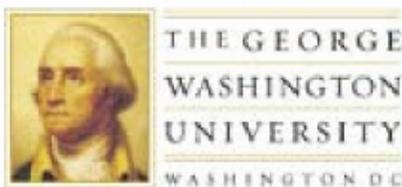


The Burger Court Opinion Writing Database

Zant v. Stephens

462 U.S. 862 (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

May 25, 1983

Re: No. 81-89, Zant v. Stephens

Dear John:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. Stevens', written in a cursive style.

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 13, 1983

No. 81-89

Zant v. Stephens

Dear Thurgood,

Please join me in your dissent in
the above case.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

May 23, 1983

Re: 81-89 - Zant v. Stephens

Dear John,

In Street v. New York, 394 U.S. 576, 588, the Court said that there was no Stromberg-Thomas hazard "when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of those counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others." (footnote omitted) In such cases, a conviction on one count neither rests on nor is intertwined with the conviction on another. If the former is valid on its own bottom, the conviction stands, and so does the sentence. Claassen v. United States, 142 U.S. 140 (1981); Barenblatt v. United States, 360 U.S. 109, 115 (1959).

It seems to me that in a capital case where each of several aggravating circumstances is specifically found by the jury and it turns out that one of those circumstances is invalid, the situation is similar to the above reservation in Street. The aggravating circumstances are independent of each other and there would not seem to be a Street problem as such.

Of course, even in a non-balancing state such as Georgia, where in arriving at its sentencing decision the jury is instructed to consider all the evidence, this would leave the question whether its decision is tainted where the evidence supporting the invalid aggravating circumstances related to constitutionally protected conduct. In this sense, the aggravating circumstances are intertwined, but is it a Street issue?

I should mention another item. You say in n. 23, p. 24, that we need not decide whether the death sentence would be impaired if the jury's findings included an aggravating circumstance which the appellate court finds to be unsupported by sufficient evidence. I had thought that under your reasoning the death sentence in such a situation would clearly be sustainable.

Since I would suppose a common basis for invalidating an aggravating circumstance would be insufficiency of the evidence, I would not leave this issue open.

I had other concerns with your first draft, but I can live with the way they are handled in your second draft. Where this leaves me, I'm not quite sure, Perhaps you can allay my concerns and I can join you outright. I would like to since there should be as many as possible on the opinion for the Court in this case.

Sincerely yours,

s/ B.R.W.

Justice Stevens
cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 24, 1983

Re: 81-89 - Zant v. Stephens

Dear John,

I doubt that we are yet on the same wave length. I shall be back to you in due course. Meanwhile, I am sending a copy of my letter to you of May 23 to the other members of the Conference.

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 10, 1983

Re: 81-89 - Zant v. Stephens

Dear John,

Continuing our Stromberg discussion, I am considering filing the following separate opinion:

JUSTICE WHITE, concurring in part and concurring in the judgment.

In Claassen v. United States, 142 U.S. 140 (1891), the defendant in a criminal case was found guilty on five of eleven counts on which the jury was instructed. The verdict was a general one and one six-year sentence was imposed. On appeal to this Court, the conviction and sentence were affirmed, the Court saying that the first "count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered." Similarly, in Barenblatt v. United States, 360 U.S. 109 (1959), a defendant was convicted on each of five counts, and a general sentence was imposed. The Court said, id. at 115, "Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count, the judgment below must be upheld if the conviction upon any of the Counts is sustainable." It is therefore clear that in cases such as Claassen and Barenblatt, there is no Stromberg, Thomas or Street problem.

Here, the jury imposing the sentence found three aggravating circumstances and based on all the evidence imposed the death sentence. One of the aggravating circumstances was found invalid on appeal, and the claim is that under Stromberg, Thomas and Street, the death sentence must be set aside. I agree with the Court that there is no such problem since the evidence supporting the invalid aggravating circumstance was properly before the jury. The Court, however, suggests that if the evidence had been inadmissible under the federal constitution, there might be a

Stromberg, Thomas or Street problem. The Court says, ante at __, "The jury's imposition of the death sentence after finding more than one aggravating circumstance...is also not precisely the same as the jury's rendition of guilty verdicts on each of several separate counts in a multiple-count indictment, because there is only a single death sentence and it does not rest solely on any one of the aggravating circumstances." But in Claassen and Barenblatt, there was only one sentence and one could be no surer there than here that the sentence did or did not rest on any one of the counts. Those cases, however, would sustain the sentence if it was authorized under any of the valid counts. The Court's statement, therefore, calls these cases into question, and to this extent I am in disagreement with the Court's opinion.

Thus in my view there would be no Stromberg-Thomas-Street problem, as such, if the invalid count had rested on constitutionally inadmissible evidence. But since the jury is instructed to take into account all the evidence, there would remain the question whether the inadmissible evidence invalidates the sentence. Perhaps it would, but at least there would be room for the application of the harmless error rule, which would not be the case, it seems to me, under the per se rule of Stromberg, Street and Thomas.

Except for the foregoing, I join the Court's opinion and its judgment as well.

Sincerely,



Justice Stevens

Copies to the Conference

cpm

Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: JUN 16 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.*
 ALPHA OTIS O'DANIEL STEPHENS

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

[June —, 1983]

JUSTICE WHITE, concurring in part and concurring in the judgment.

In *Claassen v. United States*, 142 U. S. 140 (1891), the defendant in a criminal case was found guilty on five of eleven counts on which the jury was instructed. The verdict was a general one and one six-year sentence was imposed. On appeal to this Court, the conviction and sentence were affirmed, the Court saying that the first "count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered." *Id.* at 146. Similarly, in *Barenblatt v. United States*, 360 U. S. 109 (1959), a defendant was convicted on each of five counts, and a general sentence was imposed. The Court said, *id.* at 115, "Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count, the judgment below must be upheld if the conviction upon any of the Counts is sustainable." *Pinkerton v. United States*, 328 U. S. 640, 641 n. 1 (1946); *Whitfield v. Ohio*, 297 U. S. 431, 438 (1936); *Abrams v. United States*, 250 U. S. 616, 619 (1919); and *Evans v. United States*, 153 U. S. 584, 595 (1894), were similar holdings. It is therefore clear that in cases such as *Claassen* and *Barenblatt*, there is no *Stromberg*, *Thomas*, or *Street* problem.

STYLISTIC CHANGES THROUGHOUT.

and 4, 7, 8, 9, 14, 15

Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'ConnorFrom: **Justice Marshall**

Circulated: _____

Recirculated: JUN 15 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.*
ALPHA OTIS O'DANIEL STEPHENSON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[June —, 1983]

JUSTICE MARSHALL, dissenting.

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I could scarcely join in upholding a death sentence based in part upon a statutory aggravating circumstance so vague that its application turns solely on the "whim" of the jury. *Arnold v. State*, 236 Ga. 534, 541, 224 S. E. 2d 386, 391 (1976).

The submission of the unconstitutional statutory aggravating circumstance to the jury cannot be deemed harmless error on the theory that "in Georgia, the finding of an aggravating circumstance does not play *any role* in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Ante*, at 11 (emphasis added). If the trial judge's instructions had apprised the jury of this theory, it might have been proper to assume that the unconstitutional statutory factor did not affect the jury's verdict. But such instructions would have suffered from an even more fundamental constitutional defect—a failure to provide any standards whatsoever to guide the jury's actual sentencing decision. If this Court's decisions concerning the death penalty establish anything, it is that a capital sentencing scheme based on "standardless jury

111 13275
 STYLISTIC CHANGES THROUGHOUT.

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

From: Justice Marsha

Circulated: _____

Recirculated: JUN 17 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.*
 ALPHA OTIS O'DANIEL STEPHENS

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

[June —, 1983]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,
 dissenting.

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I could scarcely join in upholding a death sentence based in part upon a statutory aggravating circumstance so vague that its application turns solely on the "whim" of the jury. *Arnold v. State*, 236 Ga. 534, 541, 224 S. E. 2d 386, 391 (1976).

The submission of the unconstitutional statutory aggravating circumstance to the jury cannot be deemed harmless error on the theory that "in Georgia, the finding of an aggravating circumstance does not play *any* role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Ante*, at 11 (emphasis added). If the trial judge's instructions had apprised the jury of this theory, it might have been proper to assume that the unconstitutional statutory factor did not affect the jury's verdict. But such instructions would have suffered from an even more fundamental constitutional defect—a failure to provide any standards whatsoever to guide the jury's actual sentencing decision. If this Court's decisions concerning the death penalty establish anything, it is

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 23, 1983

Re: No. 81-89 - Zant v. Stephens

Dear John:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry", with a horizontal line underneath it.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 11, 1983

81-89 Zant v. Stephens

Dear John:

Your thorough opinion is quite persuasive, and I may well join it.

In view, however, of what was written - including my separate opinion - when the case was here before, I will await other writing.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 28, 1983

81-89 Zant v. Stephens

Dear John:

Please join me.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

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

From: **Justice Rehnquist**

Circulated: _____

Recirculated: _____

Rec'd 4/10/83

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.* ALPHA
 OTIS O'DANIEL STEPHENS

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

[April —, 1983]

JUSTICE REHNQUIST, concurring in the judgment.

While agreeing with the Court's judgment, I write separately to make clear my understanding of the application of the Eighth and Fourteenth Amendments to the capital sentencing procedures used in this case. I agree with the Court's treatment of the factual and procedural background of the case, and with its characterization of the questions presented for review. In brief, we must decide whether the procedure by which Georgia imposes the death sentence comports with the Eighth and Fourteenth Amendments; whether, in this case, imposition of the death sentence violates the rule of *Stromberg v. California*, 283 U. S. 359 (1931); and whether the erroneous presentation to a jury of an invalid aggravating circumstance requires vacating the death sentence imposed by that jury.

I

The Georgia death sentencing procedure is comprehensively detailed in the statutes of the state, decisions of the Georgia courts, the opinion issued by the Georgia Supreme Court in response to the question certified by this Court, — U. S. — (1982), and the jury instructions in this case. As these materials reveal, two separate proceedings are necessary to imposition of the death sentence in Georgia. The

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

From: **Justice Stevens**

APR 7 '83

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R. 21

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.* ALPHA
 OTIS O'DANIEL STEPHENS

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

[April —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld. The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

In January 1975 a jury in Bleckley County, Georgia, convicted respondent of the murder of Roy Asbell and sentenced him to death. The evidence received at the guilt phase of his trial, which included his confessions and the testimony of a number of witnesses, described these events: On August 19, 1974, while respondent was serving sentences for several burglary convictions and was also awaiting trial for escape, he again escaped from the Houston County jail. In the next two days he committed three auto thefts, an armed robbery, and several burglaries. On August 21st, Roy Asbell interrupted respondent and an accomplice in the course of burglarizing the home of Asbell's son in Twiggs County. Respondent beat Asbell, robbed him, and, with the aid of the

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

7p. 1, 10, 11, 15, 20 - 26

From: **Justice Stevens**

Circulated: _____

Recirculated: 8 APR 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.* ALPHA
 OTIS O'DANIEL STEPHENS

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

[April —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld. The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

In January 1975 a jury in Bleckley County, Georgia, convicted respondent of the murder of Roy Asbell and sentenced him to death. The evidence received at the guilt phase of his trial, which included his confessions and the testimony of a number of witnesses, described these events: On August 19, 1974, while respondent was serving sentences for several burglary convictions and was also awaiting trial for escape, he again escaped from the Houston County jail. In the next two days he committed three auto thefts, an armed robbery, and several burglaries. On August 21st, Roy Asbell interrupted respondent and an accomplice in the course of burglarizing the home of Asbell's son in Twiggs County. Respondent beat Asbell, robbed him, and, with the aid of the

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1983

Re: 81-89 - Zant v. Stephens

Dear Byron:

Your letter makes a lot of sense. Do you think these changes will take care of the two problems you mention?

1. Page 24, n. 23: Continue the first paragraph rather than starting a new paragraph, as follows: "We need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information."

2. Page 20: Continue the quotation after "540-541," as follows:

"There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of these counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others." Ibid. (footnote omitted).

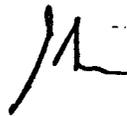
Then revise the following paragraph as follows:

"The rationale of Thomas and Street applies to cases in which there is no uncertainty about the multiple grounds on which a general verdict rests. If, under the instructions to the jury, one way of committing the offense charged is to perform an act protected by the Constitution, the rule of these cases requires that a general verdict of guilt be set aside even if the defendant's unprotected conduct, considered

separately, would support the verdict. It is a difficult theoretical question whether the rule of Thomas and Street applies to the Georgia death penalty scheme. The jury's imposition of the death sentence after finding more than one aggravating circumstance is not precisely the same as the jury's verdict of guilty on a single-count indictment after finding that the defendant has engaged in more than one type of conduct, because a wider range of considerations enters into the former determination. On the other hand, it is also not precisely the same as the jury's rendition of guilty verdicts on each of several separate counts in a multiple-count indictment, because there is only a single death sentence and it does not rest solely on any one of the aggravating circumstances. We need not answer this question here. The second rule derived from Stromberg, embodied in Thomas and Street, applies only in cases in which the State has based its prosecution, at least in part, on a charge that constitutionally protected activity is unlawful. No such charge was made in respondent's sentencing proceeding."

If these changes are acceptable to you and, if no one else objects, I will incorporate them in my next circulation.

Respectfully,



Justice White

Copies to the Conference

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

From: **Justice Stevens**

Circulated: _____

Recirculated: **MAY 27 '83**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.* ALPHA
 OTIS O'DANIEL STEPHENS

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

[May —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld. The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

In January 1975 a jury in Bleckley County, Georgia, convicted respondent of the murder of Roy Asbell and sentenced him to death. The evidence received at the guilt phase of his trial, which included his confessions and the testimony of a number of witnesses, described these events: On August 19, 1974, while respondent was serving sentences for several burglary convictions and was also awaiting trial for escape, he again escaped from the Houston County jail. In the next two days he committed three auto thefts, an armed robbery, and several burglaries. On August 21st, Roy Asbell interrupted respondent and an accomplice in the course of burglarizing the home of Asbell's son in Twiggs County. Respondent beat Asbell, robbed him, and, with the aid of the

pp. 20-21
 Stylistic Changes
 Footnotes Renumbered

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

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 14 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER *v.* ALPHA
 OTIS O'DANIEL STEPHENS

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

[June —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld. The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

In January 1975 a jury in Bleckley County, Georgia, convicted respondent of the murder of Roy Asbell and sentenced him to death. The evidence received at the guilt phase of his trial, which included his confessions and the testimony of a number of witnesses, described these events: On August 19, 1974, while respondent was serving sentences for several burglary convictions and was also awaiting trial for escape, he again escaped from the Houston County jail. In the next two days he committed three auto thefts, an armed robbery, and several burglaries. On August 21st, Roy Asbell interrupted respondent and an accomplice in the course of burglarizing the home of Asbell's son in Twiggs County. Respondent beat Asbell, robbed him, and, with the aid of the

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 22, 1983

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for 81-89 - Zant v. Stephens

This memorandum will only comment on the five Georgia cases that have been held for Zant. In my opinion the following four cases should all be denied because each involves a situation in which the Georgia Supreme Court set aside one of multiple statutory aggravating circumstances and, although other issues are raised, in my opinion those other issues would not be regarded as significant by any member of the Court. These cases are:

- 81-5240 - Gates v. Georgia
- 81-5312 - Stephens v. Georgia
- 81-5947 - Waters v. Georgia
- 82-5128 - Mathis v. Georgia

The fifth case, 81-6827 - Redd v. Zant, raises an additional question on which Justice Marshall has already prepared a draft dissent, and therefore may well need to be relisted. This is a case in which the original death sentence was set aside and the petitioner was sentenced to death a second time. At the first sentencing hearing the prosecutor relied on three aggravating circumstances, only one of which was found by the jury. On appeal, the Georgia Supreme Court set aside the death sentence because of an error in the instructions. At the second sentencing hearing, the prosecutor relied not only on the three circumstances considered in the first hearing, but also on a fourth. The jury again found the same aggravating circumstance that they had found the first time plus a second. The Georgia Supreme Court affirmed, essentially on the reasoning in our Zant opinion. Petitioner argued that he was, in effect, submitted to

7/16/83

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 22, 1983

MEMORANDUM TO THE CONFERENCE

Re: Cases held for 81-89 - Zant v. Stephens

82-5868 - Williams v. Maggio, Warden.

This is a Louisiana capital case which was, in due course, reviewed by the Fifth Circuit sitting en banc. It raises a substantial Witherspoon issue concerning at least one juror, and the Zant issue. I frankly think there is merit to the Witherspoon issue, but since it has been reviewed by the Fifth Circuit sitting en banc, I do not think we should take the case for the purpose of reexamining their evaluation of the facts. The Zant question arises because the Louisiana Supreme Court actually reviewed only one of the three aggravating circumstances that had been found by the jury, even though the other two were challenged for fairly substantial reasons. Nevertheless, under our reasoning in Zant, I would agree that that review was sufficient to uphold the death penalty. Accordingly, I plan to vote to deny. ✓

81-5962- Taylor v. North Carolina

Petitioner raises two issues beside the Zant issue: whether the erroneous admission of certain psychiatric evidence at the sentencing hearing amounted to constitutional error; and whether it was error to refuse the petitioner's request that the sentencing jury be instructed to specify the mitigating circumstances that it found. There are two parts to the Zant error: (1) that setting aside one of the three aggravating circumstances found by the jury taints the death sentence and (2) that it was error to introduce substantial evidence of the petitioner's prior criminal record. Under our holding in Zant, neither of these claims has merit and I shall therefore vote to deny.

HAB

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 22, 1983

MEMORANDUM TO THE CONFERENCE

Re: Case Held for 81-89 - Zant v. Stephens

No. 82-5260 - Moore v. Louisiana

The petitioner was convicted of a stabbing murder in the course of a rape and robbery while the victim's four-month-old daughter was in the house. The jury found three aggravating circumstances:

"(1) The offender was engaged in the commission or attempted commission of aggravated rape, aggravated burglary and armed robbery;

7
"(2) The offender knowingly created a risk of death or great bodily harm to more than one person;

"(3) The offense was committed in an especially heinous, atrocious or cruel manner."

The Louisiana Supreme Court found adequate evidentiary support for the first and third aggravating circumstances, but not for the second. It affirmed the sentence of death.

✓ This disposition is consistent with our holding in Zant. I will vote to deny.

Respectfully,



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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

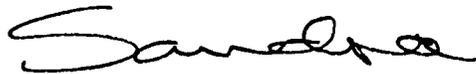
May 5, 1983

No. 81-89 Zant v. Stephens

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference