First, we start a new round of talks. The goal of these negotiations would be to identify market impediments in specific sectors, negotiate rules to remove those barriers, and agree on an effective dispute settlement mechanism to ensure that both sides stick to their agreements.

What kind of dispute mechanism would provide United States companies adequate relief when Japanese markets don't function properly? I would recommend a three-part structure consisting of GATT/WTO procedures, United States-Japan binational panels, and a subcabinet early warning committee.

1. GATT/WTO PROCEDURES

The Uruguay round provides negotiated rules and an agreed panel structure for those areas covered by the agreement. Panels are made up of three experts chosen from a permanent roster. Decisions can be appealed, but cannot be blocked by the losing party. The winner can use cross retaliation against a recalcitrant loser. The problem here, of course, is that Japan largely conforms to GATT rules. The problems are in areas, such as competition policy, which are not covered under GATT.

2. BINATIONAL PANELS

For those issues that fall outside of GATT, such as competition policy, financial services, specific sector agreements, asset prices, et cetera, the United States and Japan would negotiate bilateral rules backed by a binational dispute panel mechanism. The United States-Israel FTA panel structure is a good model, with its three-member panels. Each side chooses one member and jointly chooses the president.

Panel procedures would be open and transparent, with ample scope for nonofficial input and maximum publicity. After all, the whole point is for consumers to know what is going on. There would be strict time limits on the process to prevent stalling.

Like the United States-Canada chapter 18 panels, United States-Japan panels would hold hearings and issue reports. Reports would be politically binding and form the basis for a resolution. Whenever possible, the result would be nonimplementation or removal of the offending measure. If that didn't happen, the Government of the winning party would be free to take sanctions. These sanctions would not, as now, appear as the result of Government fiat, but be seen by consumer as the result of an open, logical process.

3. SUBCABINET EARLY WARNING

Prevention is the best policy. To nip budding disputes, where possible, the United States and Japan should establish an informal group at subcabinet level. The group would be composed, perhaps, of a deputy USTR, Under Secretaries of State and Commerce, and an NEC deputy, with Japanese counterparts. The idea would be to develop an informal forum for straight talk that would eliminate misunderstandings that lead to disputes. This would not be adding a layer of bureaucracy to manage trade, but simply an informal discussion group to keep lines of communication open.

As the final piece of the trade puzzle, the two governments could set up a deregulation working group. Deregulation is essential to opening Japan's market, but it also constitutes the greatest threat to Japan's bureaucracy, since it would weaken the bureaucracy's power over its domestic constituencies. The fate of the Hiraiwa Commission report demonstrates the size of the obstacle.

What we must find is a way to empower Hosokawa to deregulate by giving him two arguments: The Americans want it, and it is good for Japan. We could do this by setting up a deregulation working group made up of executive, legislative, business, labor, and academic representatives. This satisfies the the Americans want it criterion. The group could build on the Hiraiwa Commission, and be charged to study regulation in both countries and come up with ideas that would benefit Japan. This satisfies the it's good for Japan criterion.

There would be no formal mechanism for implementing the Commission's recommendations. If these were binding, I doubt either bureaucracy, United States or Japanese, would agree to participate. However, assuming Hosokawa really is committed to deregulation, the Commission could give him a leg up on the bureaucrats.

Second, beyond trade, we need to look for high profile cooperative efforts in areas of strategic importance to us and the Japanese. The areas specified in the Framework Agreement—environment, technology, development of human resources, population, and AIDS—are a start but, frankly, do not go far enough. We must work together on such topics as human rights in China, North Korea proliferation, Russian reform, Middle East oil, and reform of the international economic system. In this way, we can build momentum in our relationship and establish the trust so vital to our strategic interests.

The United States has a major stake in the historic transformation underway in Japan. For half a century, the United States has borne the responsibility for making the international system work, for creating a benign international environment in which America and Americans can prosper. We should not shoulder that responsibility alone, but neither can we cast it off.

That responsibility now requires intelligent support for Japan's transformation. Trade policy must be at the center of our efforts, but a trade policy that works in synch with the ongoing transformation of Japan's economy and politics to achieve results that conform to both our interests.

Mr. HATCH addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Utah is recognized.

Under the previous order, morning business closes at 10 o'clock. If the Senator wishes the full 15 minutes, he would have to ask unanimous consent.

Mr. HATCH. Mr. President, I ask unanimous consent that I be afforded the full 15 minutes and that the time not be counted against the budget resolution.

The PRESIDING OFFICER (Mr. MATHEWS). Without objection, it is so ordered.

NOMINATION OF CHIEF JUSTICE ROSEMARY BARKETT

Mr. HATCH. Mr. President, upon review of her judicial record and of her testimony before the Judiciary Committee, I have decided that I must oppose the nomination of Florida Chief Justice Rosemary Barkett to be a judge of the U.S. Court of Appeals for the Eleventh Circuit. I do so with regret because I like Chief Justice Barkett, and I consider her to be a fine person. But, I do so with the firm view that her record establishes that she will substitute her own policy views for the written law and take too soft an approach to criminal law enforcement.

In reaching this conclusion, I stress that no judicial nominee needs to agree with my reading of the law, or any other Senator's reading, in all or nearly all cases. But, there are just too many cases, across too wide a range of subjects, where I believe this nominee stepped well past the line of responsible judging. I and other Senators inquired about many of these cases at her hearing before the Judiciary Committee. Incidentally, I notified Chief Justice Barkett in advance of the cases that would be the subject of inquiry. I was not reassured by her testimony. Indeed, Chief Justice Barkett herself ultimately admitted that she overreached or was careless in a number of important opinions.

For example, in her dissent in University of Miami versus Echarte, Chief Justice Barkett voted to strike down statutory caps on noneconomic damages in medical malpractice cases. In addition to a variety of State law grounds, her dissent also relied upon the Federal equal protection clause. Without citing any Federal precedent, she asserted:

> I fail to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry.

In fact, the rational relationship between the means and the goal is self-

evident and was clearly spelled out by the legislature. One might well disagree with caps on noneconomic damages as a policy matter. But, Chief Justice Barkett's purported application of rational-basis review is a stark overreach and a flagrant misuse of the Federal equal protection clause. At her hearing, she acknowledged that she should not have relied on that clause.

In another case, Shriner's Hospital versus Zrillic, the nominee again relied on the rational basis standard under the Federal equal protection clause—as well as on a variety of State law grounds—in striking down a statute. In her opinion, she took the remarkable position that "underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test." This distortion of rational basis review into something akin to strict scrutiny clearly flies in the face of equal protection principles set forth in nearly 50 years of U.S. Supreme Court precedent.

Justice Barkett's misreliance on the Federal equal protection clause in these two cases is all the more striking to me in light of her partial dissent in Foster versus State. There, in seeking to rely on a theory of statistical racial discrimination in a challenge to the death penalty, she expressly acknowledged that the Federal equal protection clause was unavailable to her in light of a Supreme Court decision, McCleskey versus Kemp, squarely rejecting her view under the U.S. Constitution. Accordingly, in her Foster opinion she only relied on the Florida equal protection clause. Yet, she did not recognize the error of relying on the Federal Constitution when she wrote her opinions in Echarte and Zrillic. Her failure to appreciate in these two opinions that Supreme Court precedent foreclosed her reliance on the U.S. Constitution deeply troubles me. Supreme Court precedent governs lower courts not only when the claim presented is identical to that previously rejected by the Supreme Court but also when the basic doctrinal principles enunciated by the Supreme Court are applicable to a case. The failure to appreciate this opens the door to judicial activism—a door, I regret to say, I believe this nominee has repeatedly walked through.

I also find Chief Justice Barkett's reliance on Federal substantive due process very troubling. In State versus Saiez, she wrote an opinion holding that a State law criminalizing the possession of embossing machines capable of counterfeiting credit cards "violated substantive due process under the Fourteenth Amendment to the United States Constitution." Briefly, let me just say here, this expansive, substantive use of the due process clause is insupportable under Supreme Court precedent. The nominee testified that she was really relying on State due process grounds and her inclusion of the Federal due process clause was "careless".

Now, I can accept that, on occasion, a sitting judge may wish to phrase an opinion differently, in hindsight, or even believe that he or she got an opinion wrong. But tossing into her opinion the Federal equal protection clause and the Federal due process clause, on occasions where they very clearly do not belong, raises concerns that I do not find assuaged by testimony acknowledging this was erroneous. These two clauses are among the most powerful tools a judge can use, if so inclined, to legislate from the bench. In the case of the equal protection clause, virtually every law classifies people into at least two classes on some basis. Congress might enact limits on medical or product liability, which are subject to equal protection analysis as a component of the due process clause of the fifth amendment. States or Congress may seek to remove recipients from welfare rolls after a time limit of 2 years. A misreliance on Federal equal protection in reviewing these laws would lead to their erroneous invalidation. In the case of the due process clause, there is a tendency by some judges and commentators to read almost anything into it. This is all the more troubling because the misuse of these two clauses is not subject to limiting principles of judging, but only to the whim of the judge.

There will be many cases of first impression before the eleventh circuit. There will also be many times when precedents must be construed, and they may be construed broadly or narrowly. Most appellate decisions are not reviewed by the Supreme Court. These errors, then, are not merely technical or academic.

My concern about the nominee's approach to judging is heightened by other cases. For example, in a redistricting case (In re Constitutionality of Senate Joint Resolution 2G), the Florida Supreme Court selected from among six different modifications to a state legislative redistricting plan. Writing "dubitante," Justice Barkett stated that she was—

> loath to agree to any of the convoluted plans submitted under these hurried circumstances * * * If I had to choose only among those presented, however, I would choose the plan submitted by the NAACP simply because this is the organization that has traditionally represented and promoted the position that advances all minority interests.

At her hearing, Justice Barkett recognized that this opinion gave a clear appearance of partiality, as it expressed a preference for a party based on who the party was rather than the merits of that party's argument. She stated that she wished she had written her opinion differently.

On an occasional lapse, I am willing to give the benefit of the doubt to a nominee. But there are just too many instances in Justice Barkett's judicial record—the principal basis for evaluating her nomination—of overreaching, and on very significant issues, to leave me comfortable with elevating her to the eleventh circuit.

There are many other cases that concern me. For example, in Stall versus State, Chief Justice Barkett joined a dissent striking down a State obscenity statute on State law grounds. She also wrote separately in an opinion that, again, is sweeping and overbroad.

There are several problems with this dissent.

First, her statement that, "A basic legal problem with the criminalization of obscenity is that it cannot be defined" is flatly contradicted by the U.S. Supreme Court's landmark opinion in Miller versus California (413 U.S. 15 (1973)), which Chief Justice Barkett does not even acknowledge, much less discuss.

Second, she sweepingly claims that an obscenity law such as the one in Florida violates "every principle of notice and due process in our society"—not, I might add, a statement limited to state law principles, and, again, contradicted by the Miller decision.

Third, Chief Justice Barkett's opinion mischaracterizes the Florida law in the case: That law does not turn on the "subjective" view of a handful of law enforcement people and jurors or judges, as she incorrectly suggests. The Florida law incorporates the standard set forth by the U.S. Supreme Court in Miller. The law bans materials that, judged by contemporary community standards, appeal to the prurient interest, that depict or describe, in a patently offensive way, specifically defined sexual conduct, and that lack serious literary, artistic, political, or scientific value. Thus, the role of jurors or judges under this law would not be to make their own "subjective definition" of what is obscene, but rather to discern and apply existing community standards.

Incidentally, while I am pleased that she voted to uphold a Florida child pornography statute in a different case, I make two observations. First, this does not mitigate her sweeping views about the more general subject of obscenity. Second, contrary to her testimony, the child pornography statute is a different statute from the one she voted to strike down in Stall.

I have all of these concerns, and have yet to reach the issue of criminal law enforcement generally and the issue of the death penalty. There is much to say on these subjects.

With respect to criminal law issues aside from the death penalty, I believe that the nominee has too often erroneously come down on the side of lawbreakers and against police officers and law enforcement. She has exhibited an unduly restrictive view of the Fourth Amendment that would ham-

string the police, especially with regard to controlling drugs.

[See, e.g., *Bostick* v. *State*, 554 So.2d 1153 (Fla. 1989), rev'd, 111 S.Ct. 2382 (1991), on remand, 593 So.2d 494 (Fa. 1992); *State* v. *Riley*, 511 So.2d 282 (Fla. 1987), rev'd, 488 U.S. 445 (1989), on remand, 549 So.2d 673 (Fla. 1989); *Cross* v. *State*, 560 So.2d 228 (Fla. 1990); *Sarantopoulos* v. *State* (Fla. Dec 9, 1993)].

For example, in Bostick, a case involving cocaine trafficking, Justice Barkett adopted an across-the-board, per se ban on passenger searches on intercity buses even though Supreme Court precedent clearly called for an analysis of a search's legality based on all of the particular circumstances of the search. The U.S. Supreme Court reversed her.

The U.S. Supreme Court also reversed her in the Riley case, where her misapplication of precedent would have led to dismissal of charges against criminals growing marijuana. In yet another drug case, the Court criticized her overbroad reading of precedent.

In her dissent in a case called Cross, Justice Barkett refused to credit the testimony of police officers that they had seen cocaine packaged in the same peculiar way on hundreds of occasions in their combined 20 years of law enforcement. In so doing, she ignored Florida precedent cited by the majority that provided that the observation of an experienced policeman of circumstances associated with drugs could provide probable cause for an arrest.

In another dissent, she ignored settled principles enunciated in U.S. Supreme Court precedent in finding that someone who was growing marijuana in his backyard had his fourth amendment rights violated when police, acting on a tip, looked over a 6-foot fence, spotted the marijuana plants and then obtained a search warrant. Rather than inquiring whether the defendant had an expectation of privacy that was objectively reasonable, Chief Justice Barkett simply displayed her personal opposition toward what she regarded as overly intrusive law enforcement.

Justice Barkett has also written opinions striking down narrowly drawn laws that ban loitering for the purpose of prostitution and drug dealing. These opinions are badly flawed and misapply precedent. Moreover, they seriously disable communities from preventing harmful crime.

In my view, there are too many other instances where she unjustifiably construed criminal statutes in favor of criminals.

[See, e.g., *State* v. *Bivona*, 460 So.2d 469 (Fla. DCA 1984), rev'd, 496 So.2d 130 (Fla. 1986); *Gayman* v. *State*, 616 So.2d 17 (Fla. 1993).]

With regard to the death penalty, I appreciate that the nominee has voted to uphold the death penalty a number of times. I would expect as much in a State with a lawful death penalty and, unfortunately, a great deal of violent crime. But as I stated at Justice Barkett's hearing, a proper inquiry into a nominee's judicial outlook on the death penalty is not ended merely by noting that the nominee has upheld the death penalty in a number of cases, where even the most activist of judges cannot avoid its imposition. If a nominee exhibits a clear tendency to strain for unconvincing escapes from the imposition of the death penalty in cases where that penalty is appropriate, then that raises concerns in my mind about the nominee's fidelity to the law, no matter how many times the nominee may have upheld the death penalty in other cases. From my review of her record, I have concluded that Justice Barkett clearly exhibits such a tendency.

Let me further note at this point that one of Justice Barkett's dissenting opinions would render the death penalty virtually unenforceable, unless imposed on the basis of racial quotas. Her partial dissent in Foster versus State, had it been the law of Florida when she joined the Florida Supreme Court, would likely have led to a different outcome in many, if not virtually all, of the cases where she did vote to uphold the death penalty. Indeed, the theory she embraced in Foster, until its rejection by the U.S. Supreme Court in 1987, had become a principal weapon in the antideath penalty movement's arsenal.

Overall, I believe that Justice Barkett, in reviewing death sentences, views aggravating circumstances too narrowly; construes mitigating circumstances too broadly; creates unjustified categorical exclusions from death penalty eligibility; subjects the death penalty to racial statistical analysis that would paralyze its implementation, as I have just discussed; and creates procedural anomalies.

Let me mention just two of the many cases that concern me. Dougan versus State is a 1992 Florida Supreme Court case.

Dougan was the leader of a group that called itself the Black Liberation Army and that, according to the trial judge, had as its "apparent sole purpose * * * to indiscriminately kill white people and thus start a revolution and a race war." One evening in 1974, he and four other members of his group, armed with a pistol and a knife, went in search of victims. They picked up a white hitchhiker, Steven Orlando, drove him to an isolated trash dump, stabbed him repeatedly, and threw him to the ground. As Orlando writhed in pain and begged for his life, Dougan put his foot on Orlando's head and shot him twice—once in the chest and once in the ear—killing him instantly. Subsequent to the murder, Dougan made several tape recordings bragging about the murder, and mailed them to the victim's mother as well as to the media. The following excerpt from one of the tapes aptly illustrates the content:

He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes.

The Florida Supreme Court upheld the death penalty for Dougan. Justice Barkett and another Justice joined a remarkable and very disturbing dissent by Justice McDonald in which she voted to reduce the death penalty to life imprisonment, with eligibility for parole in 25 years.

I rarely fault a nominee about an opinion the nominee has joined rather than written. And I do not hold a nominee to every word or phrase in an opinion he or she joins. There is an outlook which pervades this dissenting opinion, however, which is so striking and disturbing that I believe it is appropriate to consider it in evaluating this nomination. This is especially so in light of the fact that in many other cases Justice Barkett has written separately, or merely stated that she concurred in, or dissented from, the result, when another opinion had not suited her.

Normally, I would summarize this dissent, but I do not want anyone listening to think that I am distorting it. Accordingly, I am going to read verbatim excerpts from it:

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His frustrations, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices.

To some extent, [Dougan's] emotions were parallel to that of a spouse disenchanted with marriage, full of discord and disharmony which, because of frustration or rejection, culminate in homicide. We seldom uphold a death penalty involving husbands and wives or lovers, yet the emotion of that hate-love circumstance are somewhat akin to those which existed in this case.

Such a sentence reduction should aid in an understanding and at least a partial reconciliation of the wounds arising from discordant racial relations that have permeated our society. To a large extent, it was this disease of racial bias and discrimination that infect an otherwise honorable person and contributed to the perpetration of the most horrible of crimes. An approval of the death penalty would exacerbate rather than heal those wounds still affecting a large segment of our society.

This opinion reeks of a moral relativism and excuse-making that I find shocking and unacceptable. As much as I personally like Chief Justice Barkett, I find it disturbing that President Clinton would nominate someone to a judgeship who applied these views to judicial decisions.

In the October 11, 1992, Sunshine magazine, the following reactions to this Dougan dissent are quoted:

"How can they compare a cold-blooded, premeditated, torturous crime that's motivated by racial hate and equate that to the emotional circumstances in domestic murders?" asks prosecutor Chuck Morton, himself a black man, after rereading the Dougan case.

Adds Tallahassee prosecutor Ray Markey: "To say that this white victim was a sacrificial lamb and call it a social awareness case—that's scary."

The Dougan majority had this to say in response to the dissent that Justice Barkett joined:

We disagree with the dissent that this pitiless murder should be equated with the emotional circumstances often existent in homicides among spouses. While Dougan may have deluded himself into thinking murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as a justification.

Our review must be neutral and objective. This Court recently upheld the death penalty in the indiscriminate killing of two blacks by a white defendant. The circumstances of this case merit equal punishment. To hold that death is disproportionate here would lead to the conclusion that the person who put the bomb in the airplane that exploded over Lockerbie, Scotland, or any other terrorist killer should not be sentenced to death if the crimes were motivated by deepseated philosophical or religious justifications.

Let me explain why the general attitude and outlook adopted by Justice Barkett in that dissent concern me so much. The approach taken in that dissent is certainly applicable to others besides Dougan, including criminals of all races. Let me note that we have many cases in our country of racially motivated, disgusting, violent crimes against racial minorities. I do not view the perpetrators of such violence as worthy of a lesser penalty on account of their backgrounds or personal histories either.

If a person of any race, ethnic background, or social class considering violent or other crimes comes to believe that the judicial system views past mistreatment or discrimination against them as mitigating the seriousness of the crimes they commit or the penalties they face, I believe you undermine the principle of neutral justice and seriously reduce the deterrent value of the law. You create, frankly, an environment or atmosphere of permissiveness if these kinds of reasons can be used to justify lesser sentences. And I am not only talking about murder cases, such as the recent Colin Ferguson case on a Long Island commuter train. I mean other crimes as well, assault, robbery, carjackings.

Before Senators cast their votes on this nominee, they should read the opinions in this Dougan case, along with any other opinions they deem relevant. Mr. President, I ask unanimous consent that a copy of the Dougan case be included in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HATCH. In another case, *LeCroy v. State* [533 So.2d 750 (Fla. 1988)], the Florida Supreme Court, by a vote of six to one, affirmed a death sentence for two brutal first-degree murders by LeCroy, who was 17 years and 10 months old when he committed the murders. The court noted, among other things that the sentencing judge gave great weight to LeCroy's youth but found him mentally and emotionally mature. It also noted that Florida statutes clearly provided for some decades that 17-year-olds charged with capital crimes should be punished as adults. Construing U.S. Supreme Court precedent, it ruled that there was no constitutional bar to the imposition of the death penalty on those who were 17 at the time of the capital offense.

In her lone dissent, Justice Barkett concluded that the eighth amendment of the Federal Constitution prohibited Florida from executing those who were under 18 at the time of the crime. Reaching out to overturn this death sentence seems to be another clear instance of the nominee injecting her own policy preferences for the law. It is an unfortunate fact that 16- and 17-year-olds are committing the most vicious of adult crimes, including much-noted murders of tourists. If a State wishes to treat them as adults when they commit such crimes, then the substitution of a judge's personal views for the legislature's enactment is wrong. Not surprisingly, the U.S. Supreme Court later confirmed that it was the majority in LeCroy, rather than Justice Barkett, who had correctly read the Federal Constitution. (See Stanford versus Kentucky.)

I have many other concerns about this nominee—including, for example, her openness to pervasive quotas—and many other opinions of hers that trouble me. These concerns are outlined in some detail in three memoranda on Justice Barkett's cases that I would like to attach to my remarks. Mr. President, I request unanimous consent that these three memoranda be included in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. HATCH. Some may claim that those of us who have concerns over this nomination have focused on a relatively small number of cases and that this is not an appropriate way to evaluate the nominee. I have a three-part response to this concern.

First, a large number of cases of any appellate court are, frankly, routine, and I would expect that virtually all judges would rule unobjectionably in most cases before them.

Second, and more importantly, if a small number of cases gives rise to large concerns, it is appropriate to base a vote on those cases. For example, the flagrant misuse of the Federal equal protection clause and the Federal due process clause may have occurred in just a handful of cases. But these two constitutional provisions are far too powerful, far too open to picking and choosing among democratically enacted statutes based on the policy preferences of a judge, for me to be much comforted by unobjectionable decisions in numerous other, routine cases. A single dissent that would sweepingly invalidate obscenity laws, notwithstanding clear U.S. Supreme Court precedent to the contrary, is tremendously significant for what it says about a nominee's legal outlook in a very important area of law. And it gives rise to doubts about whether the nominee will properly apply that Supreme Court precedent, especially in light of other opinions that give cause for the same concern in other contexts. A series of search and seizure opinions, improperly hamstringing the police in significant ways—especially in the war on drugs—has an importance beyond the mere number of these cases. An opinion, like her partial dissent in Foster, that would paralyze enforcement of the death penalty counts more than scores of routine death penalty cases. Joinder in an opinion like the Dougan dissent speaks volumes about a nominee's outlook on crime and personal responsibility.

I could go on and on, but this leads me to my third point:

The concerns about this nominee arise from more than a handful of cases, and they arise across numerous areas of the law, not just the death penalty.

I therefore have concluded with regret that I cannot in good conscience support this nomination.

I will close by noting that all of the tough-on-crime rhetoric the President serves up means less than his actions, including selection of judges. Placing more police officers on the street will avail us little if judges hamstring them; construe our criminal laws in an unduly narrow fashion; or sentence the criminals they do convict with unwarranted sympathy for the criminal.

I urge my colleagues to review the cases and the hearing testimony for themselves. I believe they will reach the same conclusion.

EXHIBIT 1

[Supreme Court of Florida, Jan. 2, 1992, Rehearing Denied April 1, 1992]

JACOB JOHN DOUGAN, APPELLANT, VERSUS STATE OF FLORIDA, APPELLEE, NO. 71755

Defendant was convicted in the Circuit Court, Duval County, R. Hudson Olliff, J., of homicide. Defendant appealed. The Supreme Court, 343 So.2d 1266, affirmed, and later, 362 So.2d 657 vacated sentence and remanded for resentencing. On remand, defendant was

again sentenced to death, and the Supreme Court again affirmed, 398 So.2d 439. Subsequently, the Supreme Court, 470 So.2d 697, granted defendant new appeal, affirmed his conviction, vacated death sentence, and remanded for resentencing hearing. On remand, defendant was again sentenced to death. The Supreme Court held that: (1) direction to jury to follow mandate of death penalty statute was not error; (2) finding that aggravating circumstances existed sufficient to warrant imposition of death penalty was not error; (3) finding that mitigating evidence was insufficient to warrant sentence of life imprisonment, rather than death, was not error; and (4) death sentence was not disproportionate.

Affirmed.

Kogan, J., concurred in the results only.

McDonald, J., dissented and filed an opinion in which Shaw, C.J., and Barkett, J., joined.

1. Jury ⚖33(5.1)

Trial court has broad discretion in determining if peremptory challenges exercised by prosecutor are racially motivated. (Per Curiam opinion of three Justices with one Justice concurring in the result)

2. Criminal Law ⚖731

Jury may, in its discretion, decide to grant "jury pardon" in deciding defendant's guilt. (Per Curiam opinion of three Justices with one Justice concurring in the result.)

3. Criminal Law ⚖1206.1(2)

Death penalty statutes must restrain and guide sentencing discretion in order to insure that death penalty is not meted out arbitrarily and capriciously. (Per Curiam opinion of three Justices with one Justice concurring in the result.)

4. Criminal Law ⚖796, 1206.1(2)

Death penalty statute, and instructions and recommendation forms based upon it, sets out clear and objective standard for channeling jury's discretion. (Per Curiam opinion of three Justices with one Justice concurring in the result.) West's F.S.A. §921.141(2).

5. Criminal Law ⚖796

Direction to jury to follow mandate of death penalty statute in determining whether to render advisory sentence of death or live imprisonment was not error; statute, which provides that jury must take into consideration both aggravating and mitigating circumstances and recommend sentence of death if sufficient aggravating circumstances exist and are not outweighed by sufficient mitigating circumstances, sets out clear and objective standard, and allowing jury to disregard statutory directions and guidance would engender arbitrariness and capriciousness in jury recommendations. (Per Curiam opinion of three Justices with one Justice concurring in the result.) West's F.S.A. §921.141(2).

6. Criminal Law ⚖796

Standard jury instruction on nonstatutory mitigating evidence is not ambiguous and allows jurors to consider and weigh relevant mitigation evidence. (Per Curiam opinion of three Justices with one Justice concurring in the result.)

7. Criminal Law ⚖986.2(1)

Deciding whether particular mitigating circumstances have been established and, if established, weight to be afforded those circumstances lies with trial court, and trial court's decision will not be reversed because appellant reaches opposite conclusion. (Per Curiam opinion of three Justices with one Justice concurring in the result.)

8. Homicide ⚖357(3, 7, 11)

Aggravating factors sufficient to warrant imposition of death penalty had been established where defendant and his companions set out with intent to kill any white person they came upon, defendant and his companions kidnapped and murdered hitchhiker in heinous, atrocious and cruel manner, defendant's killing of victim was committed in cold, calculated, and premeditated manner, and defendant, subsequent to murder, made several tape recordings bragging about murder, which were mailed to victim's mother and to the media. (Per Curiam opinion of three Justices with one Justice concurring in the result.) West's F.S.A. §921.141(2).

9. Homicide ⚖357(3, 4, 7, 11)

In homicide prosecution, mitigating evidence, and sentence to death, rather than life imprisonment, was required where, although defendant participated in civil rights activities and was active in community, social, health, and welfare work, and codefendants who also participated in murder had received lesser sentences, evidence indicated that murder was committed during kidnapping, that murder was heinous, atrocious and cruel, and that defendant had murdered victim in cold, calculated, and premeditated manner. (Per Curiam opinion of three Justices with one Justice concurring in the result.) West's F.S.A. §921.141(2).

10. Homicide ⚖357(3, 7, 11)

In homicide prosecution, death was not disproportionate sentence where defendant and his companions set out to murder any white person they encountered, defendant and his companions kidnapped hitchhiker and murdered him in heinous, atrocious and cruel manner, defendant, as leader of group, directed execution of kidnapping and murder in cold, calculated, and premeditated manner, and defendant was not mentally deficient, even though defendant had suffered life of racial prejudice. (Per Curiam opinion of three Justices with one Justice concurring in the result.) West's F.S.A. §921.141(2).

James E. Ferguson, II of Ferguson, Stein, Watt, Wallas & Adkins, P.A., Charlotte, N.C., for appellant.

Robert A. Butterworth, Atty. Gen. and Gary L. Printy, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM

We again review a sentence of death imposed on Jacob John Dougan, Jr., for a homicide committed on June 17, 1974.[1] This Court affirmed two prior death sentences, but later vacated them and remanded for resentencing; the findings of guilt have been affirmed.[2]

The trial judge accurately set forth the facts of this murder in his sentencing order:

"The four defendants, Jacob John Dougan, Elwood Clark Barclay, Dwyne Crittendon, and Brad W. Evans, were part of a group that termed itself the "Black Liberation Army" (BLA), and whose apparent sole purpose was to indiscriminately kill white people and thus start a revolution and racial war.

"Dougan was the group's unquestioned leader and it was he who conceived the murderous plan. Apparently he did not have to break down a wall of morality to induce Barclay, Crittendon, and Evans to participate—but it was Dougan's plan—and he pushed it through to murderous finality. The act of Dougan in firing the fatal shots and his leadership were undoubtedly reasons the jury recommended death only for him.

"The trial testimony showed that on the evening of June 17, 1974, the four defendants and William Hearn (who testified for the State) all set out in a car armed with a pistol and a knife with the intent to kill a "devil"—the "devil" being any white person they came upon under such advantageous circumstances that they could murder him, her, or them.

"As they drove around Jacksonville, they made several stops and observed a number of white persons as possible victims, but decided the circumstances were not advantageous and that they might be seen and/or thwarted by witnesses. At one stop, Dougan wrote out a note—which was to be placed on the body of the victim ultimately chosen for death.

"Eventually, the five men drove towards Jacksonville Beach, where they picked up a white hitchhiker, 18-year-old Stephen Anthony Orlando. Against Orlando's will and over his protest, they drove him to an isolated trash dump, ordered him out of the car, stabbed him repeatedly, and threw him to the ground. As the 18-year-old youth writhed in pain and begged for his life, Dougan put his foot on Orlando's head and shot him twice—once in the chest and once in the ear—killing him instantly."

Subsequent to the murder, Dougan made several tape recordings bragging about the murder, which were mailed to the victim's mother as well as to the media. The following excerpt from one of the tapes aptly illustrates the content:

The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes.

The jury recommended the death sentence by a vote of nine to three. The trial court found three aggravating circumstances and no mitigating circumstances and sentenced Dougan to death. Dougan raises numerous points on appeal, only some of which merit discussion.[3]

[1] The prosecutor exercised several peremptory challenges against black prospective jurors, and Dougan now argues that he failed to give racially neutral explanations for those excusals. The trial court, however, has broad discretion in determining if peremptory challenges are racially motivated. *Reed* v. *State*, 560 So.2d 203 (Fla.), *cert. denied*,——U.S. ——, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). Our review of the record shows no abuse of discretion in the trial court's acceptance of the prosecutor's explanations of the peremptory challenges. Thus, we find no merit to Dougan's first point on appeal.

Subsection 921.141(2), Florida Statutes (1987), provides:

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The instructions and jury's recommendation form used in this case tracked the lan-

[1] Footnotes at end of article.

guage of the statute. During deliberations, however, the jury asked the court if it could recommend life imprisonment "in the event that the jury decides that sufficient aggravating circumstances exist to justify a death sentence and that sufficient mitigating circumstances do not exist." After conferring with the parties, the court told the jury to answer each question on the recommendation form "as you deem appropriate from the law and the evidence." Dougan now argues that the jury should be allowed to recommend life imprisonment regardless of its findings as to aggravating and mitigating circumstances. We disagree.

[2, 3] A jury may, in its discretion, decide to grant a "jury pardon" in deciding a defendant's guilt. *E.g., Amado* v. *State*, 585 So.2d 282 (Fla.1991). On the other hand, "where discretion is afforded . . . on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153, 188–89, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976). As pointed out by the United States Supreme Court, "there is no . . . constitutional requirement of unfettered sentencing discretion . . . and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde* v. *California*, 494 U.S. 370, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990) (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988)). To that end, death penalty statutes must restrain and guide the sentencing discretion to ensure "that the death penalty is not meted out arbitrarily and capriciously." *California* v. *Ramos*, 463 U.S. 992, 999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). *Cf. California* v. *Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) ("death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.").

[4] Under subsection 921.141(2) death may be the appropriate recommendation if, and only if, at least one statutory aggravating factor is established. After an aggravator has been established, any mitigating circumstances established by the evidence must be weighed against the aggravator(s). Florida's death penalty statute, and the instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion.

[5] Dougan's claim that the jury should be allowed to disregard the statutory directions and guidance would engender arbitrariness and capriciousness in jury recommendations. This is improper because [i]t is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitary. At the very least, nothing . . . prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned *moral* response," rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.

Saffle v. *Parks*, 494 U.S. 484, 110 S.Ct. 1257, 1262–63, 108 L.Ed.2d 415 (1990) (citations omitted). Thus, we find no error in the trial court's directing the jury to follow the mandate of subsection 921.141(2).

[6] We also find no merit to Dougan's other arguments about the instructions on mitigating evidence. The standard jury instruction on nonstatutory mitigating evidence is not ambiguous and allows jurors to consider and weigh relevant mitigating evidence. *Robinson* v. *State*, 574 So.2d 108 (Fla.), *cert. denied*, —— U.S. ——, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991). Dougan's contention that evidence of no prior criminal history can be rebutted only by convictions is incorrect. *Walton* v. *State*, 547 So.2d 622 (Fla. 1989), *cert. denied*, 493 U.S. 1036, S.Ct. 759, 107 L.Ed.2d 775 (1990).

The trial court found that three aggravators had been established—committed during a kidnapping; heinous, atrocious, or cruel; and committed in a cold, calculated, and premeditated manner. As nonstatutory mitigating evidence, the court specifically considered Dougan's civil rights activities, his community social, health, and welfare work, his family and personal background, his codefendants' lesser sentences, and the racial unrest at the time of this murder. The court held that, on this record, the evidence did not mitigate the penalty. Now, Dougan claims that the trial court erred both in finding that the aggravators had been established and in not finding that mitigators had been established. We disagree.

[7–9] Dougan states that the mitigating evidence related to four areas: 1) positive character traits; 2) contribution of racial oppression to the homicide; 3) potential for rehabilitation; and 4) inequality between his sentence and those of his codefendants and argues that the court erred in not finding that mitigators had been established. It is apparent from the judge's written findings that he considered these matters. Based on his evaluation of the evidence, however, he decided that the facts of this case did not support Dougan's contention that these matters constituted mitigating circumstances. *Rogers* v. *State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Deciding whether particular mitigating circumstances have been established and, if established, the weight afforded it lies with the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion. *Sireci* v. *State*, 587 So.2d 450 (Fla. 1991); *Stano* v. *State*, 460 So.2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). We find no reversible error regarding consideration of the evidence Dougan presented in his attempt to mitigate his sentence.

We likewise find no error in the trial court's holding three aggravators to have been established. The evidence fully supports finding this murder to have been committed during a kidnapping. The facts also set this murder apart from the norm of killing by illustrating the victim's suffering and Dougan's indifference to the victim's pleas and support finding the heinous, atrocious, or cruel aggravator. *Cf. Ponticeli* v. *State*, 593 So.2d 483 (Fla. 1991), and cases cited therein. Finally, the planning and execution of this murder demonstrate the heightened premeditation needed to find it had been committed in a cold, calculated, and premeditated manner. *Cf. Cruse* v. *State*, 588 So.2d 983 (Fla. 1991); *Rogers*. As discussed later, Dougan had no colorable claim of any moral or legal justification for this killing.

[10] Turning to Dougan's final point, we disagree that death is disproportionate in this case. There was no suggestion that Dougan is mentally deficient. To the contrary, he is intelligent and articulate and a leader among men. In fact, he recruited his codefendants while teaching them karate. He knew precisely what he was doing.

The dissent suggests that because Dougan has suffered a life of racial prejudice and that this murder was related to this, his sentence should be reduced to life. We do not minimize the injustices perpetrated by our society upon the black race. However, it must be noted that Dougan suffered less from the racial discrimination that occurred while he was growing up than many others of his race. Although abandoned by his mother, he was adopted at the age of two and one-half years by loving parents who provided him with a stable environment. Several witnesses said that he was well liked in high school, and he achieved the rank of Eagle Scout. There was no evidence that he suffered any racial discrimination not common to all of the black community.

We disagree with the dissent that this pitiless murder should be equated with the emotional circumstances often existent in homicides among spouses. While Dougan may have deluded himself into thinking this murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as a justification.

Our review must be neutral and objective. This Court recently upheld the death penalty in the indiscriminate killing of two blacks by a white defendant. Asay v. *State, 580 So.2d 610 (Fla.), cert. denied, —— U.S. ——, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991). The circumstances of this case merit equal punishment. To hold that death is disproportionate here would lead to the conclusion that the person who put the bomb in the airplane that exploded over Lockerbie, Scotland, or any other terrorist killer should not be sentenced to death if the crime were motivated by deep-seated philosophical or religious justifications.*

We have reviewed the other issues Dougan raises[4] and find no reversible error. Therefore, we affirm the sentence of death.

It is so ordered.

OVERTON, GRIMES and HARDING, JJ., concur.

KOGAN, J., concurs in result only.

McDONALD, J., dissents with an opinion, in which SHAW, C.J., and BARKETT, J., concur.

McDONALD, Justice, dissenting.

This case is unique; it is also a case of contrast. Dougan's counsel describes the events as a tragic aberration while others view them as frightening, inexcusable, and callous. In the entire bizarre series of events leading to and following the murder by "an unacceptable act of violence upon an unsuspecting white youth," Dougan was the leader and the planner.

Substantial evidence was presented at the last sentencing proceeding to assist the jury, the trial judge, and this Court in determining the appropriate sentence. The jury recommended death,[5] which the trial judge imposed. He found that the homicide was cold, calculated, and premeditated without any

pretense of moral justification, that in its planning it was especially cruel and atrocious and in its execution especially heinous, and that there was a kidnapping to facilitate the crime. The trial judge either rejected mitigating circumstances or found them to be so insignificant that they did not outweigh the aggravating ones.

It is not our function on review to reweigh the evidence, but, rather, to determine whether the trial judge's findings and conclusions are supported by the record. There is evidence to support the conclusions of the trial judge on the aggravating factors, even though in the mind of Dougan there was a pretense of moral justification for his acts. On the other hand, it is our responsibility to review the totality of the circumstances to determine whether death is appropriate when compared to other death sentences. *Adams* v. *State*, 412 So.2d 850 (Fla.), *cert. Denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *Brown* v. *Wainright*, 392 So.2d 1327 (Fla.), *cert. Denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). We have reduced death sentences to life imprisonment after reviewing both the aggravating and mitigating circumstances as shown in the record and concluding that death is not warranted. *E.g.*, *Halliwell* v. *State*, 323 So.2d 557 (Fla.1975).

Dougan's mother was white and his father, whom he never knew, was black. After Dougan's birth, his mother returned to an all white community where she abandoned her son. Although as much white as black, Dougan was rejected by his white relatives and the white population. Ultimately he was adopted by an understanding and compassionate family which also came from a biracial background. An intelligent person, Dougan was well educated and became a leader in the black community, but throughout his life was confronted with a perception of injustice in race relations. Within the black community he was respected. He taught karate and counseled black youths. When blacks were refused service at a lunch counter, he participated in a sit-down strike in defiance of a court order and was held in contempt of court therefor. This was the only blemish, if it can be called one, on his police record until this homicide.

The events of this difficult case occurred in tumultuous times. During the time of the late sixties and early seventies, there was great unrest throughout this country in race relations. Duval County, where this homicide occurred, did not escape and was also a place of such unrest. I mention these facts not to minimize what transpired, but, rather, to explain the environment in which the events took place and to evaluate Dougan's mind-set.

The trial judge was aware of everything I have stated. Indeed, he substantially recited these facts in his sentencing order. His final conclusion was that the grossness of the homicide clearly outweighed any other factor or combination thereof which may have lessened the ultimate penalty. The majority agrees, but I cannot.

We have said that the death penalty is reserved for those cases where the most aggravating and least mitigating circumstances exist.[6] We must determine whether Dougan belongs to that class of killers for whom the death penalty is the appropriate punishment. In resolving that issue and mindful of the factors set forth in section 921.141, Florida Statutes (1973), and established case law, we must carefully review what was done, how it was done, why it was done, and what kind of a person did it. How the public views these factors depends to a large extent upon the vantage point or perception of those looking at them. Understandably, in the eyes of the victim, or potential victims, the aggravating factors clearly outweigh the mitigating; in the eyes of the defendant, his friends, and most of those situated in the circumstances of Dougan, the death penalty is not warranted and is disproportionate to the majority of hate slayings, at least where the victim is black and the perpetrator is white.

Even though we are aware of and sensitive to these contrasting emotions, our review must be neutral and objective. This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His frustrations, his anger, and his obsession of injustice overcame reason.[7] The victim was a symbolic representative of the class causing the perceived injustices.

In comparing what kind of person Dougan is with other murderers in the scores of death cases that we have reviewed, I note that few of the killers approach having the socially redeeming values of Dougan. In comparison to Dougan's usual constructive practices, this homicide was indeed an aberration. He has made and, if allowed to live, can make meaningful contributions to society.

I ask again the question, is this one of the most aggravated and least mitigated cases reserved for the ultimate penalty of death? When considering the totality of the circumstances, but with compassion for and, hopefully, understanding from the family of the victim, I think not. A life sentence makes this penalty more proportionate to what has existed in emotional or other racially caused homicides.

Such a sentence reduction should aid in an understanding and at least a partial reconciliation of the wounds arising from discordant racial relations that have permeated our society. To a large extent, it was this disease of racial bias and discrimination that infected an otherwise honorable person and contributed to the perpetration of the most horrible of crimes. An approval of the death penalty would exacerbate rather than heal those wounds still affecting a large segment of our society.

Accordingly, I believe that the death penalty should be vacated and that Dougan's sentence should be reduced to life imprisonment without eligibility for parole for twenty-five years from the date of his incarceration for this murder.

SHAW, C.J. and BARKETT, J., concur.

FOOTNOTES

1. We have jurisdiction. Art. V, §3(b)(1), Fla. Const.

2. *Barclay* v. *State*, 343 So.2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978); *Barclay* v. *State*, 362 So.2d 657 (Fla. 1978); *Dougan* v. *State*, 398 So.2d 439 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193 (1981); *Dougan* v. *Wainwright*, 448 So.2d 1005 (Fla. 1984); *Dougan* v. *State*, 470 So.2d 697 (Fla. 1985), *cert. denied*, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986).

3. Several issues have been decided adversely to Dougan's contentions: 1) adequacy of instructions on aggravating factors, *e.g.*, *Sochor* v. *State*, 580 So.2d 595 (Fla.), *cert. granted*, — U.S. —, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991); 2) ex post facto application of the cold, calculated, and premeditated aggravating factor, *Combs* v. *State*, 403 So.2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982); and 3) diminution of the jurors' sense of responsibility, *e.g.*, *Grossman* v. *State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

4. The remaining issues are: 1) impermissible appeal to racial bias; 2) refusal to grant change of venue; 3) no probable cause for the arrest; and 4) abdication of prosecutorial function.

5. The State describes the jury's recommendation of death as basically saying "that Mother Theresa would get the death penalty for organizing a plan to go out and kidnap an innocent man, torture him and then twice shoot him in the head."

6. "Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." *State* v. *Dixon*, 283 So.2d 1, 7 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

7. To some extent, his emotions were parallel to that of a spouse disenchanted with marriage, full of discord and disharmony which, because of frustration or rejection, culminate in homicide. We seldom uphold a death penalty involving husbands and wives or lovers, yet the emotions of that hate-love circumstance are somewhat akin to those which existed in this case. *See, e.g.*, *Ross* v. *State*, 474 So.2d 1170 (Fla. 1985); *Blair* v. *State*, 406 So.2d 1103 (Fla. 1981). However, if pecuniary gain is a dominant motive in a spousal homicide, we have upheld it. *E.g.*, *Buenoano* v. *State*, 527 So.2d 194 (Fla. 1988); *Byrd* v. *State*, 481 So.2d 468 (Fla. 1985), *cert. denied*, 476 U.S. 1153, 106 S.Ct. 2261, 90

EXHIBIT 2

JUSTICE BARKETT AND CRIMINAL LAW

This memorandum presents opinions by Justice Barkett in the field of criminal law that raise concerns about her decisionmaking in this field. This memorandum generally does not address Justice Barkett's death penalty jurisprudence, which is the subject of a separate memorandum.[1]

FOURTH AMENDMENT

Justice Barkett has a pattern of unduly restrictive search-and-seizure decisions that would hamstring the police in their battle against drugs if her views had prevailed.

Bostick v. *State*, 554 So.2d 1153 (Fla. 1989), rev'd, 111 S. Ct. 2382 (1991), on remand, 593 So.2d 494 (Fla. 1992)

Two Broward County Sheriff's officers searching for persons with illegal drugs boarded a bus going from Miami to Atlanta during a stopover in Fort Lauderdale. They had badges and insignia and one had a zipper pouch containing a visible pistol. They asked to inspect the defendant's ticket and identification. The ticket and identification matched. "However, the two police officers persisted and explained their presence as narcotics agents on the lookout for illegal drugs. In pursuit of that aim, they then requested the defendant's consent to search his luggage." Cocaine was discovered in his luggage, and he was arrested and charged with cocaine trafficking.

The trial judge determined, as a question of fact, that the defendant consented to the search and had been informed of his right to refuse consent. His motion to suppress was denied, and he then pled guilty, reserving his right to appeal the denial of the suppression motion. An appellate court affirmed.

By a 4 to 3 vote, the Florida Supreme Court, in an opinion by Justice Barkett, ruled that the search violated Bostick's Fourth Amendment rights. Justice Barkett's opinion adopted a per se rule that the police practice of routinely boarding buses to question passengers violates the Fourth Amendment rights of the persons questioned, and that any consent to search is necessarily tainted by this violation. The three dissenters rejected this per se rule; relying on U.S.

Footnotes at end of article.

Supreme Court precedent, they instead stated that the validity of consent was to be determined from the totality of circumstances, and they would have upheld the conviction.

By a 6 to 3 vote, the U.S. Supreme Court, in an opinion by Justice O'Connor, reversed Justice Barkett's ruling. *Florida* v. *Bostick*, 111 S. Ct. 2382 (1991). The Court rejected creation of a per se rule, and instead ruled that the determination whether a particular encounter constitutes a seizure must be made in the light of all the circumstances. The Court found "dispositive" the same U.S. Supreme Court precedent that the dissenters to Justice Barkett's opinion had relied on.

On remand, the Florida Supreme Court, by a 4–3 vote, ruled the search lawful. Justice Barkett, in dissent, concluded that "Bostick's consent to search was invalid as a product of an unreasonable seizure under the specific facts of this case."

This case is noteworthy in several respects:

1. Justice Barkett initially adopted an overbroad per se rule that would clearly have had the effect (including in the specific case at hand) of vitiating freely given consent to search and of freeing criminals.

When asked why she did not apply the totality-of-the-circumstances test called for under U.S. Supreme Court precedent, Justice Barkett did not answer the question. Instead, she stated that "search and seizure I think is one of the most difficult areas of the law" [135:7–8] and suggested (despite clear per se language in her opinion) that it was the U.S. Supreme Court that had "interpreted" her opinion to create a per se rule [135:12–14].

2. Justice Barkett did not follow existing U.S. Supreme Court precedent that both the U.S. Supreme Court and three of her colleagues recognized as dispositive. (The fact that three Supreme Court Justices sided with Justice Barkett does not in any sense validate her position: they were not obligated to adhere to Supreme Court precedent; she was.)

3. Justice Barkett found occasion to compare the police search method at issue to methods used by "Nazi Germany, Soviet Russia, and Communist Cuba."[2]

At her hearing Justice Barkett denied that she had made any such comparison: "Senator, I would never compare the conduct of any of our police officers in this country to those of Nazi Germany or Soviet Russia, and I do not think there is any question but that had I made such a comparison, I would not have received the support of many of the rank-and-file officers in my State." [136:23–137:3]

Her opinion shows, however, that Justice Barkett clearly did make such a comparison. The fact that she was able to obtain the support of many police officers in her retention campaign is beside the point (as is the number of prosecutors and law enforcement personnel who opposed her retention).

Justice Barkett's opinion elicited a rebuke from Florida Attorney General Bob Butterworth (a Barkett supporter). A January 23, 1990, St. Petersburg Times article reported on a speech he gave to the Florida Sheriffs Association:

"'A pattern appears to be developing, a pattern that should be discouraging to every law-abiding Floridian,' Butterworth said. 'During the past two or three years, the Florida Supreme Court has begun to show itself substantially more liberal on crime issues than the U.S. Supreme Court.'

"Butterworth said the time may be approaching when Floridians should consider constitutional amendments so accused criminals in Florida don't have rights that aren't available in other states.

"Butterworth gave the sheriffs a blow-by-blow look at three Florida Supreme Court rulings that overturned the convictions of defendants in drug cases. Two of the three were written by Justice Rosemary Barkett; the third was an unsigned opinion approved by a 4–3 majority of the justices.

"One of the opinions, written by Barkett in November, compared the searches conducted by Broward County sheriff's deputies on commercial buses with the roving patrols and arbitrary searches conducted in Nazi Germany, Soviet Russia and communist Cuba.

"'It is an insult to the 36,000 police officers in our state to be likened to Nazis,' Butterworth said. 'I can assure you that the three Florida law enforcement officers who lost their lives in the line of duty last year were not Nazis. Such language is simply not appropriate, and we should expect more from the highest court in this state.'"

State v. *Riley*, 511 So.2d 282 (Fla. 1987), rev'd, 488 U.S. 445 (1989), on remand, 549 So.2d 673 (Fla. 1989)

From a helicopter hovering 400 feet above Riley's property, police detected marijuana growing in a greenhouse. They then obtained a warrant to search the greenhouse, and arrested Riley. The trial court granted Riley's motion to suppress, but the appellate court reversed.

In a unanimous opinion by Justice Barkett, the Florida Supreme Court ruled that the helicopter surveillance of Riley's greenhouse violated the Fourth Amendment. In determining that Riley had a reasonable expectation of privacy that was invaded by the helicopter surveillance, Justice Barkett sought to distinguish the U.S. Supreme Court's decision in *California* v. *Ciraolo*, 476 U.S. 207 (1986). In *Ciraolo*, the Court had held that surveillance from a fixed-wing aircraft flying at 1000 feet did not violate the Fourth Amendment. According to Justice Barkett, "We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in a roof." She further stated that "[s]urveillance by helicopter is particularly likely to unreasonably intrude upon private activities" and that "the details observed here from the vantage point of a circling and hovering helicopter could [not] just as easily have been discerned by any person casually flying over the area in a fixed- wing aircraft."

The U.S. Supreme Court reversed by a 5–4 vote. The plurality and concurring opinions found *Ciraolo* indistinguishable (as, apparently, did the authors of the dissenting opinions, since they had also dissented in *Ciraolo*). In the words of the plurality opinion: "there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to [Riley's] claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude." *Florida* v. *Riley*, 488 U.S. 445, 451–452 (1989).

On remand, the Florida Supreme Court remanded to the trial court for further evidentiary development. *Riley* v. *State*, 549 So.2d 673 (Fla. 1989). Justice Barkett's opinion for the court asserted, "All nine justices of the United States Supreme Court agreed that the record lacked evidentiary development of Riley's claimed expectation of privacy." A separate opinion took the position that Riley's Fourth Amendment claim should be decided adversely to him, without any further evidentiary development.

A couple aspects of this case warrant attention:

1. Justice Barkett's attempted distinction of *Ciraolo* is not faithful to the rationale of *Ciraolo*. The question is whether an expectation of privacy is reasonable. To determine this, one should look, under the principle of *Ciraolo*, to whether helicopter flights at an altitude of 400 feet are legal or common. To instead compare what can be seen at 400 feet from a helicopter to what can be seen at 1000 feet from a plane is to misapply *Ciraolo*.

2. Justice Barkett's suggestion on remand that all 9 U.S. Supreme Court Justices believed that additional evidentiary development was necessary is not accurate. Both the plurality and the concurring opinion clearly believed that the state of the record could be held against Riley. Ultimately, it is probably a question of state law whether further development should be permitted. But the fact that Justice Barkett mischaracterized what the U.S. Supreme Court had said in order to support her remand order is troublesome.

The White House briefing materials contain a similar distortion: "The United States Supreme Court narrowly reversed on the question of allocation of the burden of proof in showing a constitutionally unacceptable invasion of privacy." [Br. at 23]

This is the second of the three cases Florida Attorney General Butterworth cited in his January, 1990 speech as part of a pattern of liberal criminal decisions of the Florida Supreme Court.

Cross v. *State*, 560 So.2d 228 (Fla. 1990)

Three detectives spotted Cross in an Amtrak station. Based on her monitoring of them and her lack of luggage for the trip that she was taking, they asked if they could speak with her. She said yes. When the name on her ticket did not match the name on her driver's license, they asked for permission to search her tote bag but advised her that she did not have to consent. She consented. Inside the tote bag, the detectives found a hard baseball-shaped object wrapped in brown tape inside a woman's slip. Having seen cocaine packaged in this manner on "hundreds of occasions" in their combined 20 years of law enforcement experience, they then arrested Cross. The contents of the package proved to be cocaine. The trial judge granted Cross's motion to suppress, but the court of appeal (ultimately) reversed.

By a vote of 5–2, the Florida Supreme Court held that probable cause existed for the arrest. The majority opinion cited Florida precedent holding that the observation of an experienced policeman of circumstances associated with drugs could provide sufficient probable cause. Justice Barkett, dissenting, adopted the reasons stated by a dissenting judge below, who opined that the taped package did not create probable cause. That opinion did not acknowledge, much less credit, the experience of the police officers that cocaine is often packaged in that unusual manner.

The majority opinion appears clearly correct, and Justice Barkett's dissent appears to reflect an unwarranted reluctance to rely on the experience of police officers (despite precedent warranting such reliance).

At her hearing, Justice Barkett stated: "My concern in that case, Senator, was to the quality of the evidence presented. *The conclusion of a police officer that it was his experience that this is the way it was does not comport, in my judgment with evidence.* A sim-

ple conclusory statement does not comport with the requisite evidence." [146:22–147:2]

The police officers' sworn testimony that they had seen cocaine packaged that way "hundreds of times" was not "conclusory." Justice Barkett is simply refusing to credit the police officers' testimony.

Sarantopoulos v. *State* (Fla. Dec. 9, 1993)

Having received an anonymous tip that Sarantopoulos was growing marijuana in his backyard, two police officers went to his residence. They entered a neighbor's yard, and one of the officers, standing on his tiptoes, peered over a six-foot high wood fence and spotted marijuana plants. The police then obtained a search warrant and arrested Sarantopoulos. The trial court granted Sarantopoulos's motion to suppress, but the appellate court reversed.

The Florida Supreme Court, by a 5–2 vote, held that the search was lawful. It reasoned that Sarantopoulos lacked a reasonable expectation of privacy in his backyard, since it was protected from view only from those who remained on the ground and who were unable to see over the six-foot fence.

Justice Barkett, dissenting, stated, "I cannot believe that American citizens sitting on porches or in their backyards are not constitutionally protected when government agents, acting only on an anonymous tip, climb on ladders or stretch on tiptoes to peer over privacy fences."

The core legal issue under U.S. Supreme Court law—which, under Florida law, governs application of Florida's search-and-seizure provision—is whether Sarantopoulos had a reasonable expectation of privacy. Justice Barkett's opinion, unlike the majority's, does not meaningfully address this issue. Instead, it simply reflects a hostility towards what she regards as overly intrusive law enforcement.

At her hearing, Justice Barkett said that the fact that the search was based on an anonymous tip was "a factor which I found very significant here." [141:20] But this factor is irrelevant to the question whether Sarantopoulos had a reasonable expectation of privacy in the first place; it comes into play only if he did. She also claimed that "another element [was] whether or not the police were lawfully in the [neighbor's] yard." [143:1–2] Again, that question has nothing to do with the prior question whether Sarantopoulos had a reasonable expectation of privacy.

State v. *Wells*, 539 So.2d 464 (Fla. 1989), aff'd (but criticized), 495 U.S. 1 (1990)

Wells was stopped for speeding. When the officer smelled alcohol on his breath, he arrested Wells for DUI. The officer then noticed cash lying on the car's floorboard, and asked Wells to open the car's trunk. Wells agreed to do so, but neither he nor the officer was able to work the trunk's lock. The officer then informed Wells that the car would be impounded. Wells gave permission for the trunk to be forced open and examined. The car was then transported to a facility, and a locked suitcase was found in the trunk. The suitcase was forced open and was found to contain a large amount of marijuana.

By a vote of 6–1, the Florida Supreme Court, in an opinion originally signed by Justice Barkett but later issued per curiam, held that the search of the suitcase violated Wells' Fourth Amendment rights. Among other things, the court held that the search of the luggage was not permissible under an inventory search theory. Justice Barkett construed a U.S. Supreme Court precedent, *Colorado* v. *Bertine*, 479 U.S. 367 (1987), as "mandat[ing] either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion." Since the police did not have a policy specifically requiring the opening of closed containers, the search of the suitcase was held to violate *Bertine*.

The U.S. Supreme Court, while affirming the judgment of the Florida Supreme Court, criticized Justice Barkett's reading of *Bertine*: "in forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical 'all or nothing' fashion. * * * A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. * * * The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment." *Florida* v. *Wells*, 495 U.S. 1, 4 (1990). (This opinion was joined by five Justices; two other Justices also expressly disagreed with Justice Barkett's reading; and no Justice defended it.)

This case illustrates Justice Barkett's inclination to create mechanical rules that severely limit police discretion and that turn the Fourth Amendment into a straitjacket.

The White House briefing materials note that the U.S. Supreme Court upheld the decision in *Wells*, but fail to mention the fact that the Court criticized Justice Barkett's reasoning. [Br. at 22] The White House cites *Wells* and *Riley* in support of the claim that Justice Barkett is "vigilant in upholding the rights of individuals *while respecting the critical need for swift and fair law enforcement.*" [Br. at 22]

PROSECUTORIAL DISCRETION

Foster v. *State*, No. 76,639 (Fla. Apr. 1, 1993)

(This case is addressed more fully in the death penalty memorandum. Its implications for quotas are discussed in the constitutional law memorandum. This memorandum will address its implications for criminal law generally.)

Foster, two young women, and another man, Lanier, drove to a deserted area where one of the women was to make some money by having sex with Lanier. As Lanier, who was very drunk, was disrobing, Foster suddenly began hitting him and then held a knife to Lanier's throat and sliced his neck. Foster and the women then dragged the still-breathing Lanier into the bushes and covered him with branches and leaves. Foster then took a knife and cut Lanier's spine. Foster and the women then split the money found in Lanier's wallet.

Foster was convicted of murder and sentenced to death in 1975. On resentencing, the trial court, finding three aggravating circumstances, again imposed the death penalty. The Florida Supreme Court, by a 4–3 vote, rejected Foster's claim that his death sentence was a product of racial discrimination against black victims. (The court did remand for resentencing on other grounds.)

Justice Barkett, dissenting from this racial discrimination ruling, would not accept the majority's determination that Foster's statistical evidence purporting to show that white-victim defendants in Bay County were more likely to get the death penalty than black-victim defendants failed to establish a constitutional violation. (Lanier, evidently, was white; Foster's race does not appear to be stated, but newspaper accounts report that he is also white.) Justice Barkett would have relied on the Florida Constitution's Equal Protection Clause to reach a result rejected by the U.S. Supreme Court in *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), under the federal Equal Protection Clause. In *McCleskey*, the Court ruled that a capital defendant claiming a violation of the federal Equal Protection Clause must show the existence of purposeful discrimination and a discriminatory effect on him. According to Justice Barkett:

(1) The *McCleskey* standard fails to address the problem of "unconscious discrimination."

(2) Statistical evidence of discriminatory impact in capital sentencing that "cannot be traced to blatant or overt discrimination" should establish a violation of Florida's Equal Protection Clause.

(3) This statistical evidence should be construed broadly to include not only analysis of the disposition of first-degree murder cases, "but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and *the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes.*" (Emphasis in italic.)

(4) The defendant should have the initial burden of showing the strong likelihood that discrimination influenced the decision to seek the death penalty. "Such discrimination conceivably could be based on the race of the victim or on the race of the defendant." Once the initial burden has been met, "the burden then shifts to the State to show that the practices in question are not racially motivated."

In addition to the fact (addressed elsewhere) that Justice Barkett's proposed standard would paralyze implementation of the death penalty, there is no reason why the standard should be limited to death penalty cases; her theory would apply equally to robbery, rape, and all other crimes. There is likewise no reason why Justice Barkett's standard would be limited to cases with white victims; a killer of a male victim, for example, could try to show that sexism pervades the prosecutor's office. As Justice Powell said in rejecting this standard in *McCleskey*: "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." *McCleskey*, 481 U.S., at 314–315.

Justice Barkett's proposed standard would effectively impose rigid judicial oversight of prosecutorial decisionmaking.

STATUTORY CONSTRUCTION

State v. *Bivona*, 460 So.2d 469 (Fla. DCA 1984), rev'd, 496 So.2d 130 (Fla. 1986)

Bivona was arrested for shoplifting in California in June 1983. He was also charged by information with a previous bank robbery in Florida. On Florida's request, the State of California held him in jail pending his extradition to Florida, which occurred in August 1983. In January 1984, Bivona filed a motion claiming that the state had failed to bring him to trial within the 180 days required under Florida law. Bivona's motion counted from the time he was first arrested in California, not from the time he was returned to Florida. The trial judge granted the motion and dismissed the charges against him.

Judge Barkett, then on the district court of appeals, wrote the opinion for a divided (2–1) court affirming the dismissal of charges. The State relied on a section of the law in question, Rule 3.191(b)(1), that read:

"A person who is . . . incarcerated in a jail or correctional institution outside the juris-

diction of this State, or who is charged by indictment or information issued or filed under the laws of this State, is not entitled to the benefit of [the 180-day time period] until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of this fact is filed with the court and served upon the prosecutor."

Noting that Bivona had cooperated in being extradited, Judge Barkett ruled that this section "must be interpreted to apply [only] when a defendant is incarcerated in jails outside the jurisdiction of this state *on charges pending in the other state*." (Emphasis in italic.)

The Florida Supreme Court unanimously reversed. It found the language of Rule 3.191(b)(1) to be "without ambiguity" and criticized Judge Barkett for "put[ting] a gloss on it, unwarranted by anything that appears in rule 3.191."

Gayman v. *State*, 616 So.2d 17 (Fla. 1993)

Facts: Gayman was found guilty of petit theft. Because he had two prior convictions for petit theft, the trial court adjudicated him guilty of felony petit theft. It also classified him as a habitual violent felony offender (under the state habitual offender statute) based on a prior felony conviction for aggravated battery. His sentence was enhanced accordingly. A second petitioner, Williams, faced a similar situation; his prior felonies were for burglary and cocaine selling.

By a 6–1 vote, the Florida Supreme Court rejected Gayman's and Williams' claim that enhancement of a sentence based on a prior conviction constituted double jeopardy.

Justice Barkett, dissenting in part, opined that it was not sufficiently clear that the Florida legislature specifically intended the double enhancement (as a felony and as a habitual felony offender).

Justice Barkett fails to demonstrate that the ordinary operation of the Florida statutes would provide anything other than double enhancement. In asserting that the Florida legislature's intent was not sufficiently clear, Justice Barkett is implicitly repudiating the basic principle that legislative intent is reflected in the plain meaning of statutes. This repudiation is a license for judicial activism.

ANTI-LOITERING LAWS

A separate memorandum discusses the serious defects arising from Justice Barkett's opinions that held unconstitutional laws prohibiting loitering for the purpose of prostitution (Wyche) and for the purpose of drug-related activity (E.L. and Holliday). The injury that these rulings inflict on the ability of communities to police themselves bears attention.

OBSCENITY

Justice Barkett's dubiously reasoned position that laws against obscenity violate due process (in Stall) is discussed in a separate memorandum. Justice Barkett uses the hypothetical danger of misapplication of obscenity laws to strike down provisions that safeguard the civilized life of the community.

FOOTNOTES

[1]The case summaries in this memorandum are not intended to discourage the reader from reviewing the opinions themselves. Indeed, we encourage such review. In addition, the transcript of Justice Barkett's hearing is available for review in the minority office of the Senate Judiciary Committee.

[2]The passage in fuller context reads: "The intrusion upon privacy rights caused by the Broward County police is too great for a democracy to sustain. Without doubt the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. Nazi Germany, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means."

JUSTICE BARKETT AND THE DEATH PENALTY

This memorandum presents Justice Barkett's approach to the death penalty. It is based on a review of over 300 death penalty cases in which Justice Barkett has participated, including every case in which she has written an opinion.[1]

Part I provides basic background on Florida's death penalty statute and on applicable laws governing death penalty proceedings. Part II examines a broad array of cases that illustrate how Justice Barkett applies these laws. Part III analyzes the oft-made (but little-scrutinized) claim by Justice Barkett's supporters that she has voted to enforce the death penalty in more than 200 cases.

At the outset, it should be made clear that Justice Barkett has voted to uphold the death penalty on a substantial number of occasions. This only begins the inquiry, however, for one would expect that a judge in a state with a death penalty and many murders committed within it will have many occasions when he or she must uphold the death penalty. But if a nominee exhibits a clear tendency to strain for unconvincing escapes from imposing the death penalty in cases where it is appropriate, that raises a concern about a judge's fidelity to the law, no matter how many times the nominee has upheld the death penalty in other cases. Moreover, as explained below, if Justice Barkett's view in the Foster case had prevailed, it is likely that the death penalty would be effectively repealed.

I. FLORIDA DEATH PENALTY LAW

Under Florida law, Fla. Stat. §921.141, a defendant who has been found guilty of capital murder then faces a separate sentencing proceeding to determine whether he should be sentenced to death or to life imprisonment. Florida is a so-called "weighing" state: the death sentence is warranted if the statutory "aggravating circumstances" outweigh the "mitigating circumstances." Florida law expressly limits the aggravating circumstances (or "aggravators") to the following list of 11:

(a) the defendant was under sentence of imprisonment when he committed the capital crime;

(b) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence;

(c) the defendant knowingly created a great risk of death to many persons;

(d) the capital crime was committed while the defendant was committing, or attempting to commit, or fleeing from committing or attempting to commit, a robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy, or bombing;

(e) the capital crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) the capital crime was committed for pecuniary gain;

(g) the capital crime was committed to disrupt or hinder the lawful exercise of any government function;

(h) the capital crime was especially heinous, atrocious, or cruel;

(i) the capital crime was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification;

(j) the victim was a law enforcement officer engaged in the performance of his official duties; and

(k) the victim was an elected or appointed public official engaged in the performance of his official duties, and the motive was related to the victim's official capacity.

Fla. Stat. §921.141(5). Florida law lists the following seven mitigating circumstances (or "mitigators"):

(a) the defendant has no significant history of prior criminal activity;

(b) the capital crime was committed under the influence of extreme mental or emotional disturbance;

(c) the victim participated in the defendant's conduct or consented to the act;

(d) the defendant was merely an accomplice whose participation was relatively minor;

(e) the defendant acted under extreme duress or the substantial domination of another person;

(f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(g) the age of the defendant at the time of the crime. Fla. Stat. §921.141(6). In addition, under current federal constitutional rulings, any other mitigating evidence is also to be weighed.

The capital sentencing proceeding has two stages. In the first stage, the jury renders an advisory sentence based on whether sufficient aggravators exist and on whether the mitigators outweigh the aggravators. Fla. Stat. §921.141(2). In the second stage, the trial judge makes these same determinations. Id. §921.141(3). But under Florida case law, *Tedder* v. *State*, 322 So.2d 908 (Fla. 1975), a jury's recommendation of a life sentence is to be given great weight and can be overturned by the trial judge only if no reasonable person could conclude that death was not warranted.

A death sentence is entitled to automatic review by the Florida Supreme Court. Fla. Stat. §921.141(4). *Under a 1972 provision, anyone who is punished by "life" imprisonment may be eligible for parole after 25 years. Fla.* Stat. §775.082.

Once death-sentenced murderers have lost their direct appeal, they may pursue postconviction relief under state law (as well as federal postconviction relief in the federal courts). Two basic avenues may be pursued. First, a convicted capital murderer may file a motion for postconviction relief in the trial court under Florida Rule of Criminal Procedure 3.850. Denial of this motion is then reviewable by the Florida Supreme Court. Second, a convicted capital murderer may file an original action in the Florida Supreme Court for a writ of habeas corpus under Article V, section 3(b)(9) of the Florida Constitution.

II. JUSTICE BARKETT'S DEATH PENALTY JURISPRUDENCE

This Part will present cases that illustrate various of the means employed by Justice Barkett to vote against the death penalty. These include: (A) construing aggravators exceedingly narrowly; (B) construing mitigators very broadly; (C) creating categorical exclusions from death penalty eligibility; (D) subjecting the death penalty to racial statistical analyses that would paralyze its imple-

[1]The case summaries in this memorandum are not intended to discourage the reader from reviewing the opinions themselves. Indeed, we encourage such review. In addition, the transcript of Justice Barkett's hearing is available for review in the minority office of the Senate Judiciary Committee.

mentation; (E) developing procedural anomalies; and (F) failing to provide any reason at all.

A. Construing Aggravators Exceedingly Narrowly

When aggravators are given artificially narrow constructions, those who would face the death penalty escape it. Many of Justice Barkett's opinions illustrate a tendency to read the aggravators far too narrowly. For example:

Cruse v. *State*, 588 So.2d 983 (Fla. 1991)—

Cruse loaded an assault rifle, a shotgun, a pistol, and 180 rounds of ammunition into his car and began driving to a shopping center. On the way, he fired the shotgun at a 14-year-old boy who was playing basketball and then at the boy's parents and brother. At the shopping center, he shot and killed two shoppers who were leaving a grocery store and wounded a third. He then shot at various other customers, killing one and wounding another.

When Cruse heard sirens approaching, he got back in his car and drove across the street to another shopping center. When Officer Ronald Grogan approached in his police car, Cruse turned, inserted a new clip into his rifle, and fired eight times into the car, killing Officer Grogan.

Officer Gerald Johnson then entered the parking lot and exited his car. Cruse shot at Officer Johnson and wounded him in the leg. Cruse then headed into the parking lot, searching for the wounded officer. When he found him, he shot Officer Johnson several more times, killing him. As a rescue team attempted to move Officer Grogan's car out of Cruse's line of fire, Cruse fired several shots at them and told them to "get away from the cop. I want the cop to die."

Cruse then entered a store and began firing at people trying to escape. He killed one more and wounded many others. He then found two women hiding in the women's restroom and held one as a hostage for several hours. In all, Cruse killed six people and wounded 10 others.

Cruse was found guilty of, among other things, six counts of first-degree murder. The jury recommended death on all six counts. The trial court imposed the death penalty for the murders of Officers Grogan and Johnson.

By a vote of 6 to 1, the Florida Supreme Court affirmed the convictions and the death sentences. In her lone dissent, Justice Barkett voted to reverse the convictions. In addition, she stated that the death sentence was in any event inappropriate for Cruse.

The basis upon which Justice Barkett would have reversed the convictions was the prosecution's alleged failure to make available to Cruse so-called "Brady evidence." Under the U.S. Supreme Court's ruling in *Brady* [v. *Maryland*, 373 U.S. 83 (1963)], the prosecution must provide the accused, upon the accused's request, material evidence in its possession that is favorable to the accused. As she stated in your opinion, "Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"

Justice Barkett would have ruled that evidence of the names of two mental health experts whom the prosecution had contacted should have been turned over to Cruse, and that the failure to turn over this evidence required reversal of the convictions and remand for a new trial. In her opinion, she rejected the majority's opinion that this evidence was merely cumulative. In addition, she stated, "I do not believe that the fact that other experts at trial expressed the same opinion [regarding Cruse's mental state] is a pertinent part of the inquiry of whether or not a Brady violation occurred."

In the second part of her dissent, Justice Barkett concluded that even if the convictions were to be upheld, the death sentence was in any event not warranted and should be reduced to life. She would have found that the cold-calculated-and-premeditated aggravator was not met. In particular, she concluded that Cruse had the "pretense of moral or legal justification" for his killings because "the evidence shows that Cruse was acting in response to his delusions that people were trying to harm him."

Justice Barkett also took the position that even apart from what she saw as a pretense of moral or legal justification, there was insufficient evidence of heightened premeditation in the murders of the two police officers.

Analysis: Justice Barkett's dissent appears riddled with flaws:

(1) Her position that it is not pertinent under *Brady* whether evidence is merely cumulative conflicts with the principle that evidence is material for purposes of *Brady* only if there is a reasonable probability that disclosure of the evidence would have led to a different result at trial. Merely cumulative evidence is by definition not material. So it appears that the basis upon which she voted to reverse Cruse's convictions is clearly invalid.

(2) As the majority pointed out, the consensus of the experts who testified was that Cruse's delusions related to a fear that others were trying to turn him into a homosexual, not to a fear of any physical harm. It therefore appears that Justice Barkett's finding of a pretense of moral or legal justification rests on a serious mischaracterization of the evidence.

(3) What additional facts would be needed to persuade Justice Barkett that Cruse had heightened premeditation? The evidence of heightened premeditation was clear: With respect to the murder of Officer Grogan, the evidence shows that when Officer Grogan approached in his police car, Cruse turned, inserted a new clip into his rifle, and fired eight times into the car, killing Officer Grogan. In addition, as a rescue team attempted to move Officer Grogan's car out of Cruse's line of fire, Cruse fired several shots at them and told them to "get away from the cop. I want the cop to die." With respect to the murder of Officer Johnson, the evidence shows that when Officer Johnson entered the parking lot and exited his car, Cruse shot at him and wounded him in the leg. Cruse then headed into the parking lot, searching for the wounded officer. When he found him, he shot Officer Johnson several more times, killing him.

McKinney v. *State*, 579 So.2d 80 (Fla. 1991)—

A driver of a rental car was shot to death in Miami when he stopped to ask directions. McKinney was convicted of first-degree murder (as well as armed robbery, armed kidnapping, and other offenses) and was sentenced to death.

The Florida Supreme Court, in an opinion by Justice Barkett, voted 6–1 to reverse the death sentence on the ground that the aggravators had not been sufficiently proven. E.g.: "While it is true that the victim was shot multiple times, a murder is not heinous, atrocious, or cruel without additional facts to raise the shooting to the shocking level required by this factor."

Analysis: Justice Barkett's determination that the only evidence supporting the "heinous, atrocious, or cruel" aggravator was the number of gunshot wounds ignores the special vulnerabilities that visitors face and the shocking nature of the crime. Indeed, there has been a recent rash of killings of tourists driving rental cars in Miami.

Porter v. *State*, 564 So.2d 1060 (Fla. 1990)—

Porter was the live-in lover of Evelyn Williams from 1985 until July 1986. Their relationship was marked by several violent incidents, including Porter's threat to kill Williams and her daughter. Porter left town for a few months, during which time Williams established a relationship with another man, Burrows.

When Porter returned to town in October 1986, Williams refused to see him. Porter contacted Williams' mother, who told him that Williams did not wish to see him anymore. A few days before the murders, Williams asked to borrow a gun from a friend; the friend declined, but the gun was later missing. During each of the two days before the murder, Porter was seen driving past Williams' home. Then, after drinking heavily, Porter invaded Williams' home, shot her to death, threatened to kill her daughter, and then killed Burrows in a scuffle. Porter pled guilty to the two murders, and was sentenced to death for the murder of Williams.

By a vote of 5 to 2, the Florida Supreme Court affirmed the death sentence. Barkett, dissenting (with Kogan), opined that in "almost every other case where a death sentence arose from a lover's quarrel or domestic dispute," the court had reversed the death sentence, and that the heightened premeditation aggravator had therefore not been met. She also concluded that Porter's heavy drinking rendered the death sentence disproportionate.

Analysis: The evidence of heightened premeditation was clear; indeed, Porter basically stalked his victim for two days. Justice Barkett's characterization of the murder as arising from "lover's quarrel or domestic dispute" appears inaccurate and beside the point.

Hodges v. *State*, 595 So.2d 929 (Fla. 1992)—

On the morning that Hodges was scheduled for a hearing on a charge of indecent exposure, the 20-year-old clerk who had complained of the indecent exposure was found shot to death next to her car in her store's parking lot. Hodges was convicted and sentenced to death. By a 6–1 vote, the Florida Supreme Court affirmed the death sentence.

Justice Barkett, dissenting, would have ruled that the two aggravators—witness elimination and cold, calculated, and premeditated killing—were "so intertwined here that they should be considered as one" and that, so considered, they did not strongly outweigh the mitigators.

Analysis: The two aggravators are "intertwined" only in the sense that aggravators arising out of the same murderous episode are inevitably intertwined. Witness elimination clearly involves a concern that the "cold, calculated, and premeditated" aggravator does not.

At her hearing, Justice Barkett claimed that her dissent followed (though it did not cite) a case called *Cherry* v. *State*, 544 So.2d 184 (Fla. 1989). In *Cherry*, the court, in an opinion by Justice Barkett, held that the aggravating factor of murder for pecuniary gain improperly duplicated the aggravating factor of murder during the commission of a burglary where the sole purpose of the burglary was pecuniary gain. The central precedent cited in *Cherry*, however, permits aggravators to be counted separately where they relate to "separate analytical con-

cepts," *Provence* v. *State*, 337 So.2d 783 (Fla. 1976), which would certainly appear to be the case in *Hodges*. Justice Barkett's dissent surely does not provide an adequate basis for her conclusion.

The White House briefing materials brazenly and falsely describe Justice Barkett's dissent in *Hodges* as "another excellent example of Justice Barkett's strict adherence to established Florida and U.S. death penalty jurisprudence." [Br. at 25]

B. Construing mitigators too expansively

In many cases, Justice Barkett appears to give undue weight to alleged mitigating evidence or to rely on such evidence to contend that the death penalty is somehow disproportionate to the crime. She appears too ready to adopt the view that society, or racism, or deprivation, mitigates responsibility for the horrific crime that the defendant has committed.

Dougan v. *State*, 595 So.2d 1 (Fla. 1992)—

Dougan was the leader of a group that called itself the Black Liberation Army and that, according to the trial judge, had as its "apparent sole purpose . . . to indiscriminately kill white people and thus start a revolution and a race war." He conceived a plan for his group to kill a "devil"—i.e., "any white person they came upon under such advantageous circumstances that they could murder him." One evening in 1974, he and four other members of his group, armed with a pistol and a knife, picked up a white hitchhiker, drove him to a trash dump, stabbed him repeatedly, and threw him to the ground. "As the 18-year-old youth writhed in pain and begged for his life, Dougan put his foot on [the youth's] head and shot him twice—once in the chest and once in the ear." Later, Dougan made several tape recordings bragging about the murder, and mailed them to the victim's mother as well as to the media. The following tape excerpt was said to be illustrative of the tapes' content: "He [the youth] was stabbed in the back, in the chest and the stomach, *ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes.*" (Emphasis in italics.)

Dougan's case had been considered on the merits five previous times by the Florida Supreme Court. The court had affirmed two prior sentences but later vacated them and remanded for resentencing. On the most recent resentencing, the jury recommended death, and the trial court found three aggravating circumstances and no mitigating circumstances and therefore sentenced Dougan to death.

The Florida Supreme Court affirmed the death sentence. The plurality rejected a slew of arguments, including the claim that the death penalty was disproportionate under the circumstances.

Justice Barkett *joined* a dissent written by Justice McDonald that would have held the death penalty disproportionate. The dissent made the following remarkable observations:

1. "This case is not simply a homicide case, *it is also a social awareness case*. Wrongly, but *rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection*. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation *matured* to taking the illogical and drastic action of murder. His frustrations, his anger, and his *obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices.*" 595 So.2d, at 7–8 (emphasis in italics).

2. "To some extent, [Dougan's] emotions were parallel to that of a spouse disenchanted with marriage, full of discord and disharmony which, because of frustration or rejection, culminate in homicide. We seldom uphold a death penalty involving husbands and wives or lovers, yet the emotion of that hate-love circumstance are somewhat akin to those which existed in this case." 595 So.2d at 7 n. 7.

3. "*The events of this difficult case occurred in tumultuous times.* During the time of the late sixties and early seventies, there was great unrest throughout this country in race relations. . . . I mention these facts not to minimize what transpired, but, rather, to *explain the environment* in which the events took place and to *evaluate Dougan's mindset.*" 595 So.2d, at 7 (emphasis in italics).

4. "There is evidence to support the conclusions of the trial judge on the aggravating factors, *even though in the mind of Dougan there was a pretense of moral justification for his acts.*" 595 So.2d, at 6 (emphasis in italics).

5. "Understandably, in the eyes of the victim, or potential victims, the aggravating factors clearly outweigh the mitigating; *in the eyes of the defendant, his friends, and most of those situated in the circumstances of Dougan, the death penalty is not warranted* and is disproportionate to the majority of hate slayings, at least where the victim is black and the perpetrator is white. Even though we are aware of and sensitive to these contrasting emotions, our review must be neutral and objective." 595 So.2d, at 7 (emphasis in italics). (The dissent proceeds directly from here to the first passage quoted above.)

6. "In comparing what kind of person Dougan is with other murderers in the scores of death cases that we have reviewed, I note that few of the killers approach having the socially redeeming values of *Dougan*." 595 So.2d, at 8 (emphasis added). (This apparently refers to the dissent's earlier observations that Dougan was "intelligent," "well educated," "a leader in the black community," "taught karate and counseled black youths," and once "participated in a sit-down strike in defiance of a court order" at a lunch counter that refused service to blacks.)

Analysis: (1) The October 11, 1992, *Sunshine* magazine quoted two prosecutors' responses to the dissent that Justice Barkett joined:

"'How can they compare a cold-blooded, premeditated, torturous crime that's motivated by racial hate and equate that to the emotional circumstances in domestic murders?' asks prosecutor Chuck Morton, himself a black man, after rereading the Dougan case.

"Adds Tallahassee prosecutor Ray Markey: 'To say that this white victim was a sacrificial lamb and call it a social awareness case—that's scary.'"

In the words of the plurality, "While Dougan may have deluded himself into thinking this murder justified, there are certain rules by which every civilized society must live. . . . To hold that death is disproportionate here would lead to the conclusion that the person who put the bomb in the airplane that exploded over Lockerbie, Scotland, or any other terrorist killer should not be sentenced to death if the crime were motivated by deep- seated philosophical or religious justifications." 595 So.2d, at 6.

(2) While Justice Barkett did not author the dissent, she signed onto it in its entirety. The fact that she would join such an opinion speaks volumes, especially since she regularly writes separately when she has a different view.

At her hearing, Justice Barkett stated that she had taken a position in *Dougan* at one point that was "different from the one I took ultimately in the dissent. It is a very close case. I cannot quarrel with a conclusion which would have found it the other way. I cannot quarrel with the majority in that case." [74:10–15]

This comment is troubling in several respects: (1) What happens in conference is confidential. To engage in self-serving, selective disclosure of confidences is to abuse the process. (2) If Justice Barkett found the dissent so persuasive that she abandoned a previously held position, that exacerbates the concerns that *Dougan* raises. (3) How can she say that she cannot quarrel with the majority? She did quarrel with it: she dissented. If she is saying that she cannot express a reasoned argument against the majority, then on what basis did she dissent?

Wickham v. *State*, 593 So.2d 191 (Fla. 1991)—

In March 1986, Wickham was driving with family and friends when they discovered that they were low on money and gas. Wickham decided to obtain money through robbery. His group tricked a passing motorist into stopping to examine their car, and Wickham then pointed a gun at him. When the motorist attempted to return to his car, Wickham shot him in the back, and then again in the chest. When the victim pled for his life, Wickham shot him twice in the head. Wickham then rummaged through the victim's pockets and found $4.05. At trial, the jury convicted and recommended death. The trial judge found six aggravating circumstances and no mitigating circumstances, and sentenced Wickham to death.

The Florida Supreme Court affirmed the death sentence by a 4 to 2 vote, with Justices Barkett and McDonald dissenting. According to Justice Barkett's dissent, "If the death penalty is supposed to be reserved for the most heinous of crimes and the most culpable of murderers, Jerry Wickham does not seem to qualify. . . . At the time he committed this senseless murder, Jerry Wickham was a forty-year-old mentally deficient, socially maladjusted individual who had been institutionalized for almost his entire life." 593 So.2d, at 194–195.

Analysis: (1) *Wickham* and *Dougan*, read together, are especially revealing: Wickham was "mentally deficient"; Dougan was "intelligent" and "well educated." Wickham was "socially maladjusted"; Dougan was socially well-adjusted ("a leader in the black community," "respected," etc.). Remarkably, the very qualities that Justice Barkett sees as somehow sparing Wickham from the death penalty, when converted into their opposites, manage to spare Dougan. (2) Justice Barkett's tendency to find unjustified mitigation for violent crime is reflected in the following passage from her dissent: "In early 1966, at the age of twenty-two, [Wickham] was permanently discharged from the mental hospital with no directions, no support, and no medication. *Not surprisingly*, seven months later he attempted to rob a cab driver, shooting him in the process." 593 So.2d, at 195 (emphasis in italics).

Hayes v. *State*, 581 So.2d 121 (Fla. 1991)—

In the course of an evening consuming beer, cocaine, and marijuana, Hayes and two friends conspired to rob and shoot a taxicab driver in order to raise money to buy more cocaine. Hayes volunteered to do the shooting. Carrying out their plan, they borrowed a gun, then called a taxicab. During the ride, Hayes shot the driver in the back of his neck and killed him. Hayes then took forty dollars from the driver's pockets.

Hayes was convicted of first-degree murder. Mitigating evidence at the penalty phase showed that he had a neglectful, abusive, and deprived upbringing, that he had borderline intelligence, and that he had been consuming drugs and alcohol heavily for three years. The jury recommended death, and the trial court, finding that the aggravators—(1) "cold, calculated, and premeditated" and (2) for pecuniary gain and in the course of an armed robbery—clearly outweighed the mitigating evidence, sentenced Hayes to death.

The Florida Supreme Court, by a 5–2 vote, affirmed the death sentence. Justice Barkett, dissenting with Kogan, would have found that the mitigating evidence "renders the death sentence disproportional punishment in this case."

Hudson v. *State*, 538 So.2d 829 (Fla. 1989)—

Two months after breaking up with his girlfriend, Hudson, armed with a knife, broke into her home during the night. The former girlfriend, having received threats from him, was spending the night elsewhere. But her roommate was at home. When she began screaming at him to leave, Hudson stabbed her to death, put her body in the trunk of her car, and dumped her in a drainage ditch in a tomato field. Hudson was convicted and sentenced to death.

By a 6 to 1 vote, the Florida Supreme Court affirmed the death sentence. Justice Barkett, dissenting from the sentence, relied on the trial court's finding that Hudson "was apparently surprised by the victim during [his] burglarizing of [her] home" in support of her view that the death penalty was disproportionate to the offense.

Analysis: Anyone who breaks into a home that he believes to be occupied should expect to encounter an occupant. It is odd that this would somehow become mitigating.

King v. *State*, 514 So.2d 354 (Fla. 1987)—

While an inmate at a work-release correctional facility, King killed an elderly woman and robbed and burned her home. He was convicted of first-degree murder and was sentenced to death. The conviction and death sentence were affirmed on direct appeal, and his state postconviction petition was denied. On federal habeas, he obtained resentencing, but was again sentenced to death.

By a 5–2 vote, the Florida Supreme Court affirmed the resentence of death. In dissent, Justice Barkett (with Kogan) opined that a capital defendant must be permitted to offer at the penalty phase so-called "lingering doubt evidence"—evidence that the defendant might not actually be guilty of the crime of which he has just been convicted beyond a reasonable doubt.

Analysis: (1) If the defendant has been found guilty beyond a reasonable doubt, it follows that any evidence suggestive of his innocence either has already been rejected by the jury and the judge as not credible or would give rise, at most, only to *un*reasonable or whimsical doubts. Why should evidence that does not give rise to even a reasonable doubt of guilt and that is not otherwise relevant in any respect be required to be admitted in the sentencing phase as evidence of possible innocence? (2) In *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), the U.S. Supreme Court rejected Justice Barkett's position and made clear that it was not consistent with pre-existing precedent. In the words of Justice O'Connor's concurring opinion, "Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt." 487 U.S. at 187.

C. Categorical exclusions

Justice Barkett would define certain categories of criminals—e.g., minors and those who are mentally retarded—as ineligible for the death penalty, and then would construe those categories very expansively. For example:

LeCroy v. *State*, 533 So.2d 750 (Fla. 1988)—

By a vote of six to one, the court affirmed a death sentence for two brutal first-degree murders by LeCroy, who was 17 years and ten months when he committed the murders. The court noted, among other things, that the sentencing judge gave great weight to LeCroy's youth but found him mentally and emotionally mature, and that Florida statutes specify that a child of any age charged with a capital crime "shall be tried and handled in every respect as if he were an adult." Construing U.S. Supreme Court precedent, it ruled that there was no constitutional bar to the imposition of the death penalty on those who were 17 at the time of the capital offense.

Justice Barkett, dissenting from the death sentence, stated her belief that both the Eighth Amendment of the federal Constitution and a state constitutional provision prohibit imposition of the death penalty on one who was a "child" at the time of the crime. "[T]he death penalty is totally inappropriate when applied to persons who, because of their youth, have not fully developed the ability to judge or consider the consequences of their behavior." 533 So.2d, at 758. "I am confident that most reasonable persons would agree that the death penalty cannot be imposed on children below a certain age. . . . In my view, that line should be drawn where the law otherwise distinguishes 'minors' from adults'"—i.e., at 18 years. *Id.*, at 759. "I cannot agree, as the majority implicitly holds, that one whose maturity is deemed legally insufficient in other respects should be considered mature enough to be executed in the electric chair." *Id.*

Analysis:

(1) It would seem that the existing statutes permitting execution of those under 18, both in Florida and in other states, are a more reliable barometer than Justice Barkett's own subjective sense of what "most reasonable persons would agree."

(2) As the majority emphasizes, the trial court found that LeCroy's ability to judge the consequences of his behavior was fully developed. It would seem that a State should be able to choose to structure its determination on an individualistic basis, rather than be required to engage in the fiction that the moment a person turns 18, he acquires a maturity that did not previously exist.

(3) The relevant question is not whether someone is "mature enough to be executed" (whatever that means); rather, it is whether someone is mature enough to recognize the wrong of brutally killing a human being. It is plainly commonsensical, and surely constitutional, for the people of a State to conclude that the degree of maturity that is necessary to exercise sound judgment regarding voting or marrying may be somewhat greater than the degree necessary to recognize the wrong of brutally killing a human being.

(4) In *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), the U.S. Supreme Court later rejected her position, as it held that there was no constitutional bar to execution of 16- and 17-year-olds.

In her written response to written questions submitted after her hearing, Justice Barkett stated that "there was no express evidence that the Florida Legislature had considered the question" of executing minors and that her *LeCroy* dissent "concluded that the Legislature had not sufficiently expressed its intent to execute juveniles to satisfy the Eighth Amendment."

This response is unsatisfactory in at least two respects: (1) It fails to acknowledge, much less rebut, the majority's detailed demonstration that the Florida legislature had, for the past 35 years, "repeatedly reiterated the historical rule that juveniles charged with capital crimes will be handled in every respect as adults" and that "it cannot be seriously argued that the legislature has not consciously decided that persons seventeen years of age may be punished as adults" and be subject to the death penalty. (2) Justice Barkett's written response gives the misimpression that her dissent rests on the ground that the legislature was not sufficiently clear. In fact, her dissent is in no way so limited.

Hall v. *State*, 614 So.2d 473 (Fla. 1993)—

In 1978, Hall and another man decided to steal a car to use in a robbery. They spotted a 7-month-pregnant woman in a grocery store parking lot. Hall forced her into her car and drove her to a secluded area, where Hall and the other man raped, beat and shot her to death. Hall was convicted and sentenced to death.

By a 5–2 vote, the Florida Supreme Court affirmed Hall's death sentence. The court ruled in part that the trial record supported the trial judge's conclusion that the mitigators alleged by Hall either had not been established or were entitled to little weight.

Justice Barkett, dissenting (with Kogan), did not agree that the mitigators had not been established. Instead, she would have found that Hall was mentally retarded and would have held that execution of the mentally retarded is cruel and unusual punishment under the Florida Constitution.

Analysis: (1) Justice Barkett relies on provisions of the Florida Constitution to reach anti-death penalty results well beyond what identical provisions of the federal Constitution have been construed to require. (2) Justice Barkett is often more ready than her colleagues to credit the defendant's mitigating evidence.

D. Racial quotas

Foster v. *State*, No. 76,639 (Fla. Apr. 1, 1993)—

Foster, two young women, and another man, Lanier, drove to a deserted area where one of the women was to make some money by having sex with Lanier. As Lanier, who was very drunk, was disrobing, Foster suddenly began hitting him and then held a knife to Lanier's throat and sliced his neck. Foster and the women then dragged the still-breathing Lanier into the bushes and covered him with branches and leaves. Foster then took a knife and cut Lanier's spine. Foster and the women then split the money found in Lanier's wallet.

Foster was convicted of murder and sentenced to death in 1975. On resentencing, the trial court, finding three aggravating circumstances, again imposed the death penalty. The Florida Supreme Court, by a 4–3 vote, rejected Foster's claim that his death sentence was a product of racial discrimination against black victims. (The court did remand for resentencing on other grounds.)

Justice Barkett, dissenting on this point, would not accept the majority's determination that Foster's statistical evidence purporting to show that white-victim defendants in Bay County were more likely to get

the death penalty than black-victim defendants failed to establish a constitutional violation. (Lanier, evidently, was white; Foster, according to newspaper accounts, was also white.) Justice Barkett would have relied on the Florida Constitution's Equal Protection Clause to reach a result rejected by the U.S. Supreme Court in *McCleskey* v. *Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the Court ruled that a capital defendant claiming a violation of the federal Equal Protection Clause must show the existence of purposeful discrimination and a discriminatory effect on him. According to Justice Barkett:

(1) The *McCleskey* standard fails to address the problem of "unconscious discrimination."

(2) "Statistical evidence" of discriminatory *impact* in capital sentencing that "cannot be traced to blatant or overt discrimination" should establish a violation of Florida's Equal Protection Clause.

(3) This "'statistical' evidence" should be construed broadly to include not only analysis of the disposition of first-degree murder cases, "but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and *the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes*." (Emphasis in italics.)

(4) The defendant should have the initial burden of showing the strong likelihood that discrimination influenced the decision to seek the death penalty. "Such discrimination conceivably could be based on the race of the victim or on the race of the defendant." Once the initial burden has been met, "the burden then shifts to the State to show that the practices in question are not racially motivated."

Analysis: (1) Justice Barkett's proposed standard would paralyze implementation of the death penalty. (This point should be kept in mind in considering her supporters' claims about her death penalty record.) Under her standard, in every capital case involving either a non-white defendant or a white victim, the capital defendant would be able to investigate the general practices of the state attorney's office. A more burdensome inquiry could hardly be imagined. (2) Indeed, as Justice Powell pointed out in his opinion in *McCleskey*, there is no reason why Justice Barkett's standard would be limited to cases with non-white defendants or white victims. A white defendant should be able to try to show that racial discrimination against whites infected the State's decision. A Catholic defendant could try to show that state attorneys told jokes about the priest and the rabbi, etc. A female defendant (or a killer of a male victim) could try to show that sexism pervades the prosecutor's office. (3) There is also no reason why Justice Barkett's standard should be limited to death penalty cases; her theory would apply equally to robbery, rape, and all other crimes. In Justice Powell's words, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." *McCleskey*, 481 U.S., at 314-315.

At her hearing, Justice Barkett stated: "I have not suggested in this opinion or anywhere else that statistics is the be-all and end-all of the inquiry. I do believe that perhaps statistics may be something that could be submitted to be included in an offer of proof on this question, but I clearly do not believe that some questions can be resolved only by use of statistical analysis." [157:1-6] How this statement can be reconciled with her opinion—in which she clearly embraces reliance on statistical evidence—is not clear.

E. Developing procedural anomalies

Justice Barkett has taken a number of positions that would place substantial procedural roadblocks in the way of the death penalty; she has taken other positions that give capital defendants special advantages. In the postconviction context, where the doctrine of procedural bar enables courts to dispose of claims that were not timely raised or that were otherwise not properly preserved, Justice Barkett has frequently declined to apply the law of procedural bar as uniformly as the court and has instead created ad hoc exceptions. See, e.g., *Bundy* v. *State*, 538 So.2d 445 (Fla. 1989); *Francis* v. *Dugger*, 581 So.2d 583 (Fla. 1991); *Foster* v. *State*, 518 So.2d 901 (Fla. 1987); *Johnson* v. *State*, 536 So.2d 1009 (Fla. 1988); *Jones* v. *State*, 533 So.2d 290 (Fla. 1988).

Grossman v. *State*, 525 So.2d 833 (Fla. 1988)—

Grossman, on probation following a prison term, drove with a companion to a wooded area to shoot a handgun that he had recently stolen from a home. When a wildlife officer came upon them, she took possession of Grossman's shotgun. Grossman pleaded with her not to turn him in, since he would be returned to prison for violating the terms of his probation. When the officer refused his plea, Grossman beat her with a large flashlight. After she fired her weapon in self-defense, Grossman wrestled the weapon away and shot her in the back of the head, killing her. Grossman was convicted and sentenced to death.

By a 6–1 vote, the Florida Supreme Court affirmed the death sentence. Justice Barkett, dissenting, would have continued to adhere to a view concededly rejected by numerous Florida Supreme Court decisions: namely, that the U.S. Supreme Court decision in *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985)—which held that it was error for a prosecutor to urge a capital sentencing jury not to view itself as determining whether the defendant would die, since the correctness of the death sentence would be reviewed on appeal—applied under Florida's scheme to the advisory jury as well as to the sentencing judge. Justice Barkett also would not have permitted written findings in support of sentencing to be made three months after sentencing, where no specific oral findings were made at the time that the death sentence was imposed. She therefore would have required that the sentence be reduced to life.

Burr v. *State*, 518 So.2d 903 (Fla. 1987)—

Burr was convicted of first-degree murder and robbery with a firearm and was sentenced to death. His conviction and sentence were affirmed on direct appeal. Following the signing of a death warrant, he filed a motion for postconviction relief, which was denied by the trial court.

By a 6–1 vote, the Florida Supreme Court affirmed the denial of relief. Justice Barkett, dissenting, would have decided for Burr based on an issue that she conceded had not even been raised by Burr—the consideration of collateral crimes evidence during the sentencing phase.

At her hearing, Justice Barkett claimed that "the United States Supreme Court reversed Burr on the same basis upon which I dissented." [95:9–10] This claim is not accurate: The U.S. Supreme Court GVRed—granted, vacated and remanded—Burr in light of its intervening decision in a case called Johnson v. *Mississippi, where the Court ruled that a death sentence could not be based on a conviction that is no longer valid. Justice Barkett's dissent is not so limited and would appear to challenge the admission of any collateral crimes evidence.*

Stewart v. *State*, 549 So.2d 171 (Fla. 1989)—

Stewart, hitchhiking, was a passenger in a car. When the driver stopped to drop him off, Stewart, struck her on the head with the butt of a gun, shot her and shot and killed her companion, forced them from the car, and drove away. The trial judge, following the jury's recommendation, sentenced Stewart to death. The trial court made detailed oral findings that were dictated into the record; it failed, however, to provide separate written findings in support of its sentence.

The Florida Supreme Court, by a 5–2 vote, remanded so that the trial court could provide written findings, as required by an intervening decision construing state law. Justice Barkett, dissenting with Kogan, would have overruled a recent precedent by holding that a trial court's failure to provide contemporaneous written findings required that a death sentence be converted to life.

Hamblen v. *Dugger*, 546 So.2d 1039 (Fla. 1989)—

Hamblen pled guilty to first-degree murder and waived his right to have a jury consider whether he should be executed. At his sentencing hearing, he presented no mitigating evidence and agreed with the prosecutor's recommendation of death. The trial judge sentenced him to death. The sentence was affirmed on direct appeal (with Justice Barkett dissenting).

The capital collateral representative then filed a habeas petition on Hamblen's behalf. The Florida Supreme Court, by a vote of 6–1, denied the petition. Justice Barkett, dissenting, opined that a court that "gives a defendant the 'right' to waive presentation of mitigating factors" cannot perform its required function of weighing the aggravating and mitigating factors.

Woods v. *State*, 531 So.2d 79 (Fla. 1988)—

Justice Barkett opined that she would require a court to entertain any claim made by a condemned prisoner, no matter how dilatory the assertion of the claim: "a court must consider any point raised by a condemned prisoner as a reason why the death penalty should not be imposed."

Analysis: One of the problems in state administration of the death penalty has been the deliberate 11th-hour filing of claims by death row inmates whose sentences have been validly imposed and upheld both on direct and collateral appeal. At some reasonable point, a State must be permitted to prevent abuse of its criminal justice system. Otherwise, a death row inmate could delay his execution forever simply by filing another claim. Justice Barkett's dissent does not seem at all attentive to the legitimate interests of the State.

F. Providing no reason

In some 50 or so cases, Justice Barkett has provided no explanation—or at times only a conclusory statement—when she has refused simply to join the opinion of the court. In a number of these cases, she actually voted to grant relief. For example:

White v. *State*, 559 So.2d 1097 (Fla. 1990)—

White was convicted of robbing a small grocery store and shooting to death a customer. His conviction and death sentence were affirmed on appeal. In a petition for postconviction relief, White claimed, among other things, that his counsel had been ineffective. The Florida Supreme Court, by a vote of 5 to 2, affirmed the denial of his petition; in particular, the court addressed in de-

tail, and found meritless, White's claim of ineffective assistance of counsel.

Justice Barkett's entire dissent reads as follows: "I cannot concur in the majority's conclusion that appellant received a fair trial with effective assistance of counsel."

When asked at her hearing why she did not provide any further explanation for overturning a sentence recommended by the jury, imposed by the trial judge, affirmed on direct appeal, and upheld by the trial judge and the majority of her colleagues in postconviction proceedings, Justice Barkett stated: "[O]ur court is an extremely busy court. . . . I would have liked to have had, I am sure, the opportunity to have expanded here. But time constraints sometimes preclude you from amplifying any further than that." [87:8–17] This response does not adequately explain why Justice Barkett failed even to identify the primary reasons that led her to dissent.

Engle v. *Florida*, 510 So.2d 881 (Fla. 1987)—

Engle and another man robbed $67 from a convenience store, took the female cashier from the store, and strangled and stabbed her to death. A four-inch laceration, likely caused by a fist, was found in the interior of the victim's vagina. The jury recommended life, but the trial judge, finding four aggravators and no mitigators, sentenced Engle to death.

By a vote of 6–1, the Florida Supreme Court ruled that there was not a reasonable basis for the jury's life recommendation and affirmed the death sentence. Justice Barkett, in a two-sentence dissent, stated, without any further explanation, her belief that "the record adequately supports the jury's recommendation of life imprisonment."

See also *Kennedy* v. *Wainwright*, 483 So.2d 424 (Fla. 1986); *Thomas* v. *Wainwright*, 486 So.2d 574 (Fla. 1986); *Thomas* v. *Wainwright*, 486 So.2d 577 (Fla. 1986); *Funchess* v. *State*, 487 So.2d 295 (Fla. 1986); *Spaziano* v. *State*, 570 So.2d 289 (Fla. 1990); *Swafford* v. *Dugger*, 569 So.2d 1264 (Fla. 1990); *Turner* v. *State*, 530 So.2d 45 (Fla. 1987).

G. Other noteworthy cases Torres-Arboledo v. *State*, 524 So.2d 403 (Fla. 1988)—

Torres-Arboledo, an illegal alien from Colombia, rounded up two other men and went to a car body shop, where they attempted to take the owner's gold chain. When the owner resisted, Torres-Arboledo shot him to death. The jury recommended a life sentence, but the trial judge, finding two aggravators and no mitigators, overrode it and imposed death.

The Florida Supreme Court, by a 6–1 vote, affirmed the death sentence. Justice Barkett, in a three-sentence dissent, opined that the standard for overriding a jury life recommendation had not been met: "In light of the totality of the circumstances presented, it simply cannot be said that no reasonable jury could have recommended life."

In a number of other cases, Justice Barkett has been far more ready than her colleagues to find that a trial judge's override of a jury's life recommendation was not warranted. See, e.g., *Routly* v. *Wainwright*, 590 So.2d 397 (Fla. 1991); *Johnson* v. *State*, 536 So.2d 1009 (Fla. 1988).

Swafford v. *State*, 533 So.2d 270 (Fla. 1988)

Facts: The body of a female gas station attendant was found in a wooded area by a dirt road some miles from where she worked. She had been sexually battered and shot nine times, twice in the head. Swafford was convicted and sentenced to death. At his trial, evidence included testimony regarding an incident that took place two months after the murder: A witness, Johnson, testified that Swafford suggested that they "go get some women" and proceeded to say that "we'll do anything we want to her" and then "I'll shoot her in the head twice." In response to Johnson's question whether that wouldn't bother him, Swafford said that "it does for a while, you know, you just get used to it." Swafford then proceeded to target a victim and draw his gun, but Johnson ended the enterprise.

By a vote of 5–2, the Florida Supreme Court affirmed the death sentence. The majority held that Johnson's "other acts" evidence was admissible under the state counterpart to Rule 404(2) of the Federal Rules of Evidence as evidence of the meaning of Swafford's statement that "you just get used to it," and that this statement, in context, was relevant to establishing his crime two months before.

Justice Barkett, dissenting, asserted that the "only relevance of this testimony was to establish the criminal propensity and character of Swafford" and that it should therefore have been excluded under Rule 404(2).

Analysis: The majority's analysis is sound. While one might question how probative Swafford's statement was, Justice Barkett is wrong when she says its "only relevance" is to propensity and character.

III. CLAIMS REGARDING JUSTICE BARKETT'S PRO-DEATH PENALTY VOTES

Justice Barkett's supporters have routinely claimed that she has voted to enforce the death penalty in more than 200 cases. The White House has made available a list of 275 supposed such cases. Here is a statement made by Senator Hatch at Justice Barkett's hearing in response to these statistical claims:

"The White House and other supporters of Justice Barkett's nomination have made statistical claims regarding her death penalty record in an effort to rebut charges that she is soft on the death penalty. In support of these statistical claims, the White House has produced a lengthy table of her death penalty rulings. I would like to respond to these claims.

"Let me say at the outset that I believe that judges should be judged by the quality of their legal reasoning and by their fidelity to the law. A careful examination of particular opinions is the best measure of these qualities. It is precisely such an examination that I have conducted and hope to continue at this hearing. By contrast, because the craft of judging lies foremost in reasoning and not in results, broad statistical compilations of results often obscure far more than they clarify.

"Unfortunately, the White House's statistics suffer from more than the usual deficiencies. In the first place, the table of death penalty cases contains pervasive doublecounting. In particular, where (as routinely happens) the Florida supreme court addresses both a Rule 3.850 postconviction petition and a habeas petition in the same case, the White House counts this case as two cases. This doublecounting has the predictable effect of padding the list of cases in which the White House says that Justice Barkett has voted to enforce the death penalty. Even more remarkably, it has the perverse effect of including in this list of supposed votes to enforce the death penalty numerous cases in which Justice Barkett has in fact voted to grant relief to the petitioning convicted murderer.

"Second, the White House's list of cases in which Justice Barkett "has voted with the majority" is not limited to those cases in which she has been part of the majority. It includes, for example, a substantial number of cases in which she has refused to join the majority and has instead either dissented in part or relied on grounds significantly more adverse to the death penalty. It also includes a very large number of cases in which, without offering any explanation, she has merely concurred in the result.

"Thus, for example, a case such as *Foster* v. *State*—in which Justice Barkett, in partial dissent, takes a position that would virtually paralyze implementation of the death penalty—is listed by the White House as a case in which Justice Barkett and the majority are in agreement. [Case 91 on White House list] Other examples abound. For example, *Melendez* v. *State* [498 So.2d 1258 (Fla. 1986)]—#576 on the White House list—is identified as a case in which the majority and Justice Barkett were in agreement even though Justice Barkett, writing separately in that case, opined that she "believe[d] that the evidence does not rise to the level of certainty that should support imposition of the death penalty." Likewise, if one starts running through the list chronologically, in three of the very first cases [*Kennedy* v. *Wainwright*, 483 So.2d 424 (Fla. 1986) (#625 on list), *Adams* v. *Wainwright*, 484 So.2d 1211 (Fla. 1986) (#624 on list), and *Thomas* v. *Wainwright*, 486 So.2d 574 (Fla. 1986) (#621 on list)], Justice Barkett voted to stay the petitioner's execution and the majority did not, but the White House fails to identify this disagreement.

"A third basic flaw in the White House's statistical analysis is that the White House fails to compile, much less analyze, case histories of death-sentenced convicts. It is not at all unusual for a death-sentenced murderer to make numerous passes through the court system. This point is shown by the fact that the set of 275 occasions on which the White House says that Justice Barkett has voted to enforce the death penalty comprises well under 200 separate convicted murderers, many or most of whom will make yet more passes at escaping their sentence. In this regard, it bears mention that of these fewer than 200 murderers, Justice Barkett would have granted relief, even beyond what her court had elsewhere granted or what her positions in yet other cases might dictate, to some one-third of them somewhere along the line.

"The White House also makes certain statistical claims regarding Justice Barkett's death penalty cases and the U.S. Supreme Court. It states, for example, that "on eight occasions since 1987, Justice Barkett has voted to impose the death penalty in cases where a majority of the U.S. Supreme Court has voted to vacate that punishment." But the White House fails to make clear a number of relevant matters:

"'In none of these cases did the U.S. Supreme Court rule that the death sentence could not be imposed or even that resentencing was necessary.

"'Indeed, only one of these eight cases was even argued before the Court. In the other seven cases, the Supreme Court used the procedural device known as a GVR —grant, vacate, and remand—to enable the state supreme court to consider the possible impact of an intervening U.S. Supreme Court decision. The Supreme Court liberally uses this GVR device, especially in death cases. A GVR does not necessarily reflect disagreement with the state supreme court's ruling; rather, it simply gives the state supreme court the opportunity to consider the possible application of the intervening U.S. Supreme Court decision.

"'In the one case that was decided on the merits, the Supreme Court remanded so that the Florida supreme court could make the basis for its ruling more clear. In seven of these eight cases, the death penalty was imposed on remand from the Supreme Court. In short, these cases provide no meaningful basis for a comparison of how Justice Barkett stands in relation to the Supreme Court on the death penalty.'

"The White House also asserts that 'in four cases in which Justice Barkett dissented from a death sentence and that case was reviewed by the U.S. Supreme Court, the Court agreed with Justice Barkett, and not the Florida Supreme Court majority.' In fact, however, the Supreme Court did not agree with the legal position that Justice Barkett took in any of the four cases. Instead, it relied on other grounds in summarily vacating the death sentence in one of the cases and issuing GVRs in light of intervening precedent in the other three.

"For these same reasons, the White House's claim regarding the 'nine instances in which the U.S. Supreme Court has reached a conclusion different from Rosemary Barkett's in a capital case' misses the mark. I must also note that the White House fails to consider those cases from other jurisdictions in which the U.S. Supreme Court has rejected the very positions taken by Justice Barkett in other cases.

"The White House also fails to observe a striking fact that the statistics do show. Even if one accepts the White House's loaded numbers, these numbers show that there have been more than one hundred occasions on which Justice Barkett has dissented from the Florida Supreme Court's decision to enforce the death penalty. By contrast, there has not been one occasion—not one single occasion—on which Justice Barkett has been in dissent from a majority decision to grant relief to a convicted capital murderer. This drastic disparity makes all the more telling the White House's refusal to compile—or at least to disclose—data on any cases in which even a single justice has taken a position that is more favorable to the convicted murderer than Justice Barkett's.

"I emphasize again that I believe that a careful reading of a judge's cases is the best means of examining that judge's record."

JUSTICE BARKETT'S CONSTITUTIONAL DECISIONMAKING

Florida chief justice Rosemary Barkett, who has been nominated for a seat on the Eleventh Circuit Court of Appeals, has a record of constitutional decisionmaking that merits careful scrutiny. This memorandum will discuss some opinions of hers that raise serious concerns. In particular, it will focus on her constitutional decisionmaking in such areas as equal protection, substantive due process, the First Amendment, obscenity, and quotas.

As one would expect with any judge who has decided a large number of cases, Justice Barkett has, of course, written a number of opinions that are unobjectionable or soundly reasoned. But the broader question is whether her judicial record reflects a strong commitment to apply the Constitution and laws as written, or whether it instead reflects an inclination to impose her own policy outlook in the guise of judging.[1]

[1] The case summaries in this memorandum are not intended to discourage the reader from reviewing the opinions themselves. Indeed, we encourage such review. In addition, the transcript of Justice Barkett's hearing is available for review in the minority office of the Senate Judiciary Committee.

I. RATIONAL-BASIS REVIEW UNDER THE EQUAL PROTECTION CLAUSE

The U.S. Supreme Court's equal protection jurisprudence is well-settled: "this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2331–2332 (1992).

How this rational-basis test is to be applied is also well-settled. As Justice Blackmun reiterated in NORDLINGER (for an 8-Justice majority), "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992) (citations omitted).

The Supreme Court, citing cases going back to 1970, reiterated these basic principles earlier this year in another 8-Justice opinion (written by Justice Thomas):

"[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is a reasonably conceivable state of facts that could provide a rational basis for the classification. . . . *This standard of review is a paradigm of judicial restraint.* . . . On rational basis-review, a classification in a statute . . . comes to us bearing a strong presumption of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"

FCC v. *Beach Communications*, 113 S. Ct. 2096, 2101–2102 (1993) (emphasis in italic) (case citations omitted).

Examination of Justice Barkett's cases calls into serious question whether she has been faithful to this "paradigm of judicial restraint." In the case of *University of Miami* v. *Echarte*, 618 So. 2d 189 (Fla. 1993), the Florida Supreme Court ruled that a statutory monetary cap on noneconomic damages in medical malpractice cases did not violate Equal Protection. The court cited at length the legislature's concern over the "financial crisis in the medical liability insurance industry"; its concern that providers of medical care would "be unable to purchase liability insurance, and many injured persons [would] therefore be unable to recover damages"; its recognition that the size and increasing frequency of very large claims was a cause of these problems; and its concern that damages for noneconomic losses were being awarded arbitrarily and irrationally.

In dissent, Justice Barkett (among other grounds) her view that the statutory caps "violate[ ] . . . the equal protection clauses of the Florida and *United States Constitutions*." (Emphasis in italic.) In her view, the caps could not survive even minimal rational-basis scrutiny. Her application of the rational basis test appears to differ fundamentally from the settled test set forth by the U.S. Supreme Court. Justice Barkett does not cite any federal precedent. Instead, she makes a startling assertion: "I fail to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry." In fact, the rational relationship between the means and the goal appears self-evident and was clearly spelled out by the legislature. Thus, it is difficult to avoid the conclusion that instead of giving the legislation the "strong presumption of validity" to which it is entitled, Justice Barkett is substituting her own policy preferences in place of those of the legislature through the purported application of rational-basis review.

The point here is not the merits, or lack of merits, of caps on noneconomic damages as a matter of policy. The point, rather, is that under clear Supreme Court precedent issues like this are left broadly to the legislatures. It is a cause of great concern that Justice Barkett, first, would rely on the federal Equal Protection Clause (since state law grounds, under her view, sufficed to reach the same result), and, second, would fail to follow clear and longstanding Supreme Court precedent in applying that clause. More generally, one must be very concerned that a judge who would so casually invoke the federal Equal Protection Clause to invalidate legislative action in this area is very ready to continue to misuse the federal Equal Protection Clause—a very powerful tool if so misused—to impose her policy preferences instead of applying the law.

This concern has very broad ramifications. For example, Congress might well enact damage caps as part of product liability reform or as part of medical liability reform under a health care bill. Because the U.S. Supreme Court has held that the equal protection principle applies to the federal government under the Fifth Amendment's due process clause, the logic of Justice Barkett's position would seem almost certainly to lead to these caps being struck down.

At her hearing Justice Barkett said that Echarte was "primarily" a case implicating the state constitutional right of access to the courts. [47:9–48:3] "I grant you that I used the term 'Federal Constitution,' but . . . the analysis is totally using Florida cases under a Florida system." [48:12–15] She ultimately conceded that she should not have invoked the federal equal protection clause: "The only reaching out was including the phrase 'Federal Constitution,' I should not have done that." [50:12–14]

Justice Barkett's response heightens the concern that she invokes the federal Constitution in a cavalier and clearly erroneous manner. The fact that she cited only Florida cases emphasizes, rather than assuages, this concern.

Another Equal Protection case that raises similar concerns is *Shriners Hospitals* v. *Zrillic*, 563 So.2d 64 (Fla. 1990). There, Justice Barkett wrote the opinion for the court striking down, on numerous bases, a Florida statute that permitted a direct heir to cancel a gift to charity made in a will when that will was executed less than six months before the testator's death. The purpose of the statute was to guard against undue influence on charitable gift givers. One of the bases on which she struck down the statute was the federal Equal Protection Clause.

Again, the concern here is not with the wisdom, or lack of wisdom, of the statute, but rather with the reasoning by which she used the federal Equal Protection clause to invalidate it. In that case, she stated,

"Equal protection analysis requires that classifications be neither too narrow nor too

broad to achieve the desired end. Such underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test."

Her opinion proceeds to hold that the statute is underinclusive because it protects against only one type of undue influence exerted on testators (that exerted by charities), and that it is overinclusive because it would render voidable many intentional bequests not tainted by undue influence. Her opinion further states that the six-month period set forth in the statute is irrational; in her words; "[t]here is no rational distinction to automatically void a devise upon request when the testator survives the execution of a will by five months and twenty-eight days, but not when the testator survives a few days longer."

Justice Barkett's opinion cites no federal authority for the proposition that the rational basis test for the federal equal protection clause forbids both underinclusive and overinclusive classifications. Nor could she, for this proposition appears plainly incorrect: the U.S. Supreme Court has long held that a classification does not violate Equal Protection simply because it "is to some extent underinclusive and overinclusive." *Vince* v. *Bradley*, 440 U.S. 93, 108 (1979). As Justice Douglas stated in an opinion for the Court more than 40 years ago, "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency* v. *New York*, 336 U.S. 106, 110 (1949). The Court restated this basic principle just last year: "[T]he legislature must be allowed leeway to approach a perceived problem incrementally. . . . '[It] may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.'" *FCC* v. *Beach Communications*, 113 S. Ct., at 2102 (quoting *Williamson* v. *Less Optical*, 348 U.S. 483 (1955)).

Justice Barkett's ruling that the six-month period is irrational simply because it produces different results when the testator survives 5 months and 28 days versus 6 months and 1 day is also deeply troubling. A similar objection could be voiced against every time limit in the law. But in such matters the legislature "ha[s] to draw the line somewhere," *Beach Communications*, 113 S. Ct., at 2102, and when it does so, the "restraints on judicial review have added force, "*id.*—restraints ignored by Justice Barkett in her opinion in this case.

Again, this case goes very far towards transforming rational-basis scrutiny into strict scrutiny. Indeed, if applied consistently, there are few laws that could survive the test that Justice Barkett sets forth. (For example, a law that terminates welfare benefits after two years would be clearly susceptible to invalidation under Justice Barkett's equal protection analysis.) Of equal concern is the prospect that the test would not be applied consistently, but would be used arbitrarily and selectively to strike down particular laws that one considers unsound.

As with Echarte, Justice Barkett asserted that "the thrust of that [Zrillic] opinion again was grounded in the Florida Constitution." [53:19–20] "[E]qual protection . . . is really not at all the focus which concerned me in Zrillic." [123:3–6] [Even though she specifically invoked the federal equal protection clause, she said that "when I am thinking equal protection, generally I am thinking in terms of the prior case law of my own court in my own State." [53:25–54:2] Why, then, did she invoke the federal equal protection clause? Again, her response reflects an alarmingly cavalier attitude towards constitutional interpretation.

Indeed, her use of the federal Equal Protection Clause in Echarte and Zrillic is all the more striking in light of her partial dissent in *Foster* v. *State* (discussed more fully below and in other memoranda). There, Justice Barkett recognized that the U.S. Supreme Court decision in *McCleskey* v. *Kemp* foreclosed her from using the federal Equal Protection Clause as the basis for a statistical attack on the death penalty, so she instead relied solely on the Florida constitution's counterpart.

It must be noted that the fact that Justice Barkett had available sufficient state law grounds makes all the more troubling her invocation of federal equal protection: not only is she making bad federal constitutional law (which activist judges in other courts might later rely on), but she is also, in effect, immunizing her ruling from U.S. Supreme Court review (since the existence of sufficient state law grounds deprives that Court of Jurisdiction).

The danger of unprincipled, result-oriented decisionmaking that results from this misstatement of Equal Protection principles can perhaps be illustrated by comparing Justice Barkett's opinion in this Zrillic case to her dissent in *LeCroy* v. *State*, 533 So.2d 750 (Fla. 1988). In LeCroy, the six other Justices voted to affirm the death sentence for a murderer who was 17 years and 10 months old at the time that he committed two brutal first-degree murders. In her lone dissent, Justice Barkett took the position that the Eighth Amendment prohibits the execution of a person who was under 18 at the time of his offense. In short, she took the view that the Constitution imposed a bright-line age minimum of 18 for offenses that can result in the death penalty. (The U.S. Supreme Court subsequently rejected the position that she took.)

For present purposes, it is revealing to apply the methodology of her Shriners opinion to the position that she took in LeCroy. Applying that Shriners methodology, one would say that a bright-line age minimum of 18 is both underinclusive and overinclusive. It is underinclusive because it fails to protect from capital punishment those persons over 18 who (in the language of her LeCroy dissent) "have not fully developed the ability to judge or consider the consequence of their behavior." It is overinclusive because it does protect those under 18 who have in fact fully developed their deliberative faculties. Moreover, her Shriners methodology would appear to dictate the conclusion that the 18-year bright line is simply irrational, since it would exempt from the death penalty a heinous murderer who was 17 years, 11 months, and 28 days at the time of his offense, but would not exempt someone who was a few days older. In short, her Shriners methodology leads to the conclusion that what she thought in LeCroy to be constitutionally mandated under the Eighth Amendment is instead constitutionally impermissible under the Equal Protection clause.

In sum, Justice Barkett's serious misapplication of rational-basis review under the Equal Protection Clause allows a judge to substitute his or her own policy preferences for the legislature's legitimate enactments.

II. SUBSTANTIVE DUE PROCESS

The manner in which Justice Barkett has invoked "substantive due process"—even where no fundamental right is at stake and rational-basis review is therefore in order—also raises serious concerns. In *State* v. *Saiez*, 489 So.2d 1125 (Fla. 1986), for example, she wrote an opinion holding that a state law criminalizing the possession of embossing machines capable of counterfeiting credit cards "violate[d] substantive due process under the fourteenth amendment to the United States Constitution" (as well as under Florida's constitution). Specifically, she stated that the law was "not reasonably related to achieving [the] legitimate legislative purpose" of curtailing credit card fraud. In her words, "It is unreasonable to criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their businesses and for other non-criminal activities." Justice Barkett cited no federal authority in support of this proposition.

The principle set forth in Saiez, if taken seriously, would have far-reaching consequences. A broad range of criminally proscribed items also have legitimate uses. Switchblades can be used to slice apples. Marijuana can be prescribed as medicine. Drug paraphernalia can be used for tobacco. Explosive devices can be used to build tunnels. It is extraordinary to conclude that "substantive due process" or any other principle of law disables society from determining that the harmful effects of some or all of these so outweigh the beneficial effects that possession should be criminalized. Again, the real danger is that this overbroad and unsound principle can be applied selectively in an unprincipled manner.

Justice Barkett acknowledged that she had relied on the federal due process clause, but again thought such reliance mitigated by the fact that she had discussed only cases construing the state constitutional counterpart: "if you go on to look at the language that is used from other cases, they are all Florida cases which have utilized the same phrase, but interpreted it in a different way." [126:12–15] When asked why she didn't apply just the State due process clause, she responded: "I think in essence I did, Senator, and all I can—I mean, I can certainly accept that in a body of law there are going to be occasions when you are going to be careless." [129:6–9]

III. LOITERING AND THE FIRST AMENDMENT

In her plurality opinion (over a vigorous 3-justice dissent) in *Wyche* v. *State*, 619 S.2d 231 (Fla. 1993), Justice Barkett struck down as facially unconstitutional an ordinance that prohibited loitering for the purpose of prostitution. In companion cases decided the same day as Wyche—*E.L.* v. *State*, 619 S.2d 252 (Fla. 1993), and *Holliday* v. *City of Tampa*, 619 So.2d 244 (Fla. 1993)—she likewise struck down as facially unconstitutional ordinances prohibiting loitering for the purpose of engaging in drug-related activity.

Her first holding in Wyche was that the ordinance did not require proof of intent to engage in unlawful acts of prostitution. This holding is puzzling. The language of the ordinance—criminalizing loitering "in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution"—appears plainly amenable to a reading that the purpose that must be manifested actually exist. In addition, the ordinance specifically provided, "No arrest shall be made for a violation of this subsection unless the arresting officer first affords such person the opportunity to explain this conduct, and no one shall be convicted of violat-

ing this subsection if it appears at trial that the explanation given was true and disclosed a lawful purpose." Especially in the criminal law, where such mens rea requirements are routinely implied, it seems quite a stretch to construe the ordinance otherwise.

Justice Barkett offered the view that to construe the ordinance to have a specific intent requirement would be to "legislate" from the bench. But it seems that it would have been more consistent with the judicial role to invoke a tenet that is basic to our separation-of-powers system and that was clearly recognized in Florida case law: namely, that courts "have a duty to avoid a holding of unconstitutionality if a fair construction of the legislation will so allow." *State* v. *Ecker*, 311 So.2d 104, 109 (Fla. 1975).

Justice Barkett's second holding in Wyche was that, even if the ordinance were construed to require specific intent to engage in unlawful acts of prostitution, it "still would be subject to unconstitutional application" and therefore would chill protected speech in violation of the First Amendment. But virtually every law could hypothetically be applied in an unconstitutional manner that could chill First Amendment speech. Under First Amendment doctrine, a person challenging a law as facially overbroad must show that it would reach a substantial amount of constitutionally protected activity. It is difficult to see how the ordinance, if construed to require specific intent, would reach any constitutionally protected activity, much less a substantial amount.

The one federal case that Justice Barkett cites in support of her holding, *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), is plainly inapposite. The Supreme Court in Jews for Jesus simply stated that the regulation in that case—which banned all First Amendment activities at an airport—could not be permitted to be remedied by case-by-case adjudication. To compare the absolutist ban on First Amendment speech in that case to the hypothetical and purely incidental effect on speech arguably resulting from the ordinance in Wyche is strained in the extreme.

Another serious problem with Justice Barkett's opinion in Wyche is that it is at serious odds with—indeed, appears irreconcilable with—the Florida Supreme Court's 1975 ruling in *State* v. *Ecker*, 311 So.2d 104 (Fla. 1975), which held that a general anti-loitering statute was constitutional. Indeed, Wyche appears to overrule Ecker without even citing it or otherwise acknowledging it. This is not a proper way to deal with precedent.

Asked about Wyche, Justice Barkett repeatedly claimed that all members of her court agreed that the statute was defective but that the dissent was ready to remedy it. [186:10–11, 186:25–187:1, 187:8–9] In fact, however, the dissent stated that the statute was facially constitutional (i.e., was not defective).

The net effect of Wyche, E.L., and Holliday is to hamper severely the ability of communities to combat the scourges of prostitution and drugs.

IV. OBSCENITY

In *Stall* v. *State* [570 So.2d 257 (Fla. 1990)], the Florida Supreme Court ruled—as it had several times before—that Florida's laws against obscenity were constitutional. In a brief 4-paragraph dissent, Justice Barkett took the position that all criminal obscenity laws violate due process. (She also joined another dissent that held that obscenity laws violate the state right of privacy.) In her words:

"A basic legal problem with the criminalization of obscenity is that it cannot be defined. . . . Thus, this crime, unlike all other crimes, depends, not on an objective definition obvious to all, but on the subjective definition, first, of those who happen to be enforcing the law at the time, and, second, of the particular jury or judges reviewing the case. Such a procedure runs counter to every principle of notice and due process in our society."

Arguably, Justice Barkett might intend that her due process holding rest only on the state constitution, though she invokes "every principle of notice and due process in our society." In any event, she does not even cite, much less discuss, U.S. Supreme Court precedent, such as *Miller* v. *California*, 413 U.S. 15 (1973), that contradicts her position. Miller held that material that, judged by contemporary community standards, appeals to the prurient interest, that depicts or describes, in a patently offensive way, specifically defined sexual conduct, and that lacks serious literary, artistic, political, or scientific value can be outlawed as obscene.

Indeed, it appears that Justice Barkett misreads or mischaracterizes the law that she would strike down. The Florida law incorporated Miller's focus on contemporary community standards as the benchmark of whether material is obscene. Thus, the role of jurors would not be to make their own "subjective definition" of what is obscene (as Justice Barkett suggests), but rather to discern and apply the existing community standards.

Further, the premise of Justice Barkett's position—namely, that obscenity laws are somehow unique—is dubious. There are any number of criminal laws whose definition or application is not any more "objective" than obscenity laws. Take, for example, criminal negligence or child neglect. Indeed, the difference between justifiable self-defense and unjustified homicide can equally be said to turn "on the subjective definition, first, of those who happen to be enforcing the law at the time, and, second, of the particular jury or judges reviewing the case." These features are an inherent part of our criminal justice system. So it seems that her basic premise cannot be maintained and that no special solicitude for obscenity is warranted.

At her hearing, Justice Barkett stated that the statute in Stall "had language in it which, in my judgment, was very ambiguous." [105:8–10] But since the language of the Stall statute was the Miller standard, this suggests that Justice Barkett is not content with the Miller standard. Given Justice Barkett's treatment of other Supreme Court precedents mentioned in this and other memoranda, there is reason to worry that her apparent disagreement with this standard would lead her to apply it too narrowly.

Justice Barkett also claimed at length that her opinion in Stall needs to be read together with her vote in *Schmitt* v. *State*, 590 So.2d 404 (Fla. 1991), where she joined the per curiam opinion upholding a conviction under Florida's child pornography statute. Justice Barkett repeatedly claimed that the two cases involved "the very same statute" [106:25]: "in both those cases, the same statute was being decided, the same statute was being considered". [106:16–17] In fact, however, Stall involved the definition of obscenity under Fla. Stat. 847.001, whereas Schmitt involved the definition of child pornography under Fla. Stat. 827.071. Justice Barkett's apparent claim that the court's decision in Schmitt somehow vindicated her position in Stall [see 107:15–22] cannot be sustained. (She may also be claiming that her dissent in Stall was confined to her disagreement with the definition of "sexual conduct" in subsection 847.001(11), which is identical to the definition of "sexual conduct" in the child pornography law. But: (a) nothing in her dissent remotely supports such a limited reading, and (b) the separate requirement in the obscenity law of "appeal to the prurient interest"—a requirement not present in the child pornography statute—eliminates any overbreadth and makes such a claim untenable.)

V. QUOTAS

Justice Barkett's views on quotas are of serious concern. According to newspaper reports, Justice Barkett was a member of the Florida Commission on the Status of Women, which issued a report in February 1993 that recommended passage of state legislation requiring that all of Florida's decisionmaking boards, councils, and commissions be half male and half female by 1998. Justice Barkett defended the Commission against charges that its report advocated a quota system, by saying:

"It is not in the context of a quota system. It is simply an acknowledgment that women make up one-half of the population of this state." (St. Petersburg Times, 2/23/93.)

If a rigid requirement that positions be filled according to population is not a quota, then it is difficult to imagine what would be. (Florida Governor Lawton Chiles stated that he opposed the Commission proposal because it would create a quota system. Orlando Sentinel Tribune, 2/23/93.) This issue is not merely semantic: it may directly affect the breadth of the remedial authority that Justice Barkett would believe that she would have as a federal judge in cases of alleged discrimination. The Supreme Court has ruled that the use of preferential remedies and voluntary preferences is generally disfavored, although it has upheld them in narrow circumstances. If Justice Barkett cannot recognize a quota for what it is, how can one have confidence that she will properly construe Supreme Court precedents governing quotas and other preferences and respect the limits that the Supreme Court has placed on their use?

Told that her views appeared to lead to pervasive race and sex quotas, Justice Barkett did not dispute this. Indeed, she appeared to embrace it (in the euphemism of "representation"): "The goal of every women's group, Senator, that I am aware of and the goal of every minority group is that there be representation in policy-making bodies that are going to affect their lives, whether it is in the private sector or in the public sector. And I think that that is a goal that is laudable. There are many different ways of trying to achieve it, but I do not think that there is any question that it should be achieved, and I am committed to that." [184:3–11]

Of course diversity in private and public employment and in policymaking bodies is welcome. The critical question, however, is whether it is to be pursued by nondiscriminatory means or by the use of quotas and preferences. Justice Barkett's statement appears to treat this fundamental distinction as though it were insignificant.

Even more disturbing is Justice Barkett's dissent in *Foster* v. *State*, No. 76,639 (Fla. Apr. 1, 1993). In that case, Foster, two young women, and another man, Lanier, drove to a deserted area where one of the women was to make some money by having sex with Lanier. As Lanier, who was very drunk, was disrobing, Foster suddenly began hitting him

and then held a knife to Lanier's throat and sliced his neck. Foster and the women then dragged the still-breathing Lanier into the bushes and covered him with branches and leaves. Foster then took a knife and cut Lanier's spine. Foster and the women then split the money found in Lanier's wallet.

Foster was convicted of murder and sentenced to death in 1975. On resentencing, the trial court, finding three aggravating circumstances, again imposed the death penalty. The Florida Supreme Court, by a 4–3 vote, rejected Foster's claim that his death sentence was a product of racial discrimination against black victims. (The court did remand for resentencing on other grounds.)

Justice Barkett, dissenting from this racial discrimination ruling, would not accept the majority's determination that Foster's statistical evidence purporting to show that white-victim defendants in Bay County were more likely to get the death penalty than black-victim defendants failed to establish a constitutional violation. (Lanier, evidently, was white; Foster, according to newspaper accounts, was also white.) Justice Barkett would have relied on the Florida Constitution's Equal Protection Clause to reach a result rejected by the U.S. Supreme Court in *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), under the federal Equal Protection Clause. In McCleskey, the Court ruled that a capital defendant claiming a violation of the federal Equal Protection Clause must show the existence of purposeful discrimination and a discriminatory effect on him. According to Justice Barkett:

(1) The McCleskey standard fails to address the problem of "unconscious discrimination."

(2) Statistical evidence of discriminatory impact in capital sentencing that "cannot be traced to blatant or overt discrimination" should establish a violation of Florida's Equal Protection Clause.

(3) This statistical evidence should be construed broadly to include not only analysis of the disposition of first-degree murder cases, "but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and *the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes.*" (Emphasis in italics.)

(4) The defendant should have the initial burden of showing the strong likelihood that discrimination influenced the decision to seek the death penalty. "Such discrimination conceivably could be based on the race of the victim or on the race of the defendant." Once the initial burden has been met, "the burden then shifts to the State to show that the practices in question are not racially motivated."

The paralyzing effect that Justice Barkett's proposed standard would have on the death penalty—and, indeed, if taken to its logical conclusion, on the criminal justice system generally—will be addressed in another memorandum. For present purposes, what must be emphasized are the broad-ranging implications that Justice Barkett's disparate impact analysis could have on the issue of quotas generally. Her focus on "unconscious discrimination" shows that she rejects, for purposes of Florida's Constitution, the basic principle under the federal Constitution that discriminatory intent is an essential element of an Equal Protection violation. Her opinion also raises a legitimate concern that she might adopt a view of statistical disparities under federal statutes like the recently amended Title VII that effectively mandates pervasive adoption of race and sex quotas.

VII. CONCERNS ABOUT IMPARTIALITY

In *In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d 543 (Fla. 1992), the Florida Supreme Court selected from among six different modifications to a state legislative redistricting plan. Writing "dubitante," Barkett wrote that she was "loath to agree to any of the convoluted plans submitted under these hurried circumstances. . . . If I had to choose only among those presented, however, *I would choose the plan submitted by the NAACP simply because this is the organization that had traditionally represented and promoted the position that advances all minority interests.*" (Emphasis in italics.)

Justice Barkett's frank admission that she would give special weight to a position based on who offered it rather than on its intrinsic merits is very disturbing and appears clearly at odds with the obligation of judicial impartiality.

Justice Barkett claimed that her words were "concededly very inartful[]" [174:15] and that what she "was attempting to say . . . was in rebuttal to a claim that the NAACP did not adequately represent the interests of African Americans." [175:1–4; see also 177:9–13] "I can understand in this case why you would read it the way you would read it. It is inartful, and I wish that I had the opportunity to edit that more than anything else that we have been talking about." [175:12–14]

Concern about Justice Barkett's impartiality also arose at her hearing over her involvement with a trial lawyer's group, the Academy of Florida Trial Lawyers, while the case of *University of Miami* v. *Echarte* was pending. Specifically:

(1) The Academy of Florida Trial Lawyers submitted an amicus brief in this case in October 1991. The Trial Lawyers brief (like other briefs submitted on behalf of one party) argued that the cap on non-economic damages in medical malpractice cases was unconstitutional.

(2) In 1992, this same organization of trial lawyers created an annual award named after her, the Rosemary Barkett Award, to be given each year to a person who, in the view of the trial lawyers, has made outstanding contributions to the law. In November 1992, she agreed to present the first annual award at the trial lawyers' annual convention, which took place one week after her successful retention election.

(3) In May 1993, she, in dissent, accepted the argument that the cap on non-economic damages was unconstitutional.

It does not seem at all consistent with her obligation to maintain both the fact and the appearance of impartiality for her to decide a case in which an organization that had named an award after her had filed a brief. Indeed, her actions would seem to have violated the ABA Code of Judicial Conduct. Canon 2, subpart B states that a judge "shall not lend the prestige of judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. . . ." Canon 3, subpart E(1) states that a judge should disqualify herself in a proceeding in which her impartiality might reasonably be questioned.

Justice Barkett stated that she understood the trial lawyers' award to reflect the group's commitment to "equal justice under the law" [179:20–21] and not to have anything to do with its "private interests" [181:7]. In any event, the trial lawyers' amicus brief in Echarte clearly advanced their private interests, and her participation in that case would seem to give rise to an appearance of lack of impartiality.

PRESIDENT MARY ROBINSON OF IRELAND ON THE FUTURE OF THE WORLD COMMUNITY

Mr. KENNEDY. Mr. President, during her visit to Boston earlier this month, Ireland's President, Mary Robinson, delivered a major address at Harvard on the future of the world community and the need for more effective international cooperation to deal with the challenges we face.

In her address on March 11, she emphasized the opening words of the preamble of the U.N. Charter—"We the peoples of the United Nations, determined to save succeeding generations from the scourge of war." She urged the western industrial nations of the world to renew and update that commitment today, by dealing more effectively with the opportunities and responsibilities of being part of the larger global community. She reminded us all of the importance of this aspect of our leadership. As she stated,

> We need a vision of the whole * * * that does not protect some of us from an acceptance of crisis simply because we are fortunate enough to be exempt from its immediate consequences.

She urged nations to learn to respect one another's diversity, so that we can draw strength and not weakness from our differences. She urged us to explore and share new approaches to economic development, alleviation of poverty, and protection of the environment.

I believe that President Robinson's thoughtful and stimulating address will be of interest to all of us concerned with these issues and with the future of relations among nations, and I ask unanimous consent that it may be printed in the RECORD.

There being no objection, the address was ordered to be printed in the Record, as follows:

[Irish Times/Harvard Colloquium, John F. Kennedy School of Government, Boston, Mar. 11, 1994]

ADDRESS BY THE PRESIDENT OF IRELAND MARY ROBINSON

WE THE PEOPLES OF THE UNITED NATIONS * * *—RENEWING THAT DETERMINATION

The preamble to the United Nations Charter, written in 1945, is an eloquent statement of its fundamental aims. It begins with these words: "We the peoples of the United Nations, determined to save succeeding generations from the scourge of war." And it then sets out those aims. I want to reflect on that preamble today, but with an emphasis on its opening words. Even as I prepare to do so, I am fully aware that I cannot claim a specialist wisdom on the United Nations. On the other hand, I am also aware that I have the true privilege of holding an elected office which is removed from day-to-day policy issues. This in turn has allowed me the advantage and responsibility of a different time-