Justice Burton's views represented the new consensus of the Court: "This [case] was remanded . . . on [the] theory there was discretion to open it [and] perhaps discretion had been abused. [The Georgia Supreme Court] now says there was no such discretion and takes offense . . . . We should leave it alone."[249] The Court no longer had the stomach for a confrontation with the State of Georgia.[250] All nine Justices voted to deny certiorari.[251]

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246. Frankfurter acknowledged that his position on this matter was "wearisomely stated in Conference." *Id.* at 6.

247. *Id.* at 6.

248. *Id.* at 7. In an earlier draft, Frankfurter phrased this thought somewhat differently: "That means doing what we did in last Term's *Williams* case, making assurance doubly sure that no federal constitutional right was sacrificed where life is at stake." An unidentified Justice returned an early circulated draft after writing in the margin, "[M]ight someone draw [the] wrong inference here?" Frankfurter apparently agreed, and changed the wording in subsequent drafts to that put forth in the text above. Justice Felix N. Frankfurter, Draft Memorandum to the Conference (available in Felix Frankfurter Papers (microfilm), reel 141).

249. Justice Harold H. Burton, Conference List (Jan. 13, 1956) (available in Harold H. Burton Papers, cont. 286).

250. Telephone Interview with E. Barrett Prettyman, *supra* note 136.

251. Burton, *supra* note 249, at 10; *cf.* Justice Tom C. Clark, Assignment List (available in Tom C. Clark Papers, box C72, file no. 3).

On January 16, 1956, the Georgia Supreme Court was informed that the U.S. Court had rejected Aubry Williams' petition.[252] Carter Goode and Eugene Gressman jointly filed a motion for a rehearing,[253] but it was hopeless. Graham Moody wrote only a terse, two-word memorandum: "Nothing new."[254] The petition for rehearing was unanimously rejected on February 27, and the Georgia Supreme Court was notified later the same day.[255]

Eugene Gressman tried to convince Carter Goode to file a federal petition for a writ of habeas corpus. To help prepare the petition, Gressman secured the assistance of Morris Abram, a lawyer with the American Civil Liberties Union. Goode initially agreed to participate, but he later changed his mind and refused to do any more work on the case. On March 28, two days before Williams' scheduled execution, Goode wrote the ACLU office in New York to say that he had decided that any further efforts on his part would be of no benefit to Williams and would be detrimental to his own interests. Two factors compelled his decision, he said: "first the law . . . [and second] the feeling that from this point on I would be putting myself in a position to receive a rather well-founded accusation of seeking to obstruct the processes of the Georgia courts by frivolous proceedings." Goode told the ACLU that the federal judge for the Southern District of Georgia and the state Attorney General's Office had been notified that no habeas petition would be submitted.[256]

Aubry Williams was executed on Good Friday, March 30, 1956.[257]

III. THE CONSEQUENCES OF *WILLIAMS V. GEORGIA*

A. *The Individual Justices' Votes*

Some irresolution is to be expected whenever judges decide highly complex, important, or novel issues.[258] In this case, however, the Justices proved extraordinarily indecisive. Seven Justices (Warren, Douglas, Black, Frankfurter, Burton, Harlan and Clark) reversed their views at least once.

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252. Williams v. Georgia, 350 U.S. 950 (1956).

253. PRETTYMAN, *supra* note 3, at 292.

254. Memorandum from Graham B. Moody, Law Clerk for Chief Justice Earl Warren, to Chief Justice Warren (Feb. 23, 1956) (available in Tom C. Clark Papers, box B160, file no. 3).

255. Williams v. Georgia, 350 U.S. 950 (1956).

256. PRETTYMAN, *supra* note 3, at 292-93.

257. Williams was electrocuted at 10:23 a.m. at the Reidsville State Prison. He did not make a last statement before he died. *Chair Ends Williams' 3-Yr. Fight*, ATLANTA CONST., Mar. 31, 1956, at 11; *Georgia Slayer Dies*, N.Y. TIMES, Mar. 31, 1956, at 30; *Long Fight Ends, Williams Goes to Death Chair*, ATLANTA J., Mar. 30, 1956, at 4. Eugene Gressman received a copy of Carter Goode's letter to the ACLU on March 30, the same day that Williams was executed. PRETTYMAN, *supra* note 3, at 293.

258. *See, e.g.*, J. Woodford Howard, Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968).

Of the six Justices who formed the initial majority, none changed his mind about the case more dramatically than did Hugo Black. Black was one of two Justices who voted to grant certiorari at the first certiorari conference, and he was one of three Justices voting at the April 23, 1955, conference to reverse the state court decision outright and order that Aubry Williams be granted a new trial. Less than a year later, however, it was Justice Black who led the Court's retreat in the case. Even then, he wavered: after his emotional speech explaining why the Court should not grant certiorari a second time, he passed on the case at the January 6 conference before finally voting to deny certiorari a week later. Black's behavior was extraordinary and greatly at odds with his popular reputation as a constitutional literalist whose principles compelled him to protect the individual's constitutional rights regardless of the cost to the government, the Court, or the parties involved.[259]

Justice Black took much of the brunt of Southern reaction against the Warren Court during the 1950's. He collected and preserved the correspondence he received about the Court's race decisions during the three Court Terms from 1954 to 1956. While the tone of most of the letters from Southerners during the 1954 Term was relatively restrained, reflecting more disappointment than outrage,[260] by the next Term the letters from "home" had grown noticeably more hostile.[261] No Justice paid a heavier personal price for *Brown*: the case made him "the most hated man in Montgomery," cost him his friendship with Senator Lister Hill, killed his son's fledgling political career, caused his family to be blackballed from local country clubs

259. *See, e.g.*, G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 335-39 (expanded ed. 1988); George D. Braden, *The Search for Objectivity in Constitutional Law*, *in* WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS 653, 658-60 (1st ed. 1961). For a more detailed account of Black's peculiar mix of constitutional principles and political pragmatism, see FREYER, *supra* note 6, at 122-37.

260. A letter from Florida is typical: "I would like to know just why a man of the South would throw his native state down." Letter from Guy Chambers, Sr., to Justice Hugo L. Black (Sept. 4, 1954) (available in Hugo L. Black Papers, Segregation Correspondence, cont. 322). An especially bizarre letter came from a real estate salesman and self-described "racial expert" in Puerto Rico who submitted a nine-page treatise to justify "seggregation" [sic] in terms of a "defense of the biblical and necessary preservation of white people and population." Letter from Tulio A. Vazquez to Justices Harold H. Burton, Sherman Melton [sic], Staley [sic] F. Reed, William O. Douglas, and Hugo L. Black 9 (Oct. 25, 1954) (available in Hugo L. Black Papers, Segregation Correspondence, cont. 322).

261. There was still a significant percentage of the milder "how could you do this to your own kind" reproaches, but many of the letters were more openly hostile. Frank Atkinson, for example, sent Black a copy of his recommendation to the Board of Trustees of the University of Alabama that the Justice be expelled from the "glorious state of Alabama." Letter from Frank W. Atkinson to Board of Trustees, University of Alabama (Mar. 3, 1956) (available in Hugo L. Black Papers, Segregation Correspondence, cont. 322). In a letter dated August 13, 1956, Frank Harvey wrote that he had taken up a collection to "purchase the home adjacent to yours where a Negro family of our choice will reside expense free for one year." Telegram from Frank W. Harvey to Justice Hugo L. Black (Aug. 13, 1956) (available in Hugo Black Papers, Segregation Correspondence, cont. 322). A postcard from Old Bill Bailey postmarked October 1, 1956, in Frederick, Maryland, reads in part: "[T]he Klux should burn a cross in front of your home and smear a little tar so you would remember where you were raised. hope [sic] some of your kinfolks will have wooly heads." Postcard from Bill Bailey to Justice Hugo Black (Oct. 1, 1956) (available in Hugo Black Papers, Segregation Correspondence, cont. 322).

and social organizations, and subjected his family to threats and intimidation that eventually drove his son to abandon Alabama altogether.[262]

Justice Black was deeply concerned about the Court's authority and prestige, and he was worried about the effects that court-ordered desegregation could have on Southern politics. Black feared that the Court's desegregation decisions might trigger a resurgence of the Ku Klux Klan and perhaps even lead to the end of Southern liberalism.[263] On at least two occasions he expressed anxiety about the possibility of a confrontational Southern reaction to *Williams*, and it seems highly likely that Black's views of this case were affected by his intimate experience with Southern hostility over his votes on school desegregation and racial equality.[264]

Like Justice Black, Chief Justice Earl Warren received hate mail following the Court's desegregation decisions, but he was more angered than troubled by it. While Black felt constrained by these attacks on the Court, they had a liberating effect on the Chief Justice. The correspondence taught him that it made little difference what the Court said, how it justified its decisions, or how conciliatory it tried to be—all that mattered was the result. If he was going to get hate mail anyway, Warren told his clerks, he might as well vote his conscience.[265] Justice Douglas responded to the segregation correspondence in much the same way as did Chief Justice Warren.

The remaining three Justices from the original majority were generally more inclined to be conciliatory toward the Georgia Supreme Court, but this fact does not necessarily make their changes of mind any easier to explain. Justice Frankfurter had to renounce a specific pledge to reverse the Georgia Supreme Court if it refused to grant Aubry Williams a new hearing or trial on

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262. HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 206-17 (1975); Daniel M. Berman, *The Persistent Race Issue*, *in* HUGO BLACK AND THE SUPREME COURT 75, 85-86 (Stephen P. Strickland ed., 1967); Virginia Van der Veer Hamilton, *Lister Hill, Hugo Black, and the Albatross of Race*, 36 ALA. L. REV. 845, 858-60 (1985). In the aftermath of *Brown*, Lister Hill even felt compelled to remove a photograph of Hugo Black from his home. Hamilton, *supra*, at 858.

263. ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 278 (1992) (citing Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 825, 828 (1987)).

264. This view was shared by at least two of the clerks on the Court at that time. Telephone Interview with Robert W. Hamilton, *supra* note 62; Telephone Interview with Graham B. Moody, *supra* note 220. Justice Black's sensitivity to Southern views of the Court's race decisions also surfaced in other cases, notably in *Brown II*. During conference, Black (along with Justice Douglas, and to a lesser degree, Justices Reed and Frankfurter) opposed deciding the case on a class-action basis, arguing that any Court order should be limited to the five cases comprising *Brown*. Justice Felix Frankfurter, Conference Notes (Apr. 16, 1955) (available in Felix Frankfurter Papers, file 4044, box 219), *cited in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 55 (1979); *cf.* RICHARD KLUGER, SIMPLE JUSTICE 706, 738-41 (1975). Black argued against imposing specific time limits for desegregating Southern schools, and along with Tom Clark he lobbied Warren to make the language of *Brown* as inoffensive to the South as possible (Stanley Reed, the third Southern Justice, was the last holdout threatening to dissent in *Brown*). KLUGER, *supra*, at 706. In the name of unanimity, the Justices finally accepted Frankfurter's suggestion to use the phrase "all deliberate speed." WHITE, *supra* note 259, at 239; Hutchinson, *supra*, at 58-60.

265. Telephone Interview with Gerald Gunther, *supra* note 207.

remand. Justice Harlan, on the other hand, remained interested in the case until the very end—he was the last holdout in favor of granting certiorari. Finally, Justice Burton was always the most tentative member of the original majority; it was probably more remarkable for him to change his mind the first time to vote to grant certiorari than it was for him to return to his original belief that the Court should leave the case alone.

B. *The Southern Response to* Williams

The judicial confrontation over *Williams* was widely reported throughout Georgia, both in the major metropolitan newspapers and among the smaller city and town newspapers.[266] The *Metropolitan Herald* used the case to attack the Warren Court in an influential article that was later reprinted by other Southern newspapers. In part, the *Herald* said:

> This should be ample and clear warning of where the Supreme Court of Georgia stands in this grave matter. It is a forceful and forthright statement.
>
> . . . .
>
> The Georgia Court has spoken out wisely and without reservation and the people of Georgia are proud of their stand. We need more such forthright justices on the benches of our highest courts and we need such constitutional authorities on the United States Supreme Court.[267]

Other Southern newspapers picked up the story as well. One popular syndicated column by Ray Tucker called the case "another rebel yell" against the United States Supreme Court and applauded the Georgia court's refusal to execute the U.S. Court's mandate.[268] Tucker quoted State Representative James C. Davis, who accused the Warren Court of "trifl[ing] with the Constitution . . . [in order] to usurp legislative functions which they do not possess," and called the Georgia court's response a "courageous stand." Tucker also noted the reaction of U.S. Senator James Eastland of Mississippi, who questioned the mental fitness of several Justices. In reviewing Southern opinion

266. Among the Georgia newspapers carrying the story were the *Atlanta Constitution*, the *Atlanta Daily World*, the *Atlanta Journal*, the *Augusta Chronicle*, the *Columbus Enquirer*, the *Columbus Ledger*, the *Metropolitan Herald* (Atlanta), the *Savannah Evening Press*, the *Savannah Morning News*, and the *Statesman* (Hapeville). In addition, both the Associated Press and United Press International newswire services picked up and distributed the story.

267. *Georgia Supreme Court Speaks Out*, METROPOLITAN HERALD (Atlanta), *reprinted in* THE STATESMAN (Hapeville), July 28, 1955, at 2.

268. Ray Tucker, *Georgia Defies High Court in Murder Case*, DALLAS MORNING NEWS, Aug. 3, 1955, at 9. Tucker was a syndicated columnist for the McClure Newspaper Syndicate, and his articles were widely circulated throughout the South.

about *Williams*, Tucker cited the *Metropolitan Herald* editorial as representing the view of the great majority of the Southern press.[269]

Perhaps more important than the general public reaction to the case was the reaction of Southern elites—especially government officials and lawyers. The case demonstrated to them that it was possible for the South to stand up to the Warren Court on issues of race and get away with it. The Joint Legislative Committee of the State of Louisiana, which worked closely with similar legislative committees in South Carolina and Texas, wrote to request copies of Justice Duckworth's opinion.[270] J.B. Westbrook, the clerk of the Supreme Court of South Carolina, wrote to the Georgia Supreme Court to say that "[t]his is an excellent opinion, and we believe that it would be approved by all of the Justices and Judges of South Carolina."[271] The clerk of the Georgia Supreme Court responded that the opinion had "received favorable comment from astounding quarters."[272]

Chief Justice Duckworth also received support from many non-Southern judges for his position on *Williams*.[273] In a letter to Chief Justice Duckworth, Justice James B. McGhee of the New Mexico Supreme Court sent his "hearty congratulations on the rebellion of yourself and associates against the usurpation of the rights and privileges of the people of the State of Georgia and its court."[274] McGhee continued:

> I rejoice that the members of a state supreme court have had the courage to refuse to honor the continued usurpation of the powers, prerogatives and privileges of the various state courts in the administration of their local laws.
>
> If you and your fellow members wind up in jail for your actions I promise to pay you a visit . . . conditioned, of course, that I do not myself get in jail for writing this letter, as I am sending a copy of it to the Chief Justice of the United States Supreme Court.[275]

Some time later, the Conference of Chief Justices issued a unanimous report accusing the Warren Court of usurping state powers and interpreting the federal Constitution according to the Justices' individual values rather than by

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269. *Id.*

270. Letter from Joint Legislative Committee of the State of Louisiana to Georgia Supreme Court (Aug. 27, 1955) (available in Georgia State Archives, Case No. 18548, location 148-08, box no. 500).

271. Letter from J.B. Westbrook, Clerk of South Carolina Supreme Court, to Catherine [sic] C. Bleckley, Clerk of Georgia Supreme Court (Sept. 22, 1955) (available in Georgia State Archives, Case No. 18548, location 148-08, box no. 500).

272. Letter from Katherine C. Bleckley, Clerk of Georgia Supreme Court, to J.B. Westbrook, Clerk of South Carolina Supreme Court (Sept. 23, 1955) (available in Georgia State Archives, Case No. 18548, location 148-08, box no. 500).

273. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204.

274. Letter from Justice James B. McGhee, Supreme Court of New Mexico, to Chief Justice W.H. Duckworth (Aug. 3, 1955) (available in Earl Warren Papers, cont. 427).

275. *Id.*

the language or intent of the Founders. Chief Justice Duckworth was the main force behind the report, which he co-signed with the chief justices of nine other state supreme courts.[276] Chief Justice Duckworth's motivation in pushing for this resolution was his continuing pique over *Williams*, and he was extremely pleased by the support he received from his fellow chief justices.[277]

In Georgia, on July 29, 1955, the board of governors of the Georgia Bar Association unanimously passed a resolution congratulating the Georgia Supreme Court for its response to the U.S. Supreme Court decision.[278] Some time later, the General Assembly adopted a resolution on March 13, 1957, calling for the impeachment of six members of the Warren Court.[279] The resolution, signed by Governor Marvin Griffin, called for the impeachment of Justices Black, Clark, Douglas, Frankfurter, Reed, and Warren for usurping the Constitution and exercising legislative powers vested solely in Congress or reserved to the states or to the people. The resolution further alleged that the Justices had given aid and comfort to Communist enemies of the United States.[280] Although the state legislature's resolution did not specifically cite *Williams*,[281] a gloss written by Assistant Attorney General J. Julian Bennett

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276. CONFERENCE OF CHIEF JUSTICES, REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS 15 (1958). The report was submitted to the Conference of Chief Justices at its tenth annual meeting in Los Angeles, California. Justices from Georgia, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, South Carolina, Texas, and Wisconsin submitted the report. *Id.* at 15. The Northern chief justices were not necessarily sympathetic to Southern racial practices. They were, however, concerned that the Warren Court was infringing on states' rights in the administration of justice with alarming frequency. *Williams*, in combining issues of race relations and states' rights in the administration of criminal justice, gave Northern and Southern state justices common cause to attack the U.S. Supreme Court. The resolution criticizing the Warren Court for infringing upon rights reserved to the states was passed by the Conference on a vote of 36 to eight, with two abstentions and four members of the Conference absent. *Id.* at 16; *see also*, MURPHY & PRITCHETT, *supra* note 3, at 289. *See generally* Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, *in* THE IMPACT OF SUPREME COURT DECISIONS, *supra* note 1, at 66-68.

277. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204.

278. *See Bar Backs Up Rebuff of U.S. Supreme Court*, SAVANNAH EVENING PRESS, July 29, 1955, at 1.

279. Impeachment of Certain United States Supreme Court Justices, H. Res. 174-554d, 1957 Ga. Laws 553.

280. The General Assembly declared that the six Justices were "guilty of attempting to subvert the Constitution of the United States, and [guilty] of high crimes and misdemeanors in office, and of giving aid or comfort to the enemies of the United States." *Id.* at 556. The resolution further charged that the Justices had systematically violated Article I, Article III, and the Fourteenth Amendment of the Constitution and had unilaterally nullified the Tenth Amendment. Accordingly, the General Assembly "[did] hereby impeach said Justices and demand their removal from office." *Id.*

The State legislature also voted in 1956 to incorporate the Confederate battle flag into the state flag as a symbol of Georgia's resistance to the Court's desegregation policies. This remains the state flag today, although there is growing political pressure to restore the 1905 flag, which was modeled after the flag of the Confederate States of America. Eric Harrison, *Georgia Flag's Rebel Emblem Assumes Olympian Proportions*, L.A. TIMES, Feb. 1, 1993, at A5.

281. The resolution cited Griffin v. Illinois, 351 U.S. 12 (1956); Bridges v. Wixon, 326 U.S. 135 (1945); Schneiderman v. United States, 320 U.S. 118 (1943); Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam); Holmes v. Atlanta, 350 U.S. 879 (1955); Gayle v. Browder, 352 U.S. 903 (1956); Edelman v. California, 344 U.S. 357 (1952); Dennis v. United States, 341 U.S. 494 (1951); Phillips Petroleum Co. v.

made it clear that the case was certainly an inspiration for the resolution. In a detailed letter to Cornell law professor Harrop A. Freeman, Bennett discussed *Williams* at great length, citing it as the primary example of how the Supreme Court had "violated the United States Constitution by invading and usurping the powers of the States." This case marked the first time, Bennett said, that a state court had "found it necessary to deliver a stinging, but merited, rebuke to the Supreme Court for unauthorized meddling in the affairs of the State." He called the Court's opinion a

> blantant [sic] attempt, in the absence of any legal ground for interfering with the Georgia court's decision, to impose, by a circuitous use of language the will of the Federal Supreme Court on Georgia court [sic]. It was an outright attempt because of the prestige of the Supreme Court to frighten a State court into a position of servitude. I am glad to say that the Georgia court recognized this attempt for what it was and refused to be intimidated . . . .
>
> By acquieseing [sic] to this stinging rebuked [sic] the Supreme Court of the United States admits its unconstitutional invasion of States Rights under the United States Constitution by the device of case law . . . . [I]t is our purpose not only to follow the law of the land but to resist every effort by any Court to destroy the Constitution of the United States by spurious case law.[282]

Bennett's boss, Attorney General Eugene Cook, followed the successful prosecution of Aubry Williams by helping to draft a series of state laws intended to circumvent U.S. Supreme Court integration rulings, although Cook himself admitted publicly that the laws were unconstitutional and would be "struck down in due course."[283] Ten years later, Cook was appointed an associate justice of the Georgia Supreme Court.[284] Former Deputy Assistant General Robert H. Hall, who had argued *Williams* before the U.S. Supreme Court, followed Cook onto the Georgia Supreme Court in 1974, but later resigned to accept a federal district court judgeship.[285] Carter Goode, Aubry Williams' attorney, eventually became an assistant attorney general for the State of Georgia.

Wisconsin, 347 U.S. 672 (1954); Pennsylvania v. Nelson, 350 U.S. 497 (1956); United States v. Twin Cities Power Co., 350 U.S. 222 (1956); General Box Co. v. United States, 351 U.S. 159 (1956); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955); Bart v. United States, 349 U.S. 219 (1955).

282. Letter from J. Julian Bennett, Assistant Attorney General, Executive Department, to Professor Harrop A. Freeman, Cornell Law School (Apr. 22, 1957) (available in Hugo Black Papers, cont. 328, Segregation Correspondence, Oct. Term 1956).

283. Russell Porter, *Report on the South: The Integration Issue—Georgia*, N.Y. TIMES, Mar. 13, 1956, at S7.

284. JOLINE WILLIAMS, SUPREME COURT OF GEORGIA 9 (1988).

285. Hall resigned from the Georgia Supreme Court in 1979. *Id.*

C. *The Court's Southern Strategy*

With *Brown v. Board of Education*, the Warren Court staked its reputation on desegregating the nation's public schools, and the Justices were determined to protect the decision at virtually any cost. Most Southern school districts failed to make even a good faith effort to desegregate,[286] however, and the absence of White House or congressional support left the Court politically isolated and vulnerable.[287]

The Justices were acutely aware of their predicament[288] and in response adopted an informal strategy of seeking to avoid unnecessary confrontations with Southern governments over ancillary racial issues. They hoped that they could forestall open rebellion against the Court's authority in the South and encourage at least the border states to comply with *Brown*.[289] The Justices developed several means to circumvent unwanted trouble: they used summary decisions to reverse some state racial practices without explanation; they sought to avoid other racial issues entirely; and, on other occasions, they issued what were in effect advisory opinions, finding state racial practices to be unconstitutional but not ordering immediate or specific compliance.[290]

Per curiam, summary judgments offered the Court three major advantages in striking down certain Southern racial practices: they provided at least the appearance of unanimity, protected individual Justices from being singled out for abuse or recrimination, and allowed the Court to overturn objectionable

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286. In 1963, nine years after *Brown*, just one percent of Southern black students were attending schools with whites. WASBY, *supra* note 6, at 170.

287. WASBY, *supra* note 6, at 172-73; MURPHY & PRITCHETT, *supra* note 3, at 324, 327; FREYER, *supra* note 6, at 126-29; BICKEL, *supra* note 6, at 14-15; MUSE, *supra* note 6, at 73-77.

288. Telephone Interview with Gerald Gunther, *supra* note 207. During conference discussions on *Brown*, the Justices were already worrying about the likely consequences of their actions and the cases they knew would follow. Despite the unanimous decision in *Brown*, the Court had been divided throughout most of its deliberations. *See generally* KLUGER, *supra* note 264; Hutchinson, *supra* note 264, at 657-747; Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991).

289. This hypothesis is based on information gathered through interviews with Gerald Gunther, Barrett Prettyman, Robert Hamilton, Graham Moody, and several unattributable sources. It is more or less consistent with WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 192-94 (1964), and STEPHEN L. WASBY ET AL., DESEGREGATION FROM *BROWN* TO *ALEXANDER* 131-61 (1977). By "informal strategy," I mean the following: first, that the Justices routinely discussed the political implications of the race cases that came before the Court between 1953 and 1956; second, that the Justices consistently expressed concerns about protecting the Court's authority and the integrity of *Brown* in deciding these cases; and third, that the Justices' actions in resolving these cases were significantly influenced by these political considerations.

For an overview of the border states' reactions to *Brown*, *see, e.g.*, FREYER, *supra* note 6, at 127-28; KLUGER, *supra* note 264, at 724-37; BICKEL, *supra* note 6, at 14, 16-17, 20; MUSE, *supra* note 6, at 31-37.

290. Wasby, D'Amato, and Metrailer suggest that the Court later used a fourth tactic to avoid negative publicity and controversy in deciding sensitive racial issues: announcing important new doctrines in cases with relatively narrow and noncontroversial factual situations, to minimize the adverse public reaction and backlash. The authors label this tactic "hitting 'em where they ain't." WASBY ET AL., *supra* note 289, at 131-32, 160-61. This tactic was not in evidence here and will not be considered further. The attempt by Black, Reed, Douglas, and Frankfurter to ignore the class-action nature of *Brown II* and limit relief to the named parties in the suit is a related tactic and should not be overlooked.

racial policies without explaining or justifying its actions. This approach followed Justice Black's philosophy that when it came to race cases, "the less we say, the better off we are."[291]

Mayor of Baltimore v. Dawson[292] affirmed without explanation a Fourth Circuit decision that prohibited separate beaches and facilities at public beaches in Baltimore. *Holmes v. City of Atlanta*[293] vacated and remanded without explanation a Fifth Circuit opinion prohibiting blacks from using the Atlanta municipal golf course. *Gayle v. Browder*[294] summarily affirmed a three-judge federal district court ruling prohibiting segregated municipal buses in Alabama, effectively overruling the separate but equal doctrine without explanation, without mentioning *Plessy v. Ferguson*, and citing only three precedents, two of which were also summary decisions.[295]

Although Gerald Gunther at one point advocated summary reversal in *Williams*, this approach did not fit the Court's general pattern for summary reversals in race cases. Between 1954 and 1958 the Court used summary reversals in race cases almost exclusively to overturn federal, rather than state, court decisions.[296] The Court's growing use of per curiam, summary reversals was controversial at the time,[297] and the Justices might have thought that a Southern state court would be more likely to take public exception to being summarily reversed in a controversial race case than a federal court. In retrospect, however, this might have been the best way to reach a fair result without much risk to the Court, especially given Justice Harlan's view that the case was unique and unlikely to set any unintended precedents.[298]

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291. Black said this during conference discussion on *Brown II*. Justice Harold H. Burton, Conference Notes (Apr. 16, 1955), *cited in* KLUGER, *supra* note 264, at 740. Felix Frankfurter's conference notes quote Black as saying that the Court should "say and do as little as possible." Justice Felix N. Frankfurter, Conference Notes (Apr. 16, 1955), *cited in* Hutchinson, *supra* note 264, at 57-58. An unidentified Justice commented that when it came to race cases, "[o]ne bombshell at a time is enough." MURPHY, *supra* note 289, at 193; WASBY ET AL., *supra* note 289, at 141. The Justices' held their conference for *Brown II* just two days before they heard oral arguments in *Williams*.

292. 350 U.S. 877 (1955) (per curiam), *aff'g* 220 F.2d 386 (4th Cir. 1955).

293. 350 U.S. 879 (1955) (per curiam), *rev'g* 223 F.2d 93 (5th Cir. 1955).

294. 352 U.S. 903 (1956) (per curiam), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956).

295. The three cases were Holmes v. City of Atlanta, 350 U.S. 879 (1955); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955); and Brown v. Board of Educ., 347 U.S. 483 (1954).

296. During this period, the Court summarily reversed only one state case in which race was a factor: Reeves v. Alabama, 348 U.S. 891 (1954) (per curiam). After the Justices' conference vote on *Reeves*, Warren returned to his chambers laughing. He told his clerks that the Court had decided to reverse the lower court's decision summarily and that the Justices had agreed to cite only two cases as authority, both of which were also summary decisions. Telephone interview with Gerald Gunther, *supra* note 207. The cases cited were Vernon v. Alabama, 313 U.S. 547 (1941), and Canty v. Alabama, 309 U.S. 629 (1940). *Canty* in turn cited one other case, Chambers v. Florida, 309 U.S. 227 (1940), while *Vernon* cited two cases, *Chambers* and White v. Texas, 310 U.S. 530 (1940).

297. Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707 (1956); Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279 (1959).

298. Supplemental Bench Memorandum from Gerald Gunther to Justice Earl Warren, *supra* note 86, at 9. Summary judgment might also have suited John Marshall Harlan, who thought that it was possible to decide *Williams* "without making bad law for the future." Harlan, *supra* note 107, at 8.

In its efforts to preserve political capital for the Court's core desegregation rulings, the Warren Court sought to avoid other racial issues entirely. The Court was especially hesitant to rule on the constitutionality of racially restrictive covenant cases and state miscegenation laws, which would have required the Court to reverse politically popular state court decisions upholding longstanding racial practices.

In *Rice v. Sioux City Memorial Park Cemetery, Inc.*,[299] a private cemetery refused to bury a Korean War hero who was part Winnebago Indian, citing a restrictive covenant prohibiting the burial of non-Caucasians in the park.[300] After the family filed a lawsuit, the Iowa State Legislature passed a new law prohibiting racially restrictive covenants, but the statute did not apply to cases already in litigation.[301] The Supreme Court accepted the case and heard oral arguments, but later denied certiorari on a 5-3 vote.[302] Writing for the majority, Felix Frankfurter claimed that the Court had initially granted certiorari without realizing that Iowa had passed corrective legislation—even though the statute had been clearly cited in the Iowa Supreme Court's opinion.[303] Frankfurter maintained that the intervening state law made *Rice* an isolated problem and an improper subject for discretionary Supreme Court review. While the federal question presented was "intellectually interesting and solid," Frankfurter concluded, the Court did not "sit to satisfy a scholarly interest in such issues."[304]

As Stephen Wasby and others have noted, Frankfurter's rationale for denying certiorari was disingenuous. The Court has had little difficulty deciding other cases that affect one person or a small group of people, or cases in which intervening state law has made an otherwise important constitutional issue "academic."[305] Political considerations led the Court "to do violence to its established certiorari procedures" in rejecting the case.[306] The Justices did not refuse to decide *Rice* because they thought that the case would have too little impact, but because they feared that it might have too much.[307]

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299. 60 N.W.2d 110 (Iowa 1953), *cert. granted*, 347 U.S. 942, *aff'd by an evenly divided court*, 348 U.S. 880 (1954) (per curiam), *reh'g granted, order vacated and cert. dismissed*, 349 U.S. 70 (1955).

300. According to a pamphlet published by the memorial park in response to the adverse publicity surrounding the case, the park's sales manager became suspicious during the graveside ceremonies for Sergeant Rice when it appeared that most of the mourners were Indians. The manager questioned the undertaker, who confirmed that Sergeant Rice was a Winnebago Indian. After the funeral party left the site, the manager refused to allow the casket to be lowered into the ground. *Rice*, 60 N.W.2d at 113.

301. 1953 Iowa Acts ch. 84, §§ 1-11 (codified at IOWA CODE §§ 566A.1-11 (1954)). Section 12 of the act read: "Nothing in this Act contained shall affect the rights of any parties to any pending litigation."

302. 349 U.S. 70 (1955).

303. *Id.* at 75.

304. *Id.* at 74.

305. Bell v. Maryland, 378 U.S. 226 (1964); Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969).

306. WASBY ET AL., *supra* note 289, at 137.

307. The Court was concerned in *Rice* that a ruling for the plaintiff would trigger a large number of housing and real estate suits. WASBY ET AL., *supra* note 289, at 136-37.

The Court followed a similar tack in *Jackson v. Alabama*,[308] a particularly troubling miscegenation case. Linnie Jackson, a black woman, was sentenced to five years in the state penitentiary for marrying a white man.[309] The Alabama Court of Appeals affirmed Jackson's conviction[310] and the Alabama Supreme Court denied certiorari.[311] The U.S. Supreme Court dismissed Jackson's handwritten petition without comment, leaving her to serve out her term.

Again, the Justices refused to correct a clear injustice because they feared that overturning the Alabama miscegenation statute would place unbearable political pressure on the Court and on *Brown*.[312] Southern governments used interracial marriage and race mongrelization to attack the Court's desegregation policies.[313] The Justices did not want to revisit these issues at that time for fear of reinforcing the linkages between desegregation and eugenics.[314] The Court avoided Linnie Jackson's case with little resulting publicity, although state governments later cited *Jackson* to justify their continued approval of state miscegenation statutes.

The following year, Virginia's miscegenation law made its way to the U.S. Supreme Court in *Naim v. Naim*.[315] This was a civil suit that came to the Court on appeal, meaning that the Court was legally obligated to decide the case. In conference, however, Frankfurter dismissed this requirement as a

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308. Jackson v. State, 72 So. 2d 114 (Ala. Ct. App.), *cert. denied*, 72 So. 2d 116 (Ala.), *and cert. denied*, 348 U.S. 888 (1954).

309. The statute provided for a punishment of between two and seven years' imprisonment in the state penitentiary. ALA. CODE tit. 14, § 360 (1940); it was eventually held unconstitutional in United States v. Brittain, 319 F. Supp. 1058 (N.D. Ala. 1970). The Alabama State Constitution provided: "The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro." ALA. CONST. art. IV, § 102. This provision is still in the Alabama Constitution, although later cases have held it to be unenforceable as violative of the Fourteenth Amendment. *See, e.g.*, *Brittain*, 319 F. Supp. at 1058.

310. *Jackson*, 72 So. 2d at 115.

311. *Id.* at 116.

312. Telephone Interview with Gerald Gunther, *supra* note 207. According to Walter Murphy, the Court avoided *Jackson* because the Justices did not want to risk sacrificing the rights of hundreds of thousands of black children in order to free one woman. MURPHY, *supra* note 289, at 192-93. Wasby adds that while miscegenation was a burning issue among many whites, it was a low-priority issue for civil rights leaders and blacks generally. This meant that judicial involvement in overturning state miscegenation statutes would have provoked toward many whites while doing little to advance black civil rights priorities. WASBY ET AL., *supra* note 289, at 137-38.

313. Archibald Robertson, who represented the State of Virginia in *Brown II*, used this approach. In both the written brief and the oral argument, Robertson repeatedly raised the specters of sexual promiscuity, illegitimacy, and sexual disease as arguments against integration. KLUGER, *supra* note 264, at 733.

314. Telephone Interview with Gerald Gunther, *supra* note 207; *cf.* WASBY ET AL., *supra* note 289, at 137-38.

315. 87 S.E.2d 749 (Va.), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam), *opinion adhered to*, 90 S.E.2d 849 (Va.), *motion denied*, 350 U.S. 985 (1956). The Virginia statute provided for criminal punishment of between one and five years in the state penitentiary. VA. CODE § 4546 (Michie 1942), *recodified as* VA. CODE ANN. § 20-59 (Michie 1950), *repealed by* Act of Apr. 2, 1968, ch. 318, 1968 Va. Acts 318. Writing for the Virginia Supreme Court of Appeals, Justice Archibald Buchanan cited *Jackson v. Alabama* in affirming the constitutionality of Virginia's miscegenation law and distinguished *Brown v. Board of Education* on the grounds that unlike education, interracial marriage was not a foundation of good citizenship. *Naim*, 87 S.E.2d at 753-55.

"technical legal consideration," and argued that the case posed such a grave risk to the Court's authority and prestige that overriding "moral considerations" justified avoiding the case.[316] There would be serious political consequences if the Court struck down the Virginia statute, Frankfurter warned, and he urged the Court to consider the "momentum of history" and the "deep feeling" people had about these laws. Frankfurter thought that the Justices were unlikely to agree on whether state miscegenation laws were constitutional, and that a split decision to do anything other than affirm the decision below would throw the Court's ruling "into the vortex of the present disquietude . . . [and] embarrass the carrying-out of the Court's decree."[317] He also feared that a confrontation with the Virginia courts over this issue would risk "thwarting or seriously handicapping" the Court's ability to enforce its desegregation decisions.[318] After some procedural wrangling, the Court dismissed the case for want of a properly presented federal question.[319]

Earl Warren later told his clerks that *Naim* had opened his eyes to Frankfurter's willingness to manipulate jurisdictional rules in order to reach a desired result, even while Frankfurter continued to deliver unbearably pious sermons in conference about how principled he was. After *Naim*, Warren considered Frankfurter a shameless hypocrite when it came to jurisdictional questions.[320] It would be another fifteen years before the Supreme Court ruled, in *Loving v. Virginia*, that state miscegenation laws were unconstitutional.[321]

The third tactic the Court used to avoid potentially damaging confrontations with Southern governments was to issue advisory opinions, finding a state racial practice to be unconstitutional but without ordering

316. Frankfurter explained this view in a memorandum read to the conference on November 4, 1955. Memorandum from Justice Felix N. Frankfurter to the Conference on *Naim v. Naim* (Nov. 4, 1955) (available in Felix Frankfurter Papers, file 4040, box 249), *reprinted in* Hutchinson, *supra* note 264, at 95-96; *see also* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 243 (1991).

317. Memorandum from Justice Felix N. Frankfurter to the Conference, *supra* note 316.

318. *Id.*; *see also* WASBY ET AL., *supra* note 289, at 140-41. One of Burton's clerks echoed Frankfurter's concerns in his certiorari memorandum: "In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time." Alan J. Moscov, Certiorari Memorandum—No. 366, at 3 (available in Harold H. Burton Papers, box 283), *quoted in* Hutchinson, *supra* note 264, at 63.

319. Naim v. Naim, 350 U.S. 985 (1956).

320. Telephone Interview with Gerald Gunther, *supra* note 207. Bernard Schwartz considers the relationship between Frankfurter and Warren to have been "warm" until about 1957, with the "high point" coming in *Brown* and *Brown II*. Bernard Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 SUP. CT. REV. 115, 118-22, 131. It would appear, however, that the Warren-Frankfurter relationship cooled rapidly between 1954 and 1955, somewhat earlier than Schwartz suggests. Schwartz relies heavily on Frankfurter's correspondence to track the relationship between the two Justices; he does not evaluate the relationship as carefully from the Chief Justice's point of view as he does from Frankfurter's perspective. Further, if *Naim* is any indication, Warren and Frankfurter's working relationship in the Court's desegregation cases might not have been as close as Schwartz implies.

321. 388 U.S. 1 (1967).

immediate or specific compliance. The Court used this approach on at least two occasions between 1954 and 1956: in *Brown II* and in *Williams*.

In *Brown II* the Court found widespread and systematic violations of the desegregation order announced in *Brown*, but rather than requiring immediate compliance the Justices invited the recalcitrant governments to repent "with all deliberate speed."[322] Less than a week later the Court decided *Williams* in similar fashion. Again the Court found that the defendant's constitutional rights had been violated, but instead of ordering immediate compliance the Court remanded the case, confident that "the courts of Georgia would [not] allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled."[323]

It is hotly disputed whether the Court's behavior in the cases discussed above was motivated by legal principle or political expedience. Alexander Bickel and Doris Provine, among others, argue that the Court's decisions in most or all of the cases discussed above were essentially principled.[324] Provine, for instance, claims that it was the clerks, not the Justices, who feared deciding too many controversial race cases too soon after *Brown*. The Justices, she says, were much less chary of aggressively pursuing civil rights issues.[325] On the other hand, Gerald Gunther and Herbert Wechsler maintain that the Court's actions in these cases were irresponsible and even lawless.[326]

As for *Williams*, the few legal scholars who have commented directly on the case have resisted the notion that political considerations determined the Court's disposition. Girardeau Spann, for example, argues that the Court's final decision to deny certiorari in *Williams must* have been based on the Justices' acceptance of the argument that the Court lacked jurisdiction over the case in the first place. "If the Court, in fact, had possessed jurisdiction but simply chose not to exercise it," he writes, "its actions would have been unconscionable."[327]

Despite assertions to the contrary, a clear pattern emerges here that the Justices sought to protect the Court's institutional authority and the integrity

322. This parallel between *Williams* and *Brown II* was first suggested to me by Robert Burt. It is hardly a coincidence that the tone of these two cases is so similar; Felix Frankfurter wrote the majority opinion in *Williams* and proposed the "all deliberate speed" standard in *Brown II*. Frankfurter also advocated a similar approach in *Naim v. Naim*, pushing to remand the case to the Virginia courts without ordering a specific outcome.

323. *Williams*, 349 U.S. at 391.

324. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 71-72, 174, 244 (2d ed. 1986); BICKEL, *supra* note 6, at 7-26 (1965); DORIS M. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 57-62 (1980).

325. PROVINE, *supra* note 324, at 58-61. Provine does admit that the Court might have rejected some race cases based upon technical procedural defects. *Id.* at 61-62.

326. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 11-12 (1964).

327. Girardeau A. Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L.J. 945, 960 n.105 (1983); *see also* Robson & Mello, *supra* note 169, at 112-13 (arguing that Court's final decision to deny certiorari undermined Court's initial claim of jurisdiction).

of *Brown* from Southern attack, even when their actions resulted in significant individual injustices. This is especially apparent in *Williams*, where Frankfurter's memorandum to the conference makes it quite clear that, long after the Justices gave up the idea of vindicating Aubry Williams' constitutional rights, they retained a strong conviction that the Court's original jurisdictional ruling had been correct.[328] The Court never renounced its right to decide the case; it simply chose not to exercise its discretion. All of the Justices—even those in dissent—considered the Court's power to set its own jurisdiction a fundamental prerogative, and, under different circumstances, the Georgia Supreme Court's frontal attack on that prerogative almost certainly would have triggered a harsh response.[329]

The U.S. Supreme Court did not answer the Georgia Supreme Court's challenge in *Williams* for the same reason it did not vindicate the litigants' clear constitutional rights in *Rice*, *Jackson*, and *Naim*: the Justices feared that a showdown with the Southern states over this case would cost the Court too dearly in terms of image and authority, undermining the Court's efforts to secure Southern compliance with *Brown*. The final vote to deny certiorari in *Williams* was not based on a principled concern for law or justice; it reflects the Justices' decision that vindicating Aubry Williams' constitutional rights was not worth the risk to the Court.

Until *Williams*, the Warren Court had negotiated the mine field of desegregation without undue damage. The Court's Southern strategy had largely succeeded in allowing the Justices to maintain a façade of authority and control in the South, allowing at least modest progress in enforcing the Court's key civil rights decisions. *Williams*, however, was a public, unequivocal defeat for the Warren Court and its efforts to transform Southern racial practices. The case clearly demonstrated that the Court was either unwilling or unable to enforce its desegregation decisions. This marked the collapse of the Warren Court's Southern strategy, and with it went the Court's hope of securing voluntary Southern compliance with *Brown*.

D. Williams *and the Failure of the Court's Southern Strategy*

Whatever chance the Warren Court had to persuade Southern governments to comply with *Brown* evaporated with *Williams*. The case confirmed that the

328. *See* Frankfurter, *supra* note 232, at 1.

329. By way of contrast, see Ashcraft v. Tennessee, 322 U.S. 143 (1944), *judgment adhered to*, 327 U.S. 274 (1946) (the intervening Tennessee cases are unreported). Defendant Ashcraft was held and interrogated incommunicado for 36 hours until he confessed. The trial court judge allowed the confession to be used at trial, but the Supreme Court reversed, finding that the coerced confession was a denial of due process. On retrial, the judge sought to evade the spirit, if not the letter, of the Supreme Court's ruling by allowing the jury to hear everything said during the interrogation *except* for the final confession. Ashcraft's second conviction was also affirmed by the state supreme court, but was again reversed by the U.S. Supreme Court. 327 U.S. at 277-79.

South was not going to change its traditional racial policies voluntarily, and sent a plain message to the Southern establishment that the Court could not compel them to do so.

In retrospect, the Warren Court made two fundamental mistakes in its handling of the case. First, the Court's decision to remand the case failed in large part because the Justices did not realize how their actions would be interpreted by the Georgia Supreme Court. Felix Frankfurter and the other members of the initial majority saw their actions as benign and enlightened leadership, offering fraternal guidance to Southern judges while accommodating Southern sensibilities and respecting state autonomy. As Justice Burton saw it, the Court was generously giving Georgia a second opportunity to do what was right, allowing the state courts to "clear the record" and fix a substantial injustice themselves, without undue federal interference. While several of the Justices suspected that the state courts would not voluntarily comply, all of them assumed that the Georgia Supreme Court would continue a dialogue in which the U.S. Supreme Court, if necessary, could grow incrementally more firm in insisting that the Georgia courts live up to their constitutional obligations.

The Georgia court, however, saw Frankfurter's opinion as insulting, illegal, and cowardly. The state justices responded with undisguised anger and contempt. Bob Brinson, Chief Justice Duckworth's legal assistant, reports that the state justices were furious when the Warren Court remanded *Williams* "with lots of advice but no order to do anything."[330] William H. Duckworth, Jr., confirms that the justices were especially upset that the federal Court had merely remanded the case in the form of an advisory opinion, without accepting any responsibility for the final outcome.[331]

After *Williams*, it became obvious that *Brown II* was going to be dead on arrival. According to Bob Brinson, these two cases showed how badly the Warren Court misunderstood the South and grossly mishandled both cases. "The Supreme Court should have known better" than to handle these cases in the way that it did. "[T]he Supreme Court gave a lot of advice, but that was about it. Everyone knew that it was not going to work."[332]

The Court's second mistake was not responding to the Georgia Supreme Court's direct challenge to its authority. The Warren Court's silent acquiescence to Duckworth's blunt refusal to recognize the Warren Court's jurisdiction to decide the case sent an unmistakable signal throughout the South that the costs of noncompliance with the Court's desegregation decisions were likely to be quite low. If the U.S. Supreme Court could not command the respect of state courts, then it certainly would not be able to hold accountable

330. Telephone Interview with Robert Brinson, *supra* note 204.
331. Telephone Interviews with William H. Duckworth, Jr., *supra* note 204.
332. Telephone Interview with Robert Brinson, *supra* note 204.

state legislators, governors, or school boards, over whom the Court had significantly less authority and virtually no effective means of control.

At the very least, the Court should have refuted the Georgia Supreme Court's unprecedented interpretation of the Tenth Amendment. The Georgia court had ruled without any supporting authority that the Tenth Amendment protected a broad range of states' rights against the federal government and that it was up to the state courts to determine the Amendment's scope and meaning. In allowing the Georgia courts to have the last word on this issue, the Warren Court gave new credence to the newly resurrected doctrine of interposition, which culminated in the publication of the Southern Manifesto in March 1956.[333]

With *Williams*, the Warren Court squandered its last, best opportunity to give *Brown II* a much-needed measure of credibility. Had the Court acted decisively to reassert federal judicial authority over Southern racial policies, it would have sent a clear message that the Court was determined to enforce its civil rights rulings despite Southern defiance. Instead, *Williams* proved that the Warren Court was likely to retreat when confronted by determined state resistance. This left increasingly hostile state governments in a much stronger position to reject *any* subsequent Court orders mandating racial integration.

EPILOGUE

In 1962, the Georgia Supreme Court effectively conceded that Justice Harlan and Barrett Prettyman were correct in their view that the Georgia courts had discretion to consider late challenges to the jury array.[334] Gerald Gunther's suggestion that Aubry Williams should seek a writ of habeas corpus was also belatedly vindicated: had Williams been alive in 1962, he almost certainly would have been entitled to a new trial as a matter of federal

333. The Southern Manifesto was published on March 11, 1956. *Text of 96 Congressmen's Declaration on Integration,* N.Y. TIMES, Mar. 12, 1956, at 19.

334. Cobb v. State, 126 S.E.2d 231 (Ga. 1962). It was alleged that Cobb's attorney was incompetent in vetting the jury, that he depended on white clients for his livelihood, and that he had neither the experience nor the ability to raise the issue of racial exclusion from the jury to the court properly. *Id.* at 239. In affirming the lower court's judgment, the Georgia Supreme Court cited the strict waiver rule as the usual rule but noted that when a defendant is not afforded an opportunity to make a timely objection to an illegally composed jury, the issue may be raised later in a motion for new trial or a petition for habeas corpus. *Id.* For Georgia cases where late objections were not allowed, however, and where the state court decision in *Williams* was cited with approval, see Hill v. Stynchcombe, 166 S.E.2d 729, 734 (Ga. 1969); Frashier v. State, 124 S.E.2d 279, 280 (Ga. 1962); Causey v. State, 322 S.E.2d 909 n.1 (Ga. Ct. App. 1984); Bishop v. State, 159 S.E.2d 477, 478-79 (Ga. Ct. App. 1968); Derryberry v. Higdon, 157 S.E.2d 559, 561 (Ga. Ct. App. 1967).

law,[335] and after 1967 he also would have been eligible for a new trial under Georgia state law.[336]

That Aubry Williams was improperly convicted and executed before these reforms could be implemented is regrettable. But the most troubling aspect of this case is that the U.S. Supreme Court had the opportunity to vindicate Williams' constitutional rights and failed to act, not because the Justices believed that they had no legal right to intervene, but because they feared the possible consequences of doing so.

The Court's behavior in this case was both unprincipled and self-defeating. The Justices' silence in the face of the Georgia court's challenge further undermined the Court's authority in the South and ended any chance the Justices might have had for securing voluntary compliance with *Brown v. Board of Education*. In sacrificing individual justice for the sake of other institutional priorities, the Warren Court succeeded only in revealing the limits of its ability to change the course of Southern racial politics.

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335. Fay v. Noia, 372 U.S. 391 (1963). Like Williams, Fay was convicted of first-degree murder after his trial lawyer failed to object to procedural rules accepted as lawful at the time of his trial but later held to be unconstitutional. Fay, however, was freed following a successful collateral attack on his state conviction and sentence of life imprisonment. *See* Goldberg, *supra* note 4, at 362 n.35.

United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), established a stricter standard for waiving fundamental procedural rights in capital cases. Here, defense counsel failed to make a timely objection to the selection of both grand and petit juries. (The defendant's black lawyer wanted to object, but the defendant's court-appointed white lawyer refused to do so.) After two unsuccessful certiorari petitions to the United States Supreme Court, the defendant filed a federal habeas corpus petition. The federal appeals court ruled that while in ordinary cases a defendant is bound by the decisions of counsel, in capital cases, there is a presumption "against waiver of fundamental constitutional rights." The record must affirmatively show that the waiver was intelligent and intentional and that a waiver by counsel was based upon a conscientious consideration of the client's best interests. 263 F.2d at 83-84 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Noting that Southern lawyers "rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries," the court found that the defendant had not knowingly and intelligently waived his rights. 263 F.2d at 82.

336. In 1967, the Georgia legislature liberalized state habeas corpus requirements in response to *Fay v. Noia*. Habeas Corpus Act of 1967, ch. 562, 1967 Ga. Laws 835, 836 (amended 1975). The 1975 amendment exempted from the blanket nonwaiver rule challenges to the composition of grand and traverse juries. Habeas Corpus Act Amended, ch. 628, 1975 Ga. Laws 1143, 1144; *see also* Donald E. Wilkes, Jr., *Postconviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act*, 12 GA. L. REV. 249, 249 (1978); *cf.* Spencer v. Kemp, 781 F.2d 1458, 1465-66, 1470-71 (11th Cir. 1986) (prohibiting retroactive application of 1975 amendment as manifestly unfair).