

# The Burger Court Opinion Writing Database

## *Barefoot v. Estelle*

463 U.S. 880 (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

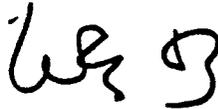
January 24, 1983

Re: No. 82-6080, Thomas A. Barefoot v. W.J. Estelle

Dear Bill:

I agree with your proposed order.

Regards,



Justice Brennan

Copies to the Conference

11  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 30, 1983

RE: Case No. 82-6080 - Barefoot v. Estelle

Dear Byron:

This will confirm my "join".

Regards,  
WRB

Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 24, 1983

MEMORANDUM TO THE CONFERENCE

RE: No. 82-6080 Barefoot v. Estelle

The enclosed form of Order was prepared with the help of Al Stevas and Frank Lorson. Al advised me that he will inform the parties that the case will be set for argument in the April session and that the briefing schedule will be tailored accordingly. I suggest that returns might be made to me at your earliest convenience.

I've undertaken to have the Chief Justice and Justice White informed.

*Bill*  
W.J.B. Jr.

There are 2  
WB 1/24  
MEMOS ; only one  
is one file list

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**Barefoot v. Estelle**

No. A-638

On Application for Stay

January 24, 1983

Memorandum of JUSTICE BRENNAN.

We have before us an application for a stay of an execution scheduled to take place on Tuesday, January 25, 1983. Petitioner applies for a stay of execution pending filing in and disposition by this Court of a petition for certiorari to the United States Court of Appeals for the Fifth Circuit, presenting the question of "the appropriate standard for granting or denying a stay of execution when a death-sentenced federal habeas corpus petitioner presents a constitutional issue of first impression to a federal court of appeals." Application for Stay, at 2.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), and I would grant the application and vacate petitioner's sentence of death for that reason alone. Independently of that view, however, I believe that a petition for certiorari presenting the question proposed by petitioner should be granted. The question of the proper standard for granting stays in death penalty cases involves fundamental issues

*MM*

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 3, 1983

Re: No. 82-6080 -- Barefoot v.  
Estelle

Dear Thurgood and Harry:

We three are in dissent in the  
above. Since Thurgood and I doubtless  
would in any event have our usual bottom  
line, would you, Harry, undertake the  
dissent?

Sincerely,

*Bill*

Justice Marshall

Justice Blackmun

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 24, 1983

No. 82-6080

Barefoot v. Estelle

Dear Thurgood,

Please join me in your dissent.

Sincerely,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 30, 1983

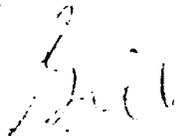
No. 82-6080

Barefoot v. Estelle

Dear Harry,

Will you please join me in Parts I  
through IV of your dissent? I do not  
join Part V because I agree with  
Thurgood's disposition.

Sincerely,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 20, 1983

MEMORANDUM TO THE CONFERENCE

Re: Barefoot v. Texas 82-6080

I have asked the Clerk's Office to add to the Conference List an application for stay which has not yet been filed but which hopefully will be filed late today or tomorrow. The stay concerns a death sentence now scheduled to be carried out on Tuesday, January 25. We denied cert on direct appeal on June 29, 1981. The cert pool memo prepared at that time is attached. The District Court has denied habeas and issued a certificate of probable cause. The appeal is still pending, and the CA has denied a stay, issuing a 16-page opinion, which is not yet here.

This sounds like Brooks. In any event, I thought the Court should take a look at it.

Cheers  
BRW

10. The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: MAY 26 1983

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[May —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We have two questions before us in this case: whether the District Court erred on the merits in rejecting the petition for habeas corpus filed by petitioner, and whether the Court of Appeals for the Fifth Circuit correctly denied a stay of execution of the death penalty pending appeal of the District Court's judgment.

### I

On November 14, 1978, petitioner was convicted of the capital murder of a police officer in Bell County, Texas. A separate sentencing hearing before the same jury was then held to determine whether the death penalty should be imposed. Under Tex. Code Crim. Proc. Ann. §37.071,<sup>1</sup> two

<sup>1</sup>Tex. Code Crim. Proc. Ann. §37.071 provides:

“(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 7, 1983

Re: 82-6080 - Barefoot v. Estelle

Dear John,

In tardy response to your letter about the circulating draft, I would much prefer, if there are four other votes in support, to leave the proposed opinion as it is. You suggest that Part II-A is inconsistent with the rest of the opinion and unnecessary. I doubt that it is either.

Barefoot submits that the Court of Appeals erroneously failed to reach the merits of his appeal and that we should remand to permit the Court of Appeals to cure its error. In response, the draft asserts that the Court of Appeals in fact reached and decided the merits; and in Part III the draft agrees with the Court of Appeals' and the District Court's view of the merits. If anything is unnecessary to decision in this case, which is here on certiorari before judgment, it is Part II-B. If four others insisted, I would be quite happy to eliminate that part.

Hence, in Navy terms, I shall stand by for boarding.

Sincerely,



Justice Stevens

Copies to the Conference

cpm

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

- pp. 9, 10, 13, 22 &  
stylistic changes throughout -

From: **Justice White**

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

Recirculated: \_\_\_\_\_ JUN 13 1983

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

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

From: Justice White

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Recirculated: JUN 17 1983

pp. 16-17

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We have two questions before us in this case: whether the District Court erred on the merits in rejecting the petition for habeas corpus filed by petitioner, and whether the Court of Appeals for the Fifth Circuit correctly denied a stay of execution of the death penalty pending appeal of the District Court's judgment.

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STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 12, 17-19, 23

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

From: Justice White

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

JUN 23 1983

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

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We have two questions before us in this case: whether the District Court erred on the merits in rejecting the petition for habeas corpus filed by petitioner, and whether the Court of Appeals for the Fifth Circuit correctly denied a stay of execution of the death penalty pending appeal of the District Court's judgment.

I

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711B

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 27, 1983

MEMORANDUM TO THE CONFERENCE

Case held for No. 82-6425 - Barefoot v. Estelle

16080

No. 82-6425 - Woomer v. Estelle

Woomer was convicted of capital murder. At the sentencing phase of his trial, the State's psychiatrist, who had examined Woomer on two occasions, predicted that, if given the opportunity, Woomer would commit violent crimes in the future. Woomer argued that psychiatric predictions of future dangerousness are so unreliable that the Constitution requires their exclusion. The South Carolina Supreme Court rejected this argument, and this holding is consistent with Barefoot.

Woomer also contends that the doctor's testimony should not have been admitted because he did not receive full Miranda warnings prior to the examination. The lower court agreed that complete warnings were necessary, but it held that the doctor had informed Woomer of his rights prior to the examination. There apparently is a dispute as to whether the doctor informed Woomer of his right to counsel--it is undisputed that the doctor informed Woomer of his right to remain silent--but this factual issue does not merit review.

Finally, Woomer asserts that the doctor was constitutionally required to inform him specifically that his answers could be used against him at the sentencing phase of the trial. There is no basis in our cases for such a proposition.

I will vote to deny cert.

*BW*

pp. 17, 1<sup>c</sup>, 23-24;  
stylistic changes throughout;  
new footnote 6; footnotes  
to be renumbered.

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

From: **Justice White**

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5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We have two questions before us in this case: whether the District Court erred on the merits in rejecting the petition for habeas corpus filed by petitioner, and whether the Court of Appeals for the Fifth Circuit correctly denied a stay of execution of the death penalty pending appeal of the District Court's judgment.

### I

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

From: Justice Marshall

JUN 23 1983

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE MARSHALL, dissenting.

I cannot agree that the procedure followed by the Court of Appeals in this case was "within the bounds of our prior decisions." *Ante*, at 7. Nor can I agree that it would be proper for a court of appeals to adopt special "summary procedures" for capital cases. *Ante*, at 12. On the merits, I would vacate petitioner's death sentence.

### I

I wholeheartedly agree that once a State prisoner has obtained a certificate of probable cause to appeal from the denial of a petition for a writ of habeas corpus, he "must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal." *Ante*, at 11. Once a prisoner has made the showing necessary to obtain a certificate of probable cause, he has satisfied the only condition that Congress has placed on the right to appeal in habeas corpus cases.<sup>1</sup> We have repeatedly held that once a certificate of probable cause has been granted, an

<sup>1</sup>Title 28, § 2253 provides that "[i]n a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had."

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

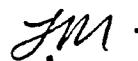
July 1, 1983

Re: No. 82-6080 - Barefoot v. Estelle

Dear Harry:

Please join me in all but Part V.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.

PP. 1, 2, 3, 6, 7

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

From: Justice Marshall

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,  
dissenting.

I cannot subscribe to the Court's conclusion that the procedure followed by the Court of Appeals in this case was "within the bounds of our prior decisions." *Ante*, at 7. Nor can I accept the notion that it would be proper for a court of appeals to adopt special "summary procedures" for capital cases. *Ante*, at 12. On the merits, I would vacate petitioner's death sentence.

I

I wholeheartedly agree that when a State prisoner has obtained a certificate of probable cause to appeal from the denial of a petition for a writ of habeas corpus, he "must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal." *Ante*, at 11. A prisoner who has made the showing necessary to obtain a certificate of probable cause has satisfied the only condition that Congress has placed on the right to appeal in habeas corpus cases.<sup>1</sup> We have repeatedly held that once

<sup>1</sup>Title 28, § 2253 provides that "[i]n a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had, if

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 24, 1983

Re: No. 82-6080 - Barefoot v. Estelle

Dear Bill:

I agree.

Sincerely,



Justice Brennan

cc: The Conference

MA

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 3, 1983

Re: No. 82-6080 - Barefoot v. Estelle

Dear Bill:

I shall be glad to undertake the dissent in this case. I appreciate that you and Thurgood, in any event, will add your usual "bottom line."

Sincerely,



Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 27, 1983

Re: No. 82-6080 - Barefoot v. Estelle

Dear Byron:

In due course, I shall try my hand at a dissent in this case.

Sincerely,



Justice White

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

Circulated: JUN 29 1983

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No. 82-6080 - Barefoot v. Estelle

JUSTICE BLACKMUN, dissenting.

I agree with most of what JUSTICE MARSHALL has said in his dissenting opinion. I, too, dissent, but I base my conclusion also on evidentiary factors that the Court rejects with some emphasis. The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result--even in a capital case--because, it is said, the testimony is subject to cross examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake--no matter how heinous his offense--a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.

I

To obtain a death sentence in Texas, the State is required to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code

For: 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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Handwritten initials and marks: H H Y, P, M, and other scribbles.

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**SUPREME COURT OF THE UNITED STATES**

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

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

Pages: 1, 3, 4, 7, 8, 9, 10, 11, 12, 13,  
14, 15, 16, 17, 18, 19, 20, 21, 22  
Footnotes 10-15 Renumbered  
Stylistic Changes Throughout

From: **Justice Blackmun**

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Recirculated: July 1, 1983

2nd PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

with whom JUSTICE BRENNAN and JUSTICE MARSHALL

JUSTICE BLACKMUN, join in Parts I-IV, dissenting.

I agree with most of what JUSTICE MARSHALL has said in his dissenting opinion. I, too, dissent, but I base my conclusion also on evidentiary factors that the Court rejects with some emphasis. The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result—even in a capital case—because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable un-touchability of a medical specialist's words, equates with death itself.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 22, 1983

No. A-638. Barefoot v. Estelle

Dear Chief,

I have now reviewed (i) the Application for a Stay; (ii) the Response of the State; (iii) the decision of CA5 denying a stay; and (iv) the decision of the DC denying federal habeas relief.

Also I have re-read Byron's helpful summary memo of January 21, and the pool memo on this case when it was here in 1980--a memo that focused on the hypothetical question and answers that are the principal ground relied upon then and now by petitioner.

The 100 per cent degree of certainty expressed by the state's psychiatrist and psychologist seems unprofessional and suspect. Yet, at the federal habeas corpus hearing, the psychiatrist and psychologist who testified for the petitioner, basing their testimony on the same hypothetical, agreed to the extent of 90% with the state's witnesses. None of these experts personally examined the petitioner, though this was an option open to the petitioner with his witnesses. Moreover, at this hearing different experts for the state--also basing their testimony on the hypothetical--agreed generally with the predictive judgment of future dangerousness.

Petitioner's challenge to this testimony is not frivolous. It has been considered and rejected, however, by the Texas Court of Criminal Appeals four times, and by the DC and the CA5 in this habeas proceeding.

In sum, I cannot say that the application for a stay now presents a substantial question meriting further judicial review. Accordingly, I would deny the application.

Sincerely,



The Chief Justice

cc: The Conference

June 6, 1983

82-6080 Barefoot v. Estelle

Dear Byron:

I am writing a join note separately, as I agree essentially with your opinion.

I do not agree with John's view that Part II-A is "inconsistent with the remainder of the opinion". Part II-A, as John suggests (letter of May 31) perhaps is "unnecessary" as this Court's action in Brooks can be justified on its own. I would not object if you decided - in order to obtain John's vote - to move the substance of the concluding portions of Part II-A to the end of the opinion. As you suggest, it was unfortunate and poor practice not to use the appropriate words ruling on the merits. It is clear, however, that in substance this is exactly what CA5 did.

Your proposed general guidelines are constructive. I do have a suggestion as to the "fifth". I agree that stays of execution should not be "automatic" even when a petition for cert is being filed in the first federal habeas corpus case. Almost invariably, I have granted a stay in such a situation. On the first habeas review, I think our normal practice has been to take a close look at the petition. It may be well to say this in substance, making clear as you have that this is not automatic.

Sincerely,

Justice White

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 6, 1983

82-6080 Barefoot v. Estelle

Dear Byron:

Please join me.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

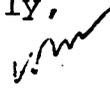
May 27, 1983

Re: No. 82-6080 Barefoot v. Estelle

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 31, 1983

Re: 82-6080 - Barefoot v. Estelle

Dear Byron:

Except for Part II-A, I agree in substance with what you have written. It seems to me, however, that II-A is both inconsistent with the remainder of the opinion and unnecessary. Parts II-B and III demonstrate that the Court of Appeals erred in this case in two ways: it should have granted a stay of execution until it decided the merits of the appeal, and it overstated the case when it said that there was no semblance of merit in the prisoner's claims. Yet Part II-A hints that the failure to enter a final judgment is nothing but a procedural technicality.

This does not suggest any disagreement with your ultimate disposition of the case. As you state, the fact that the Court of Appeals erred in failing to act on the merits of the case before the petitioner was executed does not automatically require a remand. All it requires is that some court decide the merits before the stay we entered is lifted. Since we decide the merits in Part III, the procedural error committed by the Court of Appeals will be demonstrably irrelevant as of the issuance of our mandate. I don't know whether the proper terminology is harmless procedural error or mootness, but our disposition obviously makes remand unnecessary.

I wonder if it would not remove the internal tension in the opinion to move the substance of your conclusion in Part II-A to the end of the opinion. In that manner, the opinion would begin with a statement of what the correct procedure is, continue to an analysis of the merits, and conclude with an explanation of what the correct disposition of this case is. With the possible exception of a few relatively minor points, I believe I could join

something along those lines. If you leave the discussion in its present form, I will write separately because I feel very strongly that a Court of Appeals should never let a case become moot by reason of the execution of one of the litigants when it has an obligation to decide the merits of the appeal before the execution takes place.

One final point: Brooks v. Estelle may be distinguished on the ground that there was not even arguable merit in the petitioner's claim. Even though I agree with you that we must reject the claim here, surely we cannot say that the merits contentions in this case are wholly frivolous.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 7, 1983

Re: 82-6080 - Barefoot v. Estelle

Dear Byron:

Thanks for your note. While you are standing by, I shall be doing the work of a yeoman. What I write will suggest that it is better practice to affirm a judgment than to allow the appeal to become moot by executing one of the litigants.

Respectfully,



Justice White

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 27 '83

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J.  
ESTELLE, JR, DIRECTOR, TEXAS DEPART-  
MENT OF CORRECTIONS

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

[June —, 1983]

JUSTICE STEVENS, concurring in the judgment.

For the reasons stated in parts I and II of JUSTICE MARSHALL's dissenting opinion, I agree that the Court of Appeals made a serious procedural error in this case. Nevertheless, since this Court has now reviewed the merits of petitioner's appeal, and since I agree with the ultimate conclusion that the judgment of the District Court must be affirmed, I join the Court's judgment.

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 22, 1983

Re: Barefoot v. Estelle, A-638

Dear Chief,

I have reviewed the application and the response and  
vote to deny the application for a stay.

Sincerely,



cc: The Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 24, 1983

No. 82-6080 Barefoot v. Estelle

Dear Bill,

I have no objection to the form of the  
order.

Sincerely,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 7, 1983

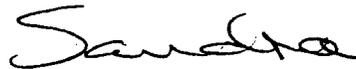
No. 82-6080 Barefoot v. Estelle

Dear Byron,

Please join me in your opinion.

I understand John's concerns and if you decide to make changes to accommodate his views, that is perfectly acceptable as far as I am concerned.

Sincerely,



Justice White

Copies to the Conference