

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

MARC HALL,

Petitioner,

v.

**JOHN McHUGH, in his official capacity
as SECRETARY OF THE ARMY and
MAJOR GENERAL JEFFREY PHILLIPS,
in his official capacity as SENIOR
COMMANDER FORT STEWART**

Respondents.

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF
TEMPORARY RESTRAINING ORDER, WRIT OF HABEAS CORPUS,
AND OTHER RELIEF**

Petitioner, Marc Hall, through his undersigned counsel, submits this memorandum of law in support of his petition for temporary restraining order, writ of habeas corpus and other relief requesting that this Court prohibit respondents from deploying him to Iraq to be prosecuted by court-martial.

FACTS

Petitioner refers the Court to his petition and the declarations under penalty of perjury submitted along with it for the facts in this matter.

ARGUMENT

The prerequisites to the issuance of a temporary restraining order or preliminary injunction are well known: (1) a substantial likelihood of success on the merits; (2) irreparable injury if the injunction is not issued; (3) threatened injury to the movant outweighs the potential damage that the proposed injunction may cause the defendants; and (4) the injunction will not be adverse to the public interest. *Schiavo ex rel. Schindler v. Schiavo*, 403 F. 3d 1223, 1240 (11th Cir. 2005). It has also been held that a district court may enter a prohibitory preliminary injunction staying “government action taken in the public interest pursuant to a statutory or regulatory scheme” where the moving party has demonstrated that (1) absent injunctive relief, he will suffer “irreparable injury,” and (2) there is “a likelihood that he will succeed on the merits of his claim.” *Plaza Health Labs, Inc. v. Perales*, 878 F. 2d 577, 580 (2d Cir. 1989). Petitioner will address the latter three prerequisites first, as they do not require substantial argument and will then turn to the arguments he makes that he is likely to succeed on the merits.

A. IRREPARABLE INJURY

The injury to petitioner, if he is moved to Iraq, is clear. He will be in a confinement facility in a war zone, far from his friends, family and supporters. He

will be under a new command with a new court-martial convening authority who can initiate proceedings against him. Once those proceedings are begun, the opportunity for his return to the United States for trial would be substantially diminished. Petitioner has been in confinement for two months already, yet no court-martial has been convened. Even in the event a military judge in Iraq determines that the appropriate venue for his trial is Fort Stewart, petitioner will undoubtedly spend substantial additional time in confinement prior to any such determination and will then have to await return to the United States and the convening of another court-martial before he gets his day in court.

It cannot be gainsaid that every day petitioner spends in confinement constitutes irreparable injury. He is currently presumed innocent and the delay in initiating proceedings against him, which will be extended if he is transferred to Iraq, is unconscionable.

B. INJURY TO PETITIONER AS COMPARED TO HARM TO RESPONDENTS

The granting of a temporary restraining order and the expedited determination of this action will cause no undue harm to respondents. Indeed, they have delayed this matter for two months already, during which time a court-martial could have been convened and proceedings begun. All delays thus far have inured to the detriment of

petitioner while respondents have suffered no adversity. Petitioner is more than happy to accept the brief additional delay that might be encountered to resolve this matter in exchange for the opportunity to demonstrate his entitlement to remain in the United States for his court-martial.

C. PUBLIC INTEREST

There can be no question but that the public interest is more likely served by enjoining petitioner's transfer than by allowing it. This is a matter that has engendered a great deal of public interest and comment. It is being covered by several journalists and SPC Hall has garnered support from a number of sources. SPC Hall has a clear constitutional right to a public trial, which he desires. The media and the public have a constitutional right to follow the proceedings. We often proclaim in this country that one of the things that distinguishes us from our enemies in Iraq and Afghanistan is that our justice system is transparent, that we do not have secret trials and that our citizens have recourse to an independent judiciary when the government is denying them rights. This Court has an opportunity to demonstrate that, at least in this instance, those are not hollow proclamations but fundamental liberties.

Moreover, petitioner only seeks a restraining order so that he can have the opportunity for a full hearing on the merits of his claim. Respondents are responsible

for all delays thus far. One further delay in the interest of the Constitution is fully warranted.

D. LIKELIHOOD OF SUCCESS ON THE MERITS

1. Authority of this Court to Intervene

Federal courts are limited in their ability to second guess or reverse decisions made by military authorities, but they are not completely powerless to do so. The seminal case in this area is *Mindes v. Seaman*, 453 F. 2d 197 (5th Cir. 1971), which addressed the plaintiff's attempt to void a factually erroneous report that resulted in his being separated from active duty and placed in a reserve status. The court in *Mindes* established a two-step approach to review of military decisions as a means of accommodating the conflicting interests of non-interference with military matters and the protection of individual rights.

First, it held that a court must determine whether the petitioner has alleged a violation of a constitutional right, applicable statutes or the service's own regulations and has exhausted administrative remedies. If that is determined in favor of the petitioner, the court must then balance the substantive claims made against the policy reasons that militate against review. The court suggested four factors to consider, without assigning a particular weight to any one of them:

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values — compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.

Id. at 201-202. The Eleventh Circuit has adopted this approach. See *Rucker v. Secretary of the Army*, 702 F. 2d 966 (11th Cir. 1983). While the *Mindes* test does not apply to certain situations, such as a claim based on an injury incident to military service, see *Speigner v. Alexander*, 248 F. 3d 1292, 1295, n. 5 (11th Cir. 2001), it remains appropriate for this case.

The facts of this case are distinguishable from those in *Schlesinger v. Councilman*, 420 U.S. 738, 95 S. Ct. 1300, 43 L. Ed.2d 591 (1975). There, the Supreme Court held that federal district courts must decline from intervening in the

military court system when a serviceman seeking an injunction can show no harm "other than that attendant to the resolution of his case in the military court system." *Id.* at 758, 95 S. Ct. 1300. Petitioner here is not concerned about the resolution of his case, but of the conduct of respondents before the case is resolved. The harm he is suffering is not that attendant to his case's resolution, but to its conduct.

Petitioner will address the *Mindes* factors and considerations in this section and will then elaborate his arguments concerning the constitutional issues and the Army's own regulations in the subsequent sections.

Petitioner has raised several significant constitutional issues. He alleges violation of his Sixth Amendment right to a public trial, as well as the First Amendment right of the public and media to attend the trial and report on it. He has alleged violation of his Sixth Amendment right to counsel of his choice and of the right to call witnesses in his favor. His right to due process under the Fifth Amendment is also embraced by these violations. His final allegation is that the Army has violated its own explicit regulation. Thus, petitioner has met the first prong of the first step in the *Mindes* analysis.

Petitioner has no other recourse but this Court. His only other avenue for redress would be pretrial motions filed with the military judge presiding over his court-martial. However, there is no military judge because the convening authority

who would summon the judge does not yet have jurisdiction over petitioner, who remains in the United States.

Article 138 of the Uniform Code of Military Justice provides a right to seek redress if a service member wishes to protest the actions of a superior. It is unavailable here, however, because paragraph 20-5a(1) of Army Regulation 27-10 states: “Generally, an action is an inappropriate subject for resolution by Article 138 procedures when . . . (r)evue is provided specifically by the UCMJ or the action is otherwise reviewable by a court authorized by the UCMJ or by a military judge or military magistrate.” Clearly, a court-martial proceeding is, ultimately, reviewable by a military judge, thus making Article 138 unavailing. Absent a military judge, however, there can be no immediate review. Even if petitioner could avail himself of Article 138 in theory, no action could conceivably be expected until after he leaves for Iraq and this Court loses jurisdiction. Thus, the second prong of the first step has been met.

Each of the four factors that *Mindes* suggests be weighed in the second step favor petitioner. His claims involve core constitutional issues that go to the very heart of the rule of law and our constitutional system. They are neither frivolous nor tenuous and are not based on matters of personal preference like hair style, but on critical constitutional liberties. As noted above, the injury to petitioner if this Court

does not act will be severe. There would, on the other hand, be minimal interference with the military function. Petitioner can be tried in the United States as easily – if not more easily – than in Iraq. The only conceivable interference would be the transport of witnesses back from Iraq for trial and their consequent absence from duty for a period of time. But they will be absent from duty to testify regardless, so the difference is only that they will be away slightly longer. In any event, the Army will be able to call its witnesses regardless of venue. Petitioner will not have that luxury, as will be discussed *infra*. Finally, this is a matter that does not require any military expertise. On the contrary, it is decidedly and particularly within the province and expertise of this Court, and not petitioner’s command, to decide the constitutional questions presented here.

2. The Right to a Public Trial

Petitioner invokes two separate aspects of the right to a public trial – his right to be afforded a public trial, protected by the Sixth Amendment, and the public’s right to follow the case, protected by the First. Both are rights belonging to the defendant in a criminal action, in this case the petitioner, which only he can waive. The reasons for the right, and its importance, were emphasized by the Supreme Court in *Gannett Co. v. Depasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979):

Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant. In *In re Oliver*, 333 U.S. 257, this Court held that the secrecy of a criminal contempt trial violated the accused's right to a public trial under the Fourteenth Amendment. The right to a public trial, the Court stated, "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.*, at 270. In an explanatory footnote, the Court stated that the public-trial guarantee

". . . `is for the protection of all persons accused of crime — the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial — that one rule [as to public trials] must be observed and applied to all.' Frequently quoted is the statement in [1] Cooley, *Constitutional Limitations* (8th ed. 1927) at 647: 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . .'" *Id.*, at 270 n. 25.

It is petitioner's desire that he secure this benefit, which respondents appear determined to deny him. The mere fact that they seek to deny him the benefit of a genuinely public trial must raise suspicions about their intent and motive. This is particularly so because this case raises significant issues of freedom of speech. The initial act that led to petitioner's current dilemma was his writing a song. The song protests the Army's "stop loss" policy which allows it to extend a soldier's time on active duty beyond the scheduled date of deactivation. After he served fourteen

months in Iraq, petitioner was looking forward to his return to civilian life when he was advised that he would likely be “stop loss-ed.” He wrote and produced his song on his own time and forwarded it to the Pentagon in July. Nothing was done by the Army until the day approached when he was to be deployed instead of deactivated. Suddenly, he was taken into custody, incarcerated and given a charge sheet.¹

The fact that anyone in Iraq who has the free time to attend the trial, or that anyone who can afford the travel costs can go to Iraq to attend (a questionable proposition) hardly renders it public in any meaningful sense. The fact that petitioner enjoys the right to “the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” See *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) and cases cited therein.

In short, the right to a public trial is not formal, but substantive. In almost all cases that discuss the right, it is in the context of certain *portions* of the proceedings

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While petitioner believes that the reason for the Army’s actions against him is its unhappiness with his song, the various specifications include allegations of threats. It would be difficult to prove, at least at this stage of the proceedings, that the real reason for the charges is the attempt to suppress free speech, but the issue cannot be ignored. Its existence strengthens petitioner’s claims because, after all, it is he who wants a public trial in the United States and the Army that is seeking to avoid it. One cannot ignore the likelihood the Army wants the court-martial to be an instrument of persecution hidden from the light of day.

being closed to the general public. The circumstances here are different and more threatening to the liberty interests involved. Here, the entire proceedings will be effectively closed to the public, despite being formally open. No court should tolerate this in the face of the opposition of an accused.

The Eleventh Circuit has noted that there is a difference between a partial and total closure of a trial:

The purposes of the public-trial guarantee are to ensure that judges, lawyers, witnesses, and jurors perform their functions responsibly; to encourage witnesses to come forward and discourage perjury; and to allow the public to see that a defendant is tried fairly (citation omitted). To further these interests, a party seeking total closure of a proceeding would have to show that the measures taken were necessary to serve an overriding interest, and the court would have to consider other alternatives and make findings adequate to support closure. Where proceedings are only partially closed, however, the test is less stringent; a "substantial" rather than a "compelling" reason is required where at least some access by the public is retained (citations omitted).

United States v. Brazel, 102 F.3d 1120, 1155 (11th Cir. 1997). Petitioner believes that there is neither a substantial nor a compelling reason for his being tried overseas but contends that, since the public will have virtually no access to the trial, the move to Iraq constitutes a total closure.

In *Brazel*, the restrictions imposed by the court were that, three weeks into the trial, those attending had to provide identification. It was this that the court considered a partial closure. By contrast, petitioner's entire court-martial will take

place on the other side of the globe, a place remote from where the alleged offenses occurred and completely unreachable for those who wish to attend.

For all the reasons that an accused can assert a Sixth Amendment right to a public trial, the public can assert a First Amendment right to access. “As noted, the analysis in these cases has proceeded largely under the First Amendment. Nevertheless, there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.” *Waller*, 467 U.S. at 46.

Petitioner’s case has elicited substantial public interest. As noted in the petition, a Google search of “Marc Hall stop loss” yields more than half a million references. A number of journalists have been covering the story. Various groups, including Iraq Veterans Against the War and Courage to Resist, have given their support to petitioner. They all wish to attend the court-martial and, for all the reasons expressed by the Supreme Court and others so often in the past, their presence would be a critical factor in protecting petitioner’s right to a fair trial.

Beyond the myriad cases upholding the right of an accused to a public trial, Rule 806 of the Rules for Courts-Martial provides that a trial should be public and defines “public” as “members of both the civilian and military communities.” An exception is made for military exigencies, such as a court-martial “on a ship at sea or

in a unit in a combat zone,” but it is emphasized that “such exigencies should not be manipulated to prevent attendance at a court-martial.” See Manual for Courts-Martial, II-79 (2008). Thus, the plan to try petitioner overseas effectively violates not just the Constitution, but the military’s own regulations.

If the public’s First Amendment right to attend and petitioner’s Sixth Amendment right to a public trial – both protected by RCM 806 – are to have any meaning, this Court must act immediately to keep petitioner within its jurisdiction and to require the Army to try him in the United States.

3. The Right to Counsel of One’s Choice and to Favorable Witnesses

Petitioner is combining these two issues because the rather scant case law that addresses them appears also to combine them. Both are rooted in the Sixth Amendment which provides that an accused shall “have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” There can be no question but that these rights are fundamental to a fair trial.²

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It is noteworthy that the Sixth Amendment also requires that a defendant be tried before “an impartial jury of the state and district wherein the crime shall have been committed.” While an accused tried by court-martial is tried before “members” rather than a jury, the intent that an accused be tried where the alleged crime was committed is clear and, at least, instructive.

As a preliminary matter, it should be noted that petitioner would have no power to compel the attendance of witnesses overseas, even if he wanted to. RCM 703(e)(2) controls how witnesses are secured. The discussion of the rule explicitly provides that “(a) subpoena may not be used to compel the attendance of a witness to travel outside the United States and its territories.” Thus, only those witnesses who would voluntarily travel halfway around the world to a war zone to testify could be called. Absent any exigency, and the fact respondents waited a month or more to announce their intent to move petitioner dispenses with any credible claim of exigency, a trial in Iraq would effectively deny petitioner his Sixth Amendment right to compulsory process.

Relatively few courts have addressed these matters, perhaps because they are so well-established that no one considers violating them. In the main, the issues have arisen in the context of immigration proceedings, where the right to counsel is found in the due process clause of the Fifth Amendment rather than in the Sixth. Nevertheless, it is fair to conclude that the right of an accused to counsel is at least equal to, if not greater than, the due process right accorded by the Fifth Amendment. There is, after all, no right to appointed counsel in non-criminal cases, a right long established for those accused of crime.

The right to counsel can be unlawfully infringed by denial of other rights or

provisions of the law. So, for example, denying a change of venue or a continuance to allow counsel to properly prepare constitutes denial of the right to counsel. See for example, *Rios-Berrios v. I.N.S.*, 776 F. 2d 859, 863 (9th Cir. 1985)(holding that a non-citizen with limited English skills transported across the country away from all his friend for a deportation hearing was entitled to a continuance to secure counsel); *Baires v. I.N.S.*, 856 F.2d 89, 93 (9th Cir. 1988)(denial of continuances and motion to change venue "deprived [attorney] of a fair opportunity to prepare his case" and violated petitioner's "statutory right to present evidence").

It is beyond cavil that petitioner will be unable to call all the witnesses in Iraq that he would call if his court-martial were held in the United States. In a court-martial, this factor is particularly important because witnesses can be called both on the issue of guilt or innocence and on the issue of sentencing. If an accused is convicted at a court-martial, the next phase of the proceeding is “extenuation and mitigation,” at which both sides may present evidence and testimony.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve (citations and internal quotation marks omitted).

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503

(2006). *Holmes* determined that state court rules of evidence that precluded testimony to the effect that a third party was guilty of the offense for which the defendant stood accused violated the defendant's rights under the Sixth and Fourteenth amendments. Thus, rules that limited the defense were found to violate a defendant's rights. Petitioner here will be denied the ability to secure witnesses at all. The decision to move petitioner overseas is, at the least, arbitrary. If the purpose is to make it more convenient for the prosecution to present its witnesses, that is clearly out of proportion to the burden placed on petitioner, the impossibility for him to compel the attendance of civilian witnesses. Had respondents acted more quickly, they may have been able to try petitioner before any of their witnesses deployed. Petitioner should not bear the burden of their sloth.

Moreover, the move to Iraq will effectively deny petitioner the opportunity to retain counsel of his choice. There are obviously no cases that reflect as egregious a maneuver as moving a criminal trial to a war zone as a means of preventing a defendant from hiring counsel of his choice, but far less draconian efforts have been condemned.

“The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.” *U.S. v. Gonzalez-Lopez*, 548 U.S.

140, 147-148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). It is evident that this root meaning will be denied if petitioner is tried in Iraq.

In *U.S. v. Kaley*, 579 F. 3d 1246 (11th Cir. 2009), the government obtained an ex parte protective order prohibiting the defendants from encumbering any of the property listed in a forfeiture count of the indictment. Early on, the defendants sought an evidentiary hearing to challenge the order, asserting they needed the encumbered property to retain counsel. The Eleventh Circuit found error in not allowing them a hearing, noting that “(b)eing effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice.” *Id.* at 1258.

This is no less true in military courts. “No accused shall be denied the right to retain civilian legal counsel if he so requests unless military exigencies or physical conditions require such a denial.” *Betonie v. Sizemore*, 496 F. 2d 1001, 1004 (5th Cir. 1974). But, just as with public trials, a convening authority cannot be permitted to create a military exigency in order to deny an accused that right.

Petitioner here will be effectively shut out by respondents from retaining counsel if he is sent overseas. Unlike the *Kaley* defendants, however, there is no issue of his using funds that might be subject to forfeiture. Indeed, there is no interest that

respondents can cite that is greater than petitioner's right to counsel of his choice.³

The right to a public trial is intended to insure that an accused is treated fairly by the government by subjecting the government to scrutiny. But if an accused who is not permitted, by government action, to secure counsel of his choosing or to call witnesses necessary to his defense, little more scrutiny is needed to determine that he has been treated unfairly. The resources of the United States Army are already arrayed against petitioner, yet respondents seek to put their thumbs on the scales of justice by depriving him of fundamental rights, protected both by the Constitution and the military's own Rules for Court-Martial. This cannot be countenanced.

After all, "the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." *Burns v. Wilson*, 346 U.S. 137, 142-143, 73 S. Ct. 1045, 987 L. Ed. 1508 (1953).

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It is not certain that petitioner will be able to secure civilian counsel if he remains in the United States. It is certain that, if he is sent to Iraq, he will not be able to.

4. Army Regulations Require that Petitioner Remain with His Unit

This requires little elaboration beyond what is contained in the petition. This Court has the authority to intervene if the Army violates its own regulations. Petitioner asserts that, since he is seeking a discharge as a conscientious objector, those regulations require that he remain with his current unit and that his current unit is a rear unit located in Fort Stewart. The regulations cannot be clearer.

Army Regulation 600-43, 2-10(a) states:

Except as provided in *b*,⁴ below, persons who have submitted applications (see para 2-1) will be retained in their unit and assigned duties providing minimum practicable conflict with their asserted beliefs, pending a final decision on their applications. Reassignment orders received after the submission of an application will be delayed until the approval authority makes a final determination. In the case of trainees, they will not be required to train in the study, use, or handling of arms or weapons. The trainee is not precluded from taking part in those aspects of training that do not involve the bearing or use of arms, weapons, or munitions. Except for this restriction, conscientious objector applicants are subject to all military orders and discipline, and regulations to include those on training.

600-43, 2-10(c)(1) states: “A Soldier assigned or attached to a unit deploying to a new duty station . . . may submit an application for conscientious objector status. The Soldier’s submission of a conscientious objector application will not preclude

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Paragraph *b* applies only to second or subsequent applications and is thus not relevant to petitioner.

the Soldier from deploying with his or her unit.”

The first question is whether petitioner is now “assigned or attached” to the unit that has already deployed to Iraq. If he is not, he cannot now be sent there. Petitioner maintains that respondents, by taking him into custody and keeping him in Liberty County after his former unit deployed effectively removed him from his unit. They cannot now claim that he is still assigned or attached to it.

Secondly, it is not possible for petitioner to deploy “with his unit,” which has long since deployed. The time for petitioner to have been moved was when his unit was deployed. He is now no longer with the unit and no longer a part of it.

CONCLUSION

Petitioner has met all the prerequisites for the issuance of a temporary restraining order. This Court has not just the authority, under these circumstances, to intervene, but a duty to do so to prevent ongoing and serious constitutional violations. These violations have nothing to do with military expertise or necessity. Rather, they are premised only in what is the objective goal of stacking the deck as much as possible against petitioner. One cannot always complain about a stacked deck, but one stacked in violation of fundamental constitutional rights cannot be tolerated.

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