To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-44

Robert Burrell et al., Petitioners, v. Milton McCray et al. } On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE BRENNAN, dissenting.

Certiorari was granted in this case, 423 U. S. 923, to consider the questions:

1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held that exhaustion of state administrative remedies was not required in an action brought pursuant to 42 U. S. C. § 1983.

2. Whether the United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the District Court in *McCray* v. *Burrell*, #74-1042, and *McCray* v. *Smith*, #74-1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded for determinations on the merits.

Following the grant of the writ of certiorari, the parties fully briefed and orally argued these questions. The result of their efforts is today's one-line order dismissing the writ of certiorari as improvidently granted. That order plainly flouts the settled principles that govern this Court's exercise of its unquestioned power to dismiss writs of certiorari as improvidently granted.

We have held that such dismissals are proper only when the more intensive consideration of the issues and the record in the case that attends full briefing and oral

argument reveals that conditions originally thought to justify granting the writ of certiorari are not in fact present. "[C]ircumstances . . . 'not . . . fully apprehended at the time certiorari was granted,'" *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183 (1959), may reveal that an important issue is not in fact presented by the record, or not presented with sufficient clarity in the record, or compel the conclusion that "the standards governing the exercise of our discretionary power to review on writ of certiorari [such as] . . . 'special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19," are not met. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 73 (1955). See R. Stern & E. Gressman, Supreme Court Practice 227–230 (4th ed. 1969). No such circumstances have been revealed upon plenary consideration of the legal claims and record in this case; certainly the parties have neither argued nor suggested any. Nor does the Court so explain its action; rather, recognizing the impossibility of any such attempt, it simply orders the writ dismissed. I can only conclude that in today's action—an action which renders our discretionary jurisdiction an essentially arbitrary jurisdiction—the Court is not pursuing our "duty to avoid decision of constitutional issues" only where reason and principle justify doing so; rather, this is plainly an instance where "avoidance becomes evasion." *Rice* v. *Sioux City Cemetery*, *supra*, at 74.

Further, a Justice who originally voted to deny the petition for writ of certiorari is of course privileged to participate in a dismissal as improvidently granted that is justified under the *Monrosa* standard. See *United States* v. *Shannon*, 342 U. S. 288, 294 (1952). But I hold the view that impermissible violence is done the Rule of Four, see *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 559–562 (1957) (Harlan, J., concurring and dissent-

ing), when a Justice who voted to deny the petition for certiorari participates after oral argument in a dismissal that, as here, is not justified under the governing standard, but which rather reflects only the factors that motivated the original vote to deny. Mr. Justice Douglas in *United States* v. *Shannon, supra,* at 298, stated the view that I share:

> "A Justice who has voted to deny the writ of certiorari is in no position after argument to vote to dismiss the writ as improvidently granted. Only those who have voted to grant the writ have that privilege. The reason strikes deep. If after the writ is granted or after argument, those who voted to deny certiorari vote to dismiss the writ as improvidently granted, the integrity of our certiorari jurisdiction is impaired. By long practice—announced to the Congress and well-known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari. If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired."

I would reach the merits and affirm the judgment of the Court of Appeals.