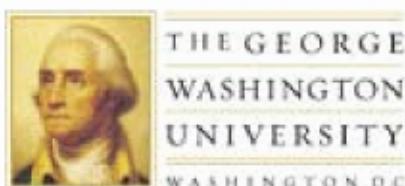


# The Burger Court Opinion Writing Database

*Donnelly v. DeChristoforo*  
416 U.S. 637 (1974)

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

CHAMBERS OF  
THE CHIEF JUSTICE

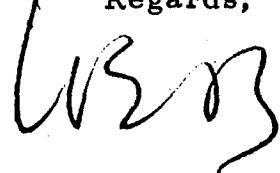
October 18, 1973

Re: Donnelly v. DeChristoforo

Dear Bill:

Please join me in your proposed per curiam.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

April 29, 1974

Re: 72-1570 - Donnelly v. DeChristoforo

Dear Bill:

Please join me.

Regards,  
W.B.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

October 12, 1973

MEMO TO CONFERENCE:

In 72-1570, DONNELLY v. DeCHRISTOFORO

I am preparing a dissent to Bill Rehnquist's  
memo.

*WJD*  
WILLIAM O. DOUGLAS

The Conference

1st DRAFT

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

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

ROBERT H. DONNELLY v. BENJAMIN A. DECHRISTOFORO

*Reprinted*

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

No. 72-1570. Decided October —, 1973

MR. JUSTICE DOUGLAS, dissenting.

This case illustrates the perversion which has affected the office of prosecutor in this country. His function is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial. As stated by the Court in *Berger v. United States*, 295 U. S. 78, 88.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The perversion of which I speak has its source in ignoble tactics which the prosecutor employs in gather-

*Do not  
join*

To : The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Black  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice O'Connor  
Mr. Justice Souter

**3rd DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 72-1570

From: Douglas, J.

Robert H. Donnelly, Petitioner, v. Benjamin A. DeChristoforo.

On Writ of Certiorari to the  
United States Court of Appeals for the First  
Circuit. *Recirculated*

[April —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial. As stated by the Court in *Berger v. United States*, 295 U. S. 78, 88.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We have here a state case, not a federal one; and the prosecutor is a state official. But we deal with an aspect

5  
 To : The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackman  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

## 4th DRAFT

## SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 72-1570

Circulate: 4-29

Robert H. Donnelly, Petitioner, v. Benjamin A. DeChristoforo. } On Writ of Certiorari to the  
 United States Court of Appeals for the First Circuit.

[April —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial. As stated by the Court in *Berger v. United States*, 295 U. S. 78, 88.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We have here a state case, not a federal one; and the prosecutor is a state official. But we deal with an aspect

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 26, 1974

RE: No. 72-1570 Donnelly v. DeChristoforo

Dear Bill:

In your dissent in the above, I wonder if it would be possible for you to separate the last paragraph on page 4 into a Part II. If you can, I'd like then to have added at the foot of your dissent, "Mr. Justice Brennan would affirm for the reasons stated in Part II of this dissent."

Sincerely,

*Bill*

Mr. Justice Douglas

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

CHAMBERS OF  
JUSTICE POTTER STEWART

October 16, 1973

72-1570 - Donnelly v. DeChristoforo

Dear Bill,

I would have denied certiorari in this case. Now that the petition has been granted, however, I join the Per Curiam you have circulated.

Sincerely yours,

P. S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

February 25, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1570, Donnelly v. DeChristoforo

Although I believe strongly that the writ in this case should be dismissed as improvidently granted, I shall, unless an appropriate majority agree with me in this view, feel obligated to consider the case on the merits. See John Harlan's concurring opinion in Ferguson v. Moore-McCormack Lines, 352 U. S. 521, at 559, in which he was joined in all relevant respects by Warren, C. J., and Black, Douglas, Clark, Burton, and Brennan, JJ.

P.S.  
P.S.

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

## 1st DRAFT

## SUPREME COURT OF THE UNITED STATES

Stewart, J.

APR 29 1974

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

No. 72-1570

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

Robert H. Donnelly, Petitioner, v. Benjamin A. DeChristoforo.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[May —, 1974]

MR. JUSTICE STEWART, concurring.

I agree with my Brother DOUGLAS that, when no new principle of law is presented, we should generally leave undisturbed the decision of a court of appeals upon the particular facts of any case that habeas corpus relief should be granted—or denied. For this reason I think it was a mistake to grant a writ of certiorari in this case, and I would now dismiss the writ as improvidently granted.

We are bound here, however, by the “rule of four.” That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court. See *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521, 559 (separate opinion of Harlan, J.).

Upon this premise, I join the Court’s opinion.

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1570

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

Recirculated: MAY 6 1974

Robert H. Donnelly, Petitioner,  
 v.  
 Benjamin A. DeChristoforo.

On Writ of Certiorari to  
 the United States Court  
 of Appeals for the First  
 Circuit.

[May —, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

I agree with my Brother DOUGLAS that, when no new principle of law is presented, we should generally leave undisturbed the decision of a court of appeals that upon the particular facts of any case habeas corpus relief should be granted—or denied. For this reason I think it was a mistake to grant a writ of certiorari in this case, and I would now dismiss the writ as improvidently granted.

We are bound here, however, by the "rule of four." That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court. See *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521, 559 (separate opinion of Harlan, J.).

Upon this premise, I join the Court's opinion.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 4, 1974

Re: No. 72-1570 - Donnelly v. DeChristoforo

Dear Potter:

Please add my name to your concurring  
opinion in this case.

Sincerely,



Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20530

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 15, 1974

Re: No. 72-1570, Donnelly v. DeChristoforo

Dear Potter:

I agree to your suggestion that the writ be dismissed as improvidently granted.

Sincerely,



T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20542

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 7, 1974

Re: No. 72-1570 -- Donnelly v. DeChristoforo

Dear Bill:

Please join me in Part II of your opinion.

Sincerely,

*T.M.*  
T. M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

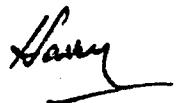
October 12, 1973

Re: No. 72-1570 - Donnelly v. DeChristoforo

Dear Bill:

If you could make one small change, I could go along with your approach as outlined in your memorandum circulated on October 11. The change I suggest is in the third line of page 7, so that that sentence reads, "In Miller the Court dealt with what was then regarded as a repeated and . . . ." I suggest this only because of what I understand are post-Miller factual developments with respect to that case.

Sincerely,



Mr. Justice Rehnquist

*S*

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 16, 1973

Dear Bill:

Re: No. 72-1570 - Donnelly v. DeChristoforo

I am able to go along with the treatment of this case  
as suggested in your recirculation of October 16.

Sincerely,

*H. A. B.*

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 25, 1974

Dear Bill:

Re: No. 72-1570 - Donnelly v. DeChristoforo

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to the Conference

October 12, 1973

No. 72-1570 Donnelly v. DeChristoforo

Dear Bill:

Your excellent memorandum has persuaded me to join in a grant and summary reversal.

I am not sure that I would vote to grant and hear argument, although I agree that the case was wrongly decided by CA1.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 26, 1974

No. 72-1570 DeChristoforo v. Donnelly

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

CC: The Conference

LFP/gg

See p 3 for  
remarks  
referred upon by  
CA3.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

ROBERT H. DONNELLY *v.* BENJAMIN A.  
DeCHRISTOFORO

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

No. 72-1570. Decided October —, 1973

Memorandum of MR. JUSTICE REHNQUIST.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and petitioner was sentenced to life imprisonment. Respondent appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court of Massachusetts affirmed the conviction with two judges dissenting. That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to offend due process.

Respondent then sought habeas corpus relief in United States District Court for the District of Massachusetts. That court denied relief, stating: ". . . the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial." The Court of Appeals reversed by a divided vote. The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this

Join  
& w  
Grant  
Searm  
+ Rev.  
10/11/73

<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. Since that offense is not relevant to the issue raised before this Court, it will not receive further mention.

For: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell

## 3rd DRAFT

Rehnquist, J.

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

## SUPREME COURT OF THE UNITED STATES

ROBERT H. DONNELLY v. BENJAMIN A. DeCHRISTOFORO

Circulated: 10-16-73

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

No. 72-1570. Decided October —, 1973

## Memorandum of MR. JUSTICE REHNQUIST.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and petitioner was sentenced to life imprisonment. Respondent appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court of Massachusetts affirmed the conviction with two judges dissenting. That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to offend due process.

Respondent then sought habeas corpus relief in United States District Court for the District of Massachusetts. That court denied relief, stating: ". . . the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial." The Court of Appeals reversed by a divided vote. The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this

<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. Since that offense is not relevant to the issue raised before this Court, it will not receive further mention.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

4th DRAFT

From: Rehnquist, J.

**SUPREME COURT OF THE UNITED STATES**

ROBERT H. DONNELLY v. BENJAMIN A.  
DECHRISTOFORO

Recirculated: 10-17-7

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

No. 72-1570. Decided October —, 1973

Memorandum of MR. JUSTICE REHNQUIST, with whom  
MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR.  
JUSTICE POWELL join. *also cf*

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and petitioner was sentenced to life imprisonment. Respondent appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court of Massachusetts affirmed the conviction with two judges dissenting. That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to offend due process.

Respondent then sought habeas corpus relief in United States District Court for the District of Massachusetts. That court denied relief, stating: ". . . the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial." The Court of Appeals reversed by a divided vote. The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this

<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. Since that offense is not relevant to the issue raised before this Court, it will not receive further mention.

for the Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell

From: Rehnquist, J.

Recirculated: 4/22/74

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 72-1570

Robert H. Donnelly, Petitioner, v. Benjamin A. DeChristoforo. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[April —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and respondent was sentenced to life imprisonment. He appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court affirmed.<sup>2</sup> That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to offend due process.

Respondent then sought habeas corpus relief in United States District Court for the District of Massachusetts. The District Court denied relief, stating: ". . . the prosecutor's arguments were not so prejudicial as to deprive

<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. The conviction is in no way related to the issues before the Court in this case.

<sup>2</sup> 1971 Mass. Adv. Sh. 1707, 277 N. E. 2d 100 (1971).

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

P. 49

### 3rd DRAFT

From: Rehnquist, J.

**ATES** Circulated:

No. 72-1570

Received date: 4/24/74

**SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_

Robert H. Donnelly,  
Petitioner,  
v.  
Benjamin A. DeChristoforo. } On Writ of Certiorari to the  
United States Court of  
Appeals for the First  
Circuit.

[April —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and respondent was sentenced to life imprisonment. He appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court affirmed.<sup>2</sup> That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to require reversal.

Respondent then sought habeas corpus relief in United States District Court for the District of Massachusetts. The District Court denied relief, stating: ". . . the prosecutor's arguments were not so prejudicial as to deprive

<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. The conviction is in no way related to the issues before the Court in this case.

<sup>2</sup> 1971 Mass. Adv. Sh. 1707, 277 N. E. 2d 100 (1971).

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

cc: Rehnquist, J.

P. 5, 11

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Recirculated: 5/10/74

## SUPREME COURT OF THE UNITED STATES

No. 72-1570

Robert H. Donnelly, Petitioner, v. Benjamin A. DeChristoforo. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[May 13, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and respondent was sentenced to life imprisonment. He appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court affirmed.<sup>2</sup> That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to require reversal.

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<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. The conviction is in no way related to the issues before the Court in this case.

<sup>2</sup> 1971 Mass. Adv. Sh. 1707, 277 N. E. 2d 100 (1971).

Supreme Court of the United States

Washington, D. C. 20543

GR

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 29, 1974

MEMORANDUM TO THE CONFERENCE

Re: Davis v. Craven, No. 73-5569

*file*  
This case was held for Donnelly v. DeChristoforo, No. 72-1570. At issue is an instruction given in a California state court trial which stated:

"It is the opinion of this Court, based on the evidence that we have heard in this case, that the guilt of the Defendant in this case has been proved beyond reasonable doubt as to each of the counts in the Indictment. I would caution you that it is your right and your duty to exercise the same independence of judgment in weighing the Judge's comments on the evidence as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of facts submitted to you. Such authority as the trial Judge has to express his personal thoughts on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict and may not be used and is not used in this case to impose his will upon you to compel a verdict."

The jury then retired and found petr guilty.

The California Court of Appeals followed a previous state decision, People v. Brock, 66 Cal. 2d 645, disapproving that instruction, but then determined that the error was harmless. The United States District Court (N.D. Cal., J. Zirpoli) on habeas disagreed. That court noted that at the time of trial petitioner had no federal constitutional right to a jury trial

but said that such judicial comment was "prima facie an unconstitutional deprivation of the due process right of fundamental fairness." The court found that this type of comment warranted reversal in all but the "exceptional case," where the facts establishing guilt were undisputed. Petitioner's application therefore was granted.

The Court of Appeals for the Ninth Circuit sat en banc and reversed. That court found that the decisions cited by the United States District Court (United States v. Murdock, 290 U.S. 389; Braley v. Gladden, 403 F.2d 858 (CA 9); Parker v. Gladden, 385 U.S. 366) did not collectively establish that this type of instruction violated due process. (Murdock struck down a similar instruction in a federal trial.) The Court of Appeals for the Ninth Circuit then declined to take that step in this case. Since the instruction was not viewed as constitutional error, there was no reason to reach the harmless error question.

Donnelly has little bearing on this case, except as it may suggest that violations of due process are not to be lightly inferred from isolated incidents in the course of a trial. Donnelly involved a remark in the prosecutor's closing argument which may have suggested that the respondent had unsuccessfully tried to plead guilty, while this case involves a particular instruction given by a state court judge on the issue of guilt or innocence. This case is probably more similar to Cupp v. Naughten, decided earlier this term, and involving an instruction claimed to violate the Winship burden of proof, than it is to Donnelly. But neither case is dispositive.

✓ The instruction complained of here has been disapproved by the California courts, and it is reasonable to expect that its use will now cease. Any decision by this Court, therefore, would probably have limited applicability. I will vote to deny.

Sincerely,

*W.W.*