

# The Burger Court Opinion Writing Database

## *Durham v. United States*

401 U.S. 481 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

GVR

CHAMBERS OF  
THE CHIEF JUSTICE

January 22, 1971

Re: No. 5928 - Durham v. U. S.

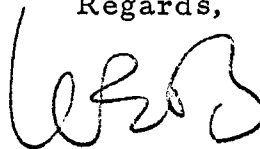
MEMORANDUM TO THE CONFERENCE:

The proposed disposition of this case gives me concern. I do not believe we have weighed possible collateral consequences of this sharp departure from precedent nor have we really found out the facts.

I propose that we get one crucial fact, i. e., the date of death so we can decide whether a viable proceeding ever existed in this Court. If the Court is not disposed to do this, I will have it done as part of what I will embrace in my dissent.

I favor general amnesties at the end of life for we shall all need them but I wonder just where this Court gets the power to grant amnesty to a person convicted in State courts who has had the benefit of all direct and other reviews provided by State law. I do not find such power.

Regards,



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 25, 1971

Re: No. 5928 - Durham v. United States

MEMORANDUM TO THE CONFERENCE

Because of the discussion over the abatement issue in this case, I have undertaken a survey of decisions of this Court dealing with or confronting the issue. I have found no case where the indictment or conviction itself was vacated by this Court. In Gravin v. Cochran, 371 U.S. 27, relied on by Mr. Justice Douglas, this Court vacated a Florida Supreme Court decision denying state habeas corpus, but on remand the state again denied habeas corpus. 138 So.2d 337 (Fla. 1962). Fletcher v. Bryan, 361 U.S. 126, was a disbarment case in which this Court vacated a CA4 decision dismissing petitioner's mandamus action, and dismissed the mandamus petition as moot. In nine other cases where persons, all apparently criminal defendants, died while cert or an appeal was pending before this Court, the Court merely dismissed the appeal or petition as moot. <sup>1/</sup>

---

1/

- \*\* Menkin v. Atlanta, 131 U.S. 405 (writ of error dismissed);
- \*\* Gersewitz v. New York, 326 U.S. 687;
- \*\* List v. Pennsylvania, 131 U.S. 396 (noting that the "cause" abated);  
Johnson v. Tennessee, 214 U.S. 485 (noting that the "appeal" abated);
- \* American Tobacco Co. v. United States, 328 U.S. 781;
- \* Singer v. United States, 323 U.S. 338, 346;
- \* United States v. Johnson, 319 U.S. 503, 520 n.1;
- \*\*\* Dir. Prisons v. Court of First Instance of the Province of Cavite,  
239 U.S. 633, 476 (dismissed for want of jurisdiction since  
case moot);
- \*\*\* Uyeki v. Styer, 329 U.S. 689 (writ dismissed as moot).

\* In these cases the writ was dismissed and the case remanded to the federal court below for such action as law and justice require.

\*\* Review of state decisions.

\*\*\* Review of decision of Supreme Court of Philippine Islands.

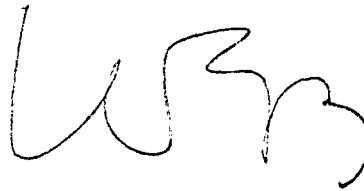
We are not informed as to possible collateral consequences vacating this conviction. If we are concerned about the inherent moral stigma, and if this is a sufficient interest upon which to base judicial review -- particularly in a federal case (as here) where the Court has a supervisory role, then we should review the case and act on it judicially, rather than wiping out a conviction that is entirely valid on its face.

In a related area, the Court has held that a criminal case does not become moot simply because the defendant has completely served the sentence conviction he is attacking. Sibron v. New York, 392 U.S. 40 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Carafas v. La Vallee, 391 U.S. 234 (1968). In Sibron, supra, at 57, the Court held that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." The Court noted that it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences," id., at 55, and thus imposed a test which results in a heavy presumption against mootness. These cases dealt with living defendants, however. See Note, 53 Va. L.Rev. 403 (1967).

Although I have not reached a final conclusion on this issue, I am of the view that the mootness issue should not be treated lightly. The case or controversy requirement is a constitutional one, and limits this Court's jurisdiction. Muskra v. United States, 219 U.S. 346; United Public Workers v. Mitchell, 330 U.S. 75.

Nothing as yet advanced affords a solid legal basis for what is proposed.

Regards,

A handwritten signature in dark ink, consisting of a stylized 'W' followed by a 'B' and a long horizontal stroke.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

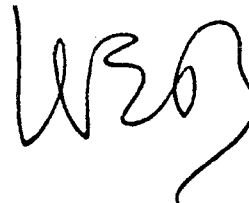
March 5, 1971

Re: No. 5928 - Durham v. U. S.

Dear Thurgood:

Please join me in your dissent in the above.

Regards,



Mr. Justice Marshall

cc: The Conference

TS

January 18, 1971

Dear Bill:

Re: No. 5928 - Durham v. United States

I agree to your Per Curiam in this case.

Sincerely,

H. L. B.

Mr. Justice Douglas

cc: Members of the Conference

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1

# SUPREME COURT OF THE UNITED STATES

October Term, 1970

GEORGE WASHINGTON DURHAM v.  
UNITED STATES

J.  
1/18/71

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5928. Decided January —, 1971

PER CURIAM.

Petitioner was convicted of having knowingly possessed a counterfeit \$20 bill. After the Court of Appeals for the Ninth Circuit affirmed his conviction he filed this petition for a writ of certiorari. We are now advised that petitioner has died.

Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted certiorari, vacated the judgment below, and ordered the complaint dismissed. *Fletcher v. Bryan*, 361 U. S. 126. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take whatever action it deemed proper. *Gravin v. Cochran*, 371 U. S. 27. Our practice in cases on direct review from state convictions has been to dismiss the proceedings. See *Gersewitz v. New York*, 326 U. S. 687. In an earlier case the Court announced the *appeal* had abated, *Johnson v. Tennessee*, 214 U. S. 485, while in another the Court stated the *cause* had abated. *List v. Pennsylvania*, 131 U. S. 396.

In federal criminal cases we developed the practice of dismissing the writ of certiorari and remanding the cause to the court below. *Singer v. United States*, 323 U. S. 338, 346; *American Tobacco Co. v. United States*, 328 U. S. 781, 815 n. 11; *United States v. Johnson*, 319 U. S. 503, 520 n. 1. We have cited *United States v. Pomeroy*, 152 F. 279, rev'd 164 F. 324, and *United States v. Dunne*,

To: The Hon. Justice  
Mr. Justice Black  
Mr. Justice Brennan ✓  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

October Term, 1970

GEORGE WASHINGTON DURHAM v.  
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5928. Decided January —, 1971

PER CURIAM.

Petitioner was convicted of having knowingly possessed a counterfeit \$20 bill. After the Court of Appeals for the Ninth Circuit affirmed his conviction he filed this petition for a writ of certiorari. We are now advised that petitioner has died.

It is true that the petition for certiorari is out of time under our Rule 22 (2), though timeliness under our rules, of course, presents no jurisdictional question. Subsequent to the affirmance of his conviction below, petitioner filed a timely petition for rehearing. Upon his inquiry to the Court of Appeals he was informed that he would be notified as to the disposition of his petition as soon as the court acted. When several months passed without any word, petitioner again wrote to that court. In reply, on September 8, 1970, he received a copy of the order dated March 5, 1970, denying his petition for rehearing. Within three weeks from receipt of the denial from the Court of Appeals his petition for a writ of certiorari was docketed in this Court. On these facts waiver of our Rule 22 is proper.

Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted certiorari, vacated the judgment below, and ordered the complaint dismissed. *Fletcher v. Bryan*, 361 U. S. 126. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take

1/20/71

m



Mr. Justice Black  
Mr. Justice Harlan ✓  
Mr. Justice Brennan

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

October Term, 1970

GEORGE WASHINGTON DURHAM v.  
UNITED STATES

1/26/71

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5928. Decided January —, 1971

PER CURIAM.

Petitioner was convicted of having knowingly possessed a counterfeit \$20 bill. After the Court of Appeals for the Ninth Circuit affirmed his conviction he filed this petition for a writ of certiorari. We are now advised that petitioner has died.

It is true that the petition for certiorari is out of time under our Rule 22 (2), though timeliness under our rules, of course, presents no jurisdictional question. Subsequent to the affirmance of his conviction below, petitioner filed a timely petition for rehearing. Upon his inquiry to the Court of Appeals he was informed that he would be notified as to the disposition of his petition as soon as the court acted. When several months passed without any word, petitioner again wrote to that court. In reply, on September 8, 1970, he received a copy of the order dated March 5, 1970, denying his petition for rehearing. Within three weeks from receipt of the denial from the Court of Appeals his petition for a writ of certiorari was docketed in this Court. On these facts waiver of our Rule 22 is proper.

Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted certiorari, vacated the judgment below, and ordered the complaint dismissed. *Fletcher v. Bryan*, 361 U. S. 126. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take

M

January 18, 1971

Re: No. 5928 - Durham v. U.S.

Dear Bill:

I agree with your per curiam.

Sincerely,

J. M. H.

Mr. Justice Douglas

CC: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 19, 1971

RE: No. 5928 - Durham v. United States

Dear Bill:

I agree with the Per Curiam you have  
prepared in this case.

Sincerely,

  
W.J.B. Jr.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 20, 1971

No. 5928, Durham v. U. S.

Dear Harry,

I am glad to join your dissenting  
opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

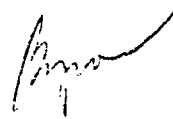
January 19, 1971

Re: No. 5928 - Durham v. United States

Dear Bill:

Please join me in your per curiam  
disposition of this case.

Sincerely,



Mr. Justice Douglas

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 21, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 5928 - Durham v. United States

I suggest this and similar cases be disposed of as follows: "The petitioner having died while his Petition for Certiorari was pending before this Court we dismiss the Petition as moot and direct the Court of Appeals to note this action on their records."

  
J.M.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Blackmun, J.

October Term, 1970

Circulated: 1/20/71

**GEORGE WASHINGTON DURHAM v.  
UNITED STATES**

Recirculated: \_\_\_\_\_

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5928. Decided January —, 1971

MR. JUSTICE BLACKMUN, dissenting.

This case is here on Durham's petition for certiorari after his appeal to the United States Court of Appeals for the Ninth Circuit resulted in the affirmance of his conviction for a violation of 18 U. S. C. § 474. The Solicitor General now has suggested that the petitioner died on November 20, 1970, while his petition was pending but prior to this Court's taking any action upon it by way of grant or denial.

The petition is untimely. The Ninth Circuit's opinion was filed on November 12, 1969, and rehearing was denied by that court on March 5, 1970. A petition for certiorari to review the judgment of the court of appeals in a criminal case is timely, under our Rule ~~2.2~~, only when it is filed here within 30 days after the entry of the judgment or within such additional time, not exceeding 30 days, as is allowed by a Justice of this Court for good cause shown. The petition was filed only on September 26, 1970, and thus is out of time by more than five months.

Further the situation is not one where the decedent possessed, and had exercised, a right of appeal to this Court, and then died while his appeal was pending. That contrasting and very different situation is the typical one which confronts the federal courts of appeals and with which the Eighth Circuit was concerned in *Crooker v. United States*, 325 F. 2d 318 (CAS 1963), cited in the Court's *per curiam* opinion.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 24, 1971

Re: No. 5928 - Durham v. United States

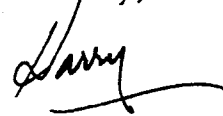
Dear John:

I am inclined to agree with your remark made at Conference last Friday that the writing of opinions in this case is not very advisable.

I believe I understood you to suggest that a mere dismissal of the petition for writ of certiorari would be acceptable to you. I would be entirely content with that simple action and, indeed, have said so in the very first line of the second page of the dissent I circulated on January 20. What disturbs me, and what I think is wrong, is to vacate the judgment of conviction and to remand the case with directions to dismiss the indictment and, thus, to wipe the slate clean. I cannot go for this, and if this is the Court's mature decision, I feel obliged to write.

I have made some minor revisions in my proposed dissent and am circulating it. I say again, however, that if we throw the opinions away and merely dismiss the petition, as I believe the Court has usually done in the past, I shall be entirely content.

Sincerely,



Mr. Justice Harlan



to: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

pp. 1, 2

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

October Term, 1970

Circulated: \_\_\_\_\_

GEORGE WASHINGTON DURHAM v.  
UNITED STATES

Recirculated: 2/24/71

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5928. Decided March —, 1971

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE  
STEWART concurs, dissenting.

This case is here on Durham's petition for certiorari after his appeal to the United States Court of Appeals for the Ninth Circuit resulted in the affirmance of his conviction for a violation of 18 U. S. C. § 474. The Solicitor General now has suggested that the petitioner died on November 20, 1970, while his petition was pending but prior to this Court's taking any action upon it by way of grant or denial.

The petition is untimely. The Ninth Circuit's opinion was filed on November 12, 1969, and rehearing was denied by that court on March 5, 1970. A petition for certiorari to review the judgment of the court of appeals in a criminal case is timely, under our Rule 22.2, only when it is filed here within 30 days after the entry of the judgment or within such additional time, not exceeding 30 days, as is allowed by a Justice of this Court for good cause shown. The petition was filed only on September 26, 1970, and thus is out of time by more than five months.

Further, the situation is not one where the decedent possessed, and had exercised, a right of appeal to this Court, and then died while his appeal was pending. That contrasting and very different situation is the typical one which confronts the federal courts of appeals and with which the Eighth Circuit was concerned in *Crooker v.*

m