

10-31-1974

10-31-74 Preliminary Memorandum

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Associate Justice, US Supreme Court

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FRANCISCO V. GATHRIGHT

No. 73-5768

Proposed P.C. of Justice Rhenquist

The opinion seems fine, except that it does not make the point that you considered significant with respect to the effects of counsel's tactics on his client. Whether a footnote (possibly an addition to n.6) would be appropriate, I don't know. It might read: "Petitioner's claims, whatever their merit, might have been vindicated more speedily if he had sought habeas relief in the state courts rather than following the federal route. But the wisdom of that choice, whether made by him or his counsel, is not part of this case." I would recommend against including it, however.

The P.C. says that the distinction between this case and Roberts (at 4) is that here the intervening state court decision came down before petitioner filed his petition for habeas relief in federal court. My notes of oral argument indicate that counsel claimed he was "unaware" of Sharp, the intervening decision, which would be understandable, in view of the short time span involved. Should this fact be mentioned, so as to eliminate any question as to whether there was any initial intention to avoid the state court route? Probably not, because the state court route was later made available (see n.6) when counsel was definitely aware of Sharp.

Recommendation: In light of your expressed views, I recommend joining.

RB 10/31/74