

The Burger Court Opinion Writing Database

Barclay v. Florida

463 U.S. 939 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

February 23, 1983

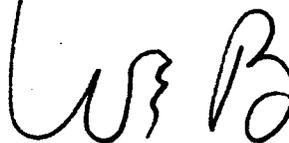
Re: 81-6908, Barclay v. Florida

Dear John:

I am inclined to agree with your suggestion
in your February 22 memo.

I will await views of others. We should act
not later than Friday, or earlier if possible.

Regards,

A handwritten signature in black ink, appearing to be 'W. J. Stevens', written over the typed name 'Justice Stevens'.

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

May 16, 1983

Re: 81-6908 - Barclay v. Florida

MEMORANDUM TO THE CONFERENCE:

The votes now appear to be to affirm in this case, and I assign
it to Bill Rehnquist.

Regards,

A handwritten signature in dark ink, appearing to be 'WR', written in a cursive style.

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

CHAMBERS OF
THE CHIEF JUSTICE

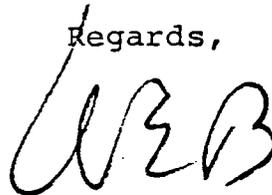
June 14, 1983

Re: No. 81-6908, Barclay v. Florida

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written over the typed word 'Regards,'.

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 24, 1983

RE: No. 81-6908 Barclay v. Florida

Dear John:

I can go along with your suggestion.

Sincerely,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 27, 1983

No. 81-6908

Barclay v. Florida

Dear Thurgood,

Please join me in your dissent in
the above.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 23, 1983

Re: 81-6908 - Barclay v. Florida

Dear John,

My own feeling is that we should hear Barclay. I hadn't thought the issue was all that close to the question in Zant, and the Florida penal statutes are surely a different kettle of fish from those of Georgia.

Sincerely,



Justice Stevens

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 6, 1983

Re: 81-6908 - Barclay v. Florida

Dear Bill,

I agree.

Sincerely yours,



Justice Rehnquist

cc: The Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 24, 1982

Re: No. 81-6908 - Barclay v. Florida,
Summer List 12, page 2

MEMORANDUM TO THE CONFERENCE

I plan on filing the attached as a dissent in the event that three others do not vote to grant certiorari in this case.

Sincerely,

T.M.
T.M.

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: SEP 24 1982

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

ELWOOD BARCLAY *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF FLORIDA

No. 81-6908. Decided October —, 1982

JUSTICE MARSHALL, dissenting from denial of certiorari.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Florida, insofar as it left undisturbed the death sentence imposed in this case. However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

On September 26, 1974, petitioner Elwood Barclay and three others were indicted in Duval County, Fla., for murder in the first degree. According to the trial evidence, the four defendants picked up an 18-year-old hitchhiker, drove him to an isolated trash dump, and murdered him. The victim was chosen solely because of his race. The jury returned a verdict of guilty. After the trial court conducted a separate advisory sentencing proceeding, the jury recommended life imprisonment for petitioner by a vote of seven to five. The trial judge rejected the jury's recommendation, however, and sentenced petitioner to death. On appeal, the Florida Supreme Court affirmed the conviction and sentence, commending the trial judge's "thorough analysis." *Barclay v. State*, 343 So. 2d 1266, 1271 n. 8 (Fla. 1977). The State Supreme Court subsequently vacated the death sentence and ordered the trial court to hold a hearing concerning information contained in a presentence investigation report, as required in *Gardner v. Florida*, 430 U. S. 349 (1977).¹ The trial court's

¹362 So. 2d 657 (Fla. 1978). One month later, this Court denied a peti-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1983

Re: No. 81-6908-Barclay v. Florida

Dear Bill:

I am working on a dissent in this one.

Sincerely,

T.M.

T.M.

Justice Rehnquist

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: ~~JUN 24 1983~~

Recirculated: _____

No. 81-6908

Barclay v. Florida

JUSTICE MARSHALL, dissenting.

Based on a sentencing order rife with errors, the trial judge condemned petitioner Elwood Barclay to death. The Florida Supreme Court then conducted a perfunctory review and affirmed the sentence. Today the majority approves this miscarriage of justice. In doing so the Court is utterly faithless to the safeguards established by its prior decisions. I dissent.

I

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See Gregg v. Georgia, 428 U.S. 153, 231 (1976) (MARSHALL, J., dissenting); Furman v. Georgia, 408 U.S. 238, 358-369 (1972) (MARSHALL, J., concurring). I would vacate petitioner's death sentence on this basis alone.

P. 2

Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Marshall**Circulated: JUN 27 1983

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDAON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[June —, 1983]

JUSTICE MARSHALL, dissenting.

Based on a sentencing order rife with errors, the trial judge condemned petitioner Elwood Barclay to death. The Florida Supreme Court then conducted a perfunctory review and affirmed the sentence. Today the majority approves this miscarriage of justice. In doing so the Court is utterly faithless to the safeguards established by its prior decisions. I dissent.

I

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 358-369 (1972) (MARSHALL, J., concurring). I would vacate petitioner's death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I would vacate the death sentence imposed in this case.

II

In order to assess the process by which petitioner was sentenced to death, it is vital to understand the trial judge's explanation for his sentence of death and the subsequent review

pp. 1, 2, 6, 7, 10, 13-18.

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

Recirculated: JUN 30 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[June —, 1983]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,
dissenting.

Based on a sentencing order rife with errors, the trial judge condemned petitioner Elwood Barclay to death. The Florida Supreme Court then conducted a perfunctory review and affirmed the sentence. Today the plurality approves this miscarriage of justice. In doing so it is utterly faithless to the safeguards established by the Courts prior decisions. I dissent.

I

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 358-369 (1972) (MARSHALL, J., concurring). I would vacate petitioner's death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I would vacate the death sentence imposed in this case.

II

In order to assess the process by which petitioner was sentenced to death, it is vital to understand the trial judge's ex-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 24, 1983

Re: No. 81-6908 - Barclay v. Florida

Dear Chief:

I am sympathetic to John's suggestion.

Sincerely,



The Chief Justice

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Blackmun

No. 81-6908 - Barclay v. Florida

Circulated: JUN 27 1983

JUSTICE BLACKMUN, dissenting.

Recirculated: _____

Like JUSTICE STEVENS, ante, at 15, I cannot "applaud" the procedures and appellate analysis that have led to petitioner's death sentence. Like the Court, however, I cannot "applaud" the undertakings of petitioner and his companions that led to their victim's death in the Jacksonville area that night in June 1974. But when a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law. JUSTICE MARSHALL's opinion convincingly demonstrates the fragility, in Barclay's case, of the application of Florida's established law. The errors and missteps--intentional or otherwise--come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court.

The final result reached by the Florida courts, and now by this Court, in Barclay's case may well be deserved, but I cannot be convinced of that until the legal process of the case has been cleansed of error that is so substantial. The end does not justify the means even in what may be deemed to be a "deserving" capital punishment situation.

I therefore dissent.

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

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Recirculated: JUN 28 1983

Printed
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1983]

JUSTICE BLACKMUN, dissenting.

Like JUSTICE STEVENS, *ante*, at 16, I cannot “applaud” the procedures and appellate analysis that have led to petitioner’s death sentence. Like the Court, however, I cannot “applaud” the undertakings of petitioner and his companions that led to their victim’s death in the Jacksonville area that night in June 1974. But when a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law. JUSTICE MARSHALL’s opinion convincingly demonstrates the fragility, in Barclay’s case, of the application of Florida’s established law. The errors and missteps—intentional or otherwise—come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court.

The final result reached by the Florida courts, and now by this Court, in Barclay’s case may well be deserved, but I cannot be convinced of that until the legal process of the case has been cleansed of error that is so substantial. The end does not justify the means even in what may be deemed to be a “deserving” capital punishment situation.

I therefore dissent.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 23, 1983

81-6908 Barclay v. Florida

Dear John:

I agree with the suggestion in your letter of February 22.

I suppose we can act on this at Friday's Conference.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

June 27, 1983

81-6908 Barclay v. Florida

Dear Bill:

After considering again your opinion and John's, I have decided to join his concurrence.

I cannot pinpoint changes in language in your opinion that would make a controlling difference with me. My feeling about the two opinions comes down, I suppose, to one of tone. You and I tried in Furman to provide broad latitude to the states in imposing capital punishment, and we did not prevail. In an effort to find some middle ground on which capital punishment could be approved, I collaborated with Potter and John in the Gregg group of cases. The principal difference was that by requiring specification of aggravating and mitigating factors, and prescribed appellate review, we hoped to narrow the class or types of murders for which the death penalty may be imposed.

The trend of our cases since Gregg has not been a "straight line". And you and I have not always read Gregg the same way, e.g., Godfrey and Eddings. As I read John's opinion in Zant, in which he has a Court, it affords somewhat more leeway to state courts than Gregg. It seems to me, however, that your opinion in this case is broader in this respect. At the trial level, the sentencer may be allowed to inject considerations into the sentencing process so long as they are "neither irrational nor arbitrary". (p. 9) And at the appellate level, the standard of review also is expressed in terms of the state court decision not being "irrational or arbitrary" in its application of Florida's aggravating circumstances. (p. 7).

In any event, with the four votes for your opinion plus John's and mine for his concurrence, I think the result of Barclay generally will be constructive.

Sincerely

Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 28, 1983

81-6908 Barclay v. Florida

Dear John:

Please join me in your opinion concurring in the judgment.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
FLORIDA

[June —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

The central question in this case is whether Florida may constitutionally impose the death penalty on petitioner Elwood Barclay when one of the "aggravating circumstances" relied upon by the trial judge to support the sentence was not among those established by the Florida death penalty statute.

The facts, as found by the sentencing judge and quoted by the Florida Supreme Court, are as follows:

"[T]he four defendants were part of a group that termed itself the 'BLACK LIBERATION ARMY' (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

"The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill . . . any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

"That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

- Stylistic changes throughout
pp. 4, 11

From: **Justice Rehnquist**

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Recirculated: _____ JUN 8 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[June —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

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"The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill . . . any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

"That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1983

Re: No. 81-6908 Barclay v. Florida

Dear Thurgood:

I greatly appreciate your having supplied me with an advanced copy of your draft dissent in this case, so that I may try to leave Washington by July 1st. Having read the dissent, I anticipate making only one change in my circulating draft. In the last sentence of footnote 9, presently appearing on page 11, I will insert after the word "appears" the phrase "contrary to Justice Marshall's assertion, post, at ____."

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

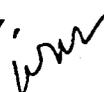
June 27, 1983

Re: No. 81-6908 Barclay v. Florida

Dear Chief:

I think the votes are now all in in this case; I am recirculating my opinion to show that it is that of only a plurality, but unless others wish to write further, I think the case can then be brought down.

Sincerely,



The Chief Justice

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 27, 1983

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 81-6908, Barclay v. Florida

82-840 Wainwright v. Henry

Respondent was convicted in Florida of the murder of his next-door neighbor. When a police officer attempted to arrest him, respondent grabbed the officer's gun, shot him three times, and fled. The trial judge instructed the jury that it could consider any aggravating factor, "including, but not limited to" the statutory aggravating factors. Respondent did not object. The jury recommended the death sentence. The trial judge sentenced respondent to death, referring to the shooting of the officer and to several statutory aggravating circumstances. It found no mitigating circumstances of any kind. The Florida Supreme Court affirmed, and this Court denied cert.

✓ The District Court granted habeas, holding that it is unconstitutional to consider nonstatutory aggravating factors. The CA affirmed. It held that any consideration of nonstatutory aggravating circumstances would create excessive discretion, despite the Florida rule that such an error can be harmless where there are some statutory aggravating circumstances and no mitigating circumstances. The CA also held that the Florida Supreme Court must have excused the procedural default of failure to object to the jury instruction to reach the merits. The CA reaffirmed this holding after this Court GVR'd for reconsideration in light of Engle.

The question whether the CA properly considered Engle does not merit review here. However, the CA essentially invalidated the harmless error rule approved in Barclay. I will vote to GVR for reconsideration in light of Barclay.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JUN 28 1983

1, 11 + 18

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[June —, 1983]

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR joined.

The central question in this case is whether Florida may constitutionally impose the death penalty on petitioner Elwood Barclay when one of the "aggravating circumstances" relied upon by the trial judge to support the sentence was not among those established by the Florida death penalty statute.

The facts, as found by the sentencing judge and quoted by the Florida Supreme Court, are as follows:

"[T]he four defendants were part of a group that termed itself the 'BLACK LIBERATION ARMY' (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

"The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill . . . any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

"That as they drove around the City of Jacksonville they made several stops and observed white persons as

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 28, 1983

MEMORANDUM TO THE CONFERENCE

Re: No. 81-6908 Barclay v. Florida

Because the plurality opinion in Barclay quotes from California v. Ramos, Barclay cannot come down until Ramos does.

Sincerely,

WHR/
DJ

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 22, 1983

Re: 81-6908 - Barclay v. Florida

Dear Chief:

At Conference last Friday I suggested that we might want to consider taking this case off the argument calendar. It is presently set for argument on March 30, 1983.

We granted certiorari to consider the question whether the Florida trial judge committed constitutional error by relying, in part, on a nonstatutory aggravating circumstance when he imposed the death penalty on petitioner. The Florida Attorney General did not oppose cert because he wanted the Court to resolve the conflict between the Florida Supreme Court's decision in this case and the later holding of the Eleventh Circuit in Proffitt v. Wainwright, 685 F.2d 1227. When we took the case, we had not yet received the Georgia Supreme Court's response to our certified question in Zant v. Stephens, the case presenting the question whether a jury's reliance on an invalid statutory aggravating circumstance is permissible.

The similarity between the Barclay issue and the issue in Zant v. Stephens persuades me that there is a strong likelihood that the outcome of Barclay will be determined by Zant. Unfortunately, I will not have a draft of Zant circulated soon enough to enable you to appraise this suggestion in the light of an actual opinion, but a comparison of the Eleventh Circuit's reasoning in Proffitt with the respondent's brief in Zant will reveal the similarity between the two cases.

I was one of the four votes to grant in Barclay and I now am inclined to think my vote was improvident.

Rather than dismissing the writ, however, I think it would be prudent for us to take the case off the argument calendar and hold it in abeyance until Zant comes down. I am troubled, of course, about the unfairness to counsel who have been briefing the case, but I think that factor is outweighed by the value of an hour of oral argument time. If we are to take the case off the argument calendar, we of course should do so as expeditiously as possible.

Respectfully,



The Chief Justice

Copies to the Conference

Sally - Give to me
to take to Conference

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

Friday AM

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 13, 1983

81-6908

Dear Chief:

In order to make travel connections for a moot court at the University of Iowa, I will have to leave the Conference at noon on Friday. I will leave my votes with Bill Rehnquist if we are not finished. To be sure that I am present during the discussion of Barclay v. Florida, I wonder if you would be willing to take that up ahead of the conference list?

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 14, 1983

Re: 81-6908 - Barclay v. Florida

Dear Bill:

In a few days I expect to circulate an opinion concurring in the judgment.

Respectfully,



Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: JUN 23 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[June —, 1983]

JUSTICE STEVENS, concurring in the judgment.

Death as a punishment is unique in its severity and irrevocability. Since *Furman v. Georgia*, this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations. *Gregg v. Georgia*, 428 U. S. 153, 189, 196-206 (1976); *Proffitt v. Florida*, 428 U. S. 242, 247-253 (1976); *Woodson v. North Carolina*, 428 U. S. 280 (1976); *Gardner v. Florida*, 430 U. S. 349 (1977); *Roberts (Harry) v. Louisiana*, 431 U. S. 633 (1977); *Lockett v. Ohio*, 438 U. S. 586 (1978); *Bell v. Ohio*, 438 U. S. 637 (1978); *Green v. Georgia*, 442 U. S. 95 (1979); *Godfrey v. Georgia*, 446 U. S. 420 (1980); *Eddings v. Oklahoma*, 455 U. S. — (1982). We have "attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." *Eddings, supra*, at —. Again this Term we have reaffirmed our adherence to these principles. *Zant v. Stephens*, — U. S. —, — (1983) (slip op., at 11-17). Our decisions, taken as a whole, have given substantial content to the guarantees embodied in the Eighth and Fourteenth Amendments.

Particular features of state sentencing schemes may be sufficiently inadequate, unreliable, or unfair that they violate the United States Constitution. Particular death penalty

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



June 24, 1983

Re: 81-6908 - Barclay v. Florida

Dear Lewis:

Many thanks for the suggested rider. Is it okay with you if I change its style slightly to read this way:

"Although I agree with the plurality's conclusion, and with much of what is said in its opinion, I think it important to write separately. The plurality acknowledges, of course, the constitutional guarantees that have been emphasized in our cases since Gregg. But in some of its language the plurality speaks with unnecessary, and somewhat inappropriate, breadth. A constant theme of our cases--from Gregg and Proffitt through Godfrey, Eddings, and most recently Zant--has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner. As stated in Zant, we have stressed the necessity of 'generally narrow[ing] the class of persons eligible for the death penalty', and of assuring consistently applied appellate review. Slip op. at 14, 27-28. Accordingly, my primary purpose is to reemphasize these limiting factors in light of the decisions of the Supreme Court of Florida."

Any and all suggestions are welcome.

Respectfully,

Justice Powell

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

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Fig. 2, 7, 10, 13, 16
 stylistic changes &
 footnotes unnumbered

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1983]

JUSTICE STEVENS, concurring in the judgment.

Death as a punishment is unique in its severity and irrevocability. Since *Furman v. Georgia*, this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations. *Gregg v. Georgia*, 428 U. S. 153, 189, 196-206 (1976); *Proffitt v. Florida*, 428 U. S. 242, 247-253 (1976); *Woodson v. North Carolina*, 428 U. S. 280 (1976); *Gardner v. Florida*, 430 U. S. 349 (1977); *Roberts (Harry) v. Louisiana*, 431 U. S. 633 (1977); *Lockett v. Ohio*, 438 U. S. 586 (1978); *Bell v. Ohio*, 438 U. S. 637 (1978); *Green v. Georgia*, 442 U. S. 95 (1979); *Godfrey v. Georgia*, 446 U. S. 420 (1980); *Eddings v. Oklahoma*, 455 U. S. — (1982). We have "attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." *Eddings, supra*, at —. Again this Term we have reaffirmed our adherence to these principles. *Zant v. Stephens*, — U. S. —, — (1983) (slip op., at 11-17). Our decisions, taken as a whole, have given substantial content to the guarantees embodied in the Eighth and Fourteenth Amendments.

Particular features of state sentencing schemes may be sufficiently inadequate, unreliable, or unfair that they violate the United States Constitution. Particular death penalty

Stylistic changes
7, 1, 2, 11, 15

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: JUN 29 83

SUPREME COURT OF THE UNITED STATES

No. 81-6908

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[June —, 1983]

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Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

7.2
 stylistic changes

From: **Justice Stevens**

Circulated: _____

Recirculated: _____ **JL 1 83**

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-6908

ELWOOD BARCLAY, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1983]

JUSTICE STEVENS, with whom JUSTICE POWELL joins,
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 24, 1983

No. 81-6908 Barclay v. Florida

Dear Chief,

I tend to agree with Byron that we
should hear this case as scheduled.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 28, 1983

No. 81-6908 Barclay v. Florida

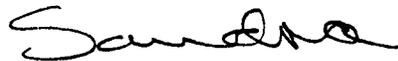
Dear Chief,

At Conference, I expressed the view that we should certify questions to the Florida Supreme Court before addressing the merits of this case. I still believe that is the wisest and best course of action. Unfortunately, we appear to be at an impasse with four to affirm, four to certify questions, and one to reverse. As things stand, I assume the result may be the case would be affirmed as by an equally divided Court.

I do not want to stand in the way of a resolution of the case and I would look at any circulation to affirm the case with a predisposition to join it if the confusing state of the Florida law in capital cases can be adequately explained.

I will change my vote to a tentative affirm if it will get us off dead center.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 8, 1983

No. 81-6908 Barclay v. Florida

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference