The Burger Court Opinion Writing Database

Darden v. Wainwright

477 U.S. 168 (1986)

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

September 3, 1985

MEMORANDUM TO THE CONFERENCE:

85-5319

RE: A-181 - Darden v. Wainwright

My vote is to deny the application for a stay of execution in this case.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

September 4, 1985

RE: 85-5319 - Darden v. Wainwright

Dear Joe:

Please issue an amended order in this case and insert my dissent as follows:

"The CHIEF JUSTICE, dissenting:

"In the twelve years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see, Darden v. Florida, 430 U.S. 704 (1977)(certiorari dismissed as improvidently granted); Darden v. Wainwright, ____ U.S. ____ (1984)(certiorari denied); Wainwright v. Darden, ____ U.S. ____ (1985)(vacating and remanding); Darden v. Wainwright, ____ U.S. ____ (1985)(order dated September 3, 1985 denying application for stay), and have been litigated before no fewer than 95 federal and state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent."

Regards,

WEB

Mr. Joseph Spaniol
Clerk of the Court

copies to the Conference

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

rec'd 9/11 2:50 PM

September 10, 1985

CHAMBERS OF
THE CHIEF JUSTICE

RE: No. 85-5319, Darden v. Wainwright

Dear Lewis:

Your memo and the others on this case greeted me after a week in your Virginia mountains. I agree that the events leading up to our disposition of the stay application in this case and in Pinkerton four weeks ago merit discussion at the September 30 Conference when we finish with the Lists.

I also agree with Bill Brennan's observation that we have "exposed the Court to the criticism that its own decisions are arbitrary" by the events of last week, but I am not sure that he and I agree on what it is that merits criticism. Although criticism per se does not concern me, our sudden "about face" performed late Tuesday evening surely raises valid questions in some minds.

Prior to the granting of the stay and certiorari on Tuesday, we had already considered and rejected the claims raised in Darden's stay application on three separate occassions. As John's recent memo points out, we granted certiorari in 1976 to review Darden's direct appeal and then in 1977 dismissed the writ as improvidently granted. Darden's 1976 petition raised the same issues raised in his recent stay application. Then, just one year ago, we denied certiorari on Darden's cross-petition which again raised the same claims raised in the recent stay application. By denying the cross-petition, and remanding the case for consideration in light of Witt, we left only the Witherspoon issue for the Court of Appeals to resolve. On remand, the Court of Appeals rejected that claim.

The denial of the cross petition should have removed any doubt created by our DIG of the first petition as to our view of the merits of those claims. Finally, last Tuesday we considered and rejected those same issues in the stay application. Having had three opportunities to review this case (two of which were clearly in the "ordinary course of business") and having rejected Darden's claims three times, we have now granted a stay and certiorari.

Any suggestion that our disposition of these cases is a "rush to judgment" is unmitigated nonsense. Thirteen years have elapsed since Darden was charged with murder. In that time, Darden's claims have been heard repeatedly and repeatedly rejected by this Court and other courts. Ninety five times a judge has passed on Darden's claims.

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

CHAMBERS OF
THE CHIEF JUSTICE

May 27, 1986

85-5319 - Darden v. Wainwright

Dear Lewis:

I join.

Regards,

Justice Powell

Copies to the Conference

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

From: **The Chief Justice**

Circulated: JUN 13 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

CHIEF JUSTICE BURGER, concurring.

I concur fully in the opinion for the Court and write separately only to address the dissent's suggestion that the Court rejects Darden's *Witherspoon* claim because of its "impatience with the progress of Darden's constitutional challenges to his conviction." *Ante*, at ——. In support of this contention, reference is made to my dissent from the grant of certiorari in this case. The dissent states that I voted to deny the petition because Darden's claims have been reviewed by 95 judges in the 12 years since his conviction. What my dissent actually stated, however, was:

> "In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (certiorari dismissed as improvidently granted); *Darden* v. *Wainwright*, —— U. S. —— (1984) (certiorari denied); *Wainwright* v. *Darden*, —— U. S. —— (1985) (vacating and remanding); *Darden* v. *Wainwright*, —— U. S. —— (1985) (order dated September 3, 1985 denying application for stay), and have been litigated before no fewer than 95 federal and state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary re-

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

all pages 1, 2

From: **The Chief Justice**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

CHIEF JUSTICE BURGER, concurring.

I concur fully in the opinion for the Court and write separately only to address the dissent's suggestion that the Court rejects Darden's *Witherspoon* claim because of its "impatience with the progress of Darden's constitutional challenges to his conviction." *Ante*, at ——. In support of this contention, reference is made to my dissent from the grant of certiorari in this case. The dissent states that I voted to deny the petition because Darden's claims have been reviewed by 95 judges in the 12 years since his conviction. This is simply incorrect. To set the record straight, I quote my dissent in full:

> "In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (certiorari dismissed as improvidently granted); *Darden* v. *Wainwright*, —— U. S. —— (1984) (certiorari denied); *Wainwright* v. *Darden*, —— U. S. —— (1985) (vacating and remanding); *Darden* v. *Wainwright*, —— U. S. —— (1985) (order dated September 3, 1985 denying application for stay), and have been litigated before no fewer than 95 federal and state court judges. Upon review of the petition and the history of this case, I

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

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1986

RE: No. 85-5319 - Darden v. Wainwright

Dear Harry:

I too prefer not to indulge in the exchange of views that the Darden case has prompted. I wrote separately because I felt that your parenthetical description following the citation to my dissent from the grant of certiorari was simply incorrect. So long as the incorrect statement remains in your opinion I am bound to set the record straight. Actually there is no point to any of this exchange.

Regards,

WEB

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 3, 1985

MEMORANDUM TO THE CONFERENCE:

Re: Darden v. Wainwright, No. 85-5319

My vote is to grant the petition for a writ of certiorari.

Sincerely,

WJB/md

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 3, 1985

MEMORANDUM TO THE CONFERENCE

Re: Stay Application in Darden v. Wainright

I would vote to grant the stay and file the following:

Adhering to my view that capital punishment is in all circumstances prohibited as cruel and unusual punishment by the Eighth and Fourteenth Amendments, I would vote to grant a stay of the death sentence imposed in this case.

Sincerely,

Bill

HAB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 6, 1985

No. 85-5319 -- Darden v. Wainwright

Dear Colleagues:

I certainly share Lewis's feeling that our current handling of capital cases requires examination. Twice in the past four weeks we have stayed executions at the eleventh hour. In both cases we were, as a result of the late hour and the fact that some of us were away from Washington, unable to meet and make our decisions in an orderly and unhurried fashion. These two cases have not only disrupted our lives and the lives of the litigants and their counsel; they have also exposed the Court to the criticism that its own decisions are arbitrary. On Tuesday we 1) denied a stay, 2) granted cert in the case in which we had declined to issue a stay, 3) vacated the order denying the stay and 4) granted a stay. Of course, the problems we have faced in the past two weeks will not simply go away on their own accord; current estimates indicate that there are approximately 60 executions scheduled this term. I fully agree with Lewis that we should reconsider our procedures for dealing with capital cases.

My own view is that the Rule of Four is vital to the sound and just administration of the business of this Court. We can talk about this at greater length at Conference, but I must say that I am somewhat at a loss to comprehend how the Rule of Four was "exploited" in Darden's case. As I understand what happened

Tuesday, four of us believed that the petition raised certworthy issues and accordingly voted to grant. With respect, I do not foresee any danger that counsel will be able to "exploit" our procedures. The votes of four Justices are required to grant cert. It is not possible for counsel to manipulate this rule.

What does concern me greatly is the prospect of what was narrowly avoided Tuesday evening, namely, the Court granting cert in a capital case while refusing to stay the execution, with the result that the petitioner dies even while his case is being docketed and scheduled for argument. I think we all agree that this would be intolerable, not only from the perspective of public reaction, but, more fundamentally, in terms of the unspeakable irony it would present. We are all indebted to Lewis for twice sparing the Court and the petitioner this fate.

The question we now face is how to assure that neither the Court nor Lewis is again placed in this difficult position. My sense, again, is that the solution to the dilemma is not to forsake the Rule of Four, but to consider whether, in a capital context, we will continue to permit an execution date set by a state judge to force us to abandon our regular and well-established procedure for disposing of petitions for certiorari.

The Court is increasingly put in a position where Justices must vote on a cert petition before they are fully prepared to do so. This haste is unnecessary, since the state would suffer no real prejudice were we to follow normal procedures. In other words, if we ultimately deny the petition, the state will execute the petitioner, and the only "injury" it will have experienced is

the passage of a few weeks. I fail to see why this minimal delay should be deemed a state interest of sufficient magnitude to displace and disrupt our procedures. Of course, if we ultimately grant the petition, after appropriate regard, the state's "injury" is of no consequence.

I propose that in capital cases we adopt a Rule of Four to stay executions. At the very least, we should adopt this rule for first federal habeas petitions. The virtue of this approach would be to allow those Justices who feel that the case may be certworthy the time to consider the petition in the same unhurried and deliberate way that every other petition is considered, and thus to avoid the rush to judgment that threatens to become the rule rather than the exception. Were we to adopt such a rule, it is possible--although, of course, I personally would be disappointed--that cert would actually be granted in fewer capital cases. The Court need not fear that such a Rule of Four would inexorably lead to the granting of a stay. However, where four Justices do require time to decide the merits of a petition, and where, as a consequence, the possibility that cert will be granted remains, it is clear to me that the state's interest in immediate execution must yield to the possibility of an erroneous execution.

Incidentally, Darden does maintain, and has throughout his litigation maintained, his innocence; indeed, that fact becomes critical when assessing the issue of prosecutorial misconduct and harmless error. (The question of innocence was the thrust of Darden's oral argument before us in 1977.) The point here is

that if we continue to allow state-set execution dates to rush us to judgment, we run the risk of providing capital petitioners with less, rather than equal, justice.

Sincerely,

W.J.B., Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 27, 1986

No. 85-5319

Darden v. Wainwright

Dear Thurgood, Harry and John,

We four are in dissent in the above. Will you, Harry, take it on?

Sincerely,

Bill

Justice Marshall

Justice Blackmun

Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 24, 1986

No. 85-5319

Darden v. Wainwright

Dear Lewis,

I shall await the dissent in the above.

Sincerely,

Bill

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1986

No. 85-5319

Darden v. Wainwright

Dear Harry,

Please join me.

Sincerely,

Bill

Justice Blackumn

Copies to the Conference

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

From: **Justice Brennan**

Circulated: JUN 5 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE BRENNAN, dissenting.

I join my Brother BLACKMUN's dissent. Moreover, adhering 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) (BRENNAN, J., dissenting), I would vacate the death sentence imposed in this case.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

September 3, 1985

MEMORANDUM TO THE CONFERENCE

Re: Darden v. Wainwright

My vote is to
I would deny Darden's application for a stay of the Eleventh Circuit's judgment.

B.R.W.
ep m

cc: Mr. Joseph F. Spaniol, Jr.
Clerk of the Court

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 24, 1986

85-5319 - Darden v. Wainwright

Dear Lewis,

Please join me.

Sincerely yours,

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 3, 1985

Re: A-181 - Darden v. Wainwright

Dear Chief:

My vote is to grant the application for a stay of execution.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 10, 1985

Re: No. 85-5319, Darden v. Wainwright

MEMORANDUM TO THE CONFERENCE

I would like to add to the current debate on the Rule of Four my understanding of the meaning and history of the Rule. That history establishes, in my view, that a majority of five Justices does not have the right to prevent the Court from considering the merits of a case in which four Justices have voted to grant certiorari, whether directly or by failure to preserve the status quo so that the Court may reach a determination.

It is clear that Congress relied on the Court's Rule of Four when it passed the Judiciary Act of 1925 enlarging the scope of certiorari jurisdiction. See S. Rep. No. 362, 68th Cong., 1st Sess. 1 (1924). The House Report quoted with approval the testimony of Justice Van Devanter, who explicitly committed the Court to observing the Rule of Four in all cases. The reason for quoting that passage was to quell any fear that the increase of discretionary jurisdiction might "impair the administration of justice and lead to partial hearings and not secure a decision by the whole Court." H.R. Rep. No. 1075, 68th Cong., 1st Sess. 3 (1925). The House Committee was satisfied that the Court's established procedures--particularly the Rule of Four--would protect the integrity of the review process from these evils. Ibid.

For present purposes, however, it seems most important to stress what was meant by the Court's assurances to Congress that the Rule of Four would be unerringly observed. The best indication of that meaning is found in the testimony of Justice Van Devanter, who declared, "We always grant the petition when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted." Hearings Before the Committee on the Judiciary of the House on H.R. 8206, 68th Cong.,

1st Sess. 7 (1924). Several years later, the same meaning was attributed to the Rule of Four, when Justice Van Devanter's 1924 testimony was read into the record during debates on the "court-packing" plan. At that time, Senator Austin commented on Congress's understanding of the Court's procedure as follows: "If as many as four of the Justices are excited to action on the case ... then, if four of them say so, there is a hearing on the merits ...." 81 Cong. Rec. 3325 (1937). Thus, the Rule of Four connotes more than an empty gesture that can be immediately overruled upon the will of the other five; a grant of the writ means "that the Court finds probable cause for a full consideration of the case in ordinary course." Hearings Before a Subcommittee of the Committee on the Judiciary of the Senate on S.2060 and 2061, 68th Cong., 1st Sess. 30 (1924).

This understanding that a grant of certiorari is a commitment to provide plenary review finds support in the decisions of this Court in Rogers v. Missouri R.R. Co., 352 U.S. 500 (1957), and companion cases. Justice Frankfurter voiced an argument which is strikingly analogous to that made in Bill Rehnquist's memorandum of September 9--that a majority of five Justices should be permitted to dismiss a writ as improvidently granted when the will of the majority opposes plenary review. Id., at 528. A majority of six Justices, however, adopted Justice Harlan's position that "any case warranting consideration in the opinion of such a substantial minority of the Court [as four] will be taken and disposed of." Id., at 560. See Rogers, supra, at 509 n. 23. That is not to say, of course, that the Court may not decide, on the basis of information not available at the time the writ was granted, that the case is inappropriate for review. The Court merely determined that the majority may not subvert the Rule of Four by preventing plenary review after cert has been granted.

The Rule represents both a promise to Congress and a tradition that has served the Court well for decades. It helps to ensure that the Court will recognize an obligation to give thorough consideration to borderline cases and that it will never foreclose the possibility of changing its mind in the face of a compelling argument. I do not see how we can embrace the Rule and at the same time recognize an inherent majority right to prevent consideration of a granted case. When the case at issue involves the death penalty, the Court's opportunity to decide the merits may depend entirely on the delay of a scheduled execution. And in those very cases, the possible harm to the state is

minimal, as Bill Brennan explained in his memorandum of September 6, while the possible harm to the defendant refused a stay is, of course, of the ultimate degree. But the principle is the same in all cases: if cert has been granted and the Court's ability to pass on the merits will otherwise be undermined, a stay should be granted to preserve the status quo.

In view of the fact that four Justices have been given the power to accept jurisdiction for the Court, it would be odd if five were required to maintain it. Therefore, I believe that once cert has been granted, the standard for granting a stay is no longer that applied to petitions for stays pending cert, as in White v. Florida, 458 U.S. 1301 (Powell, J., in chambers), or Corsetti v. Massachusetts, 458 U.S. 1305 (Brennan, J., in chambers). In short, I believe that history, precedent, and prudence require a rule that, when four Justices have voted to grant cert, the full Court will acquiesce and not moot the case.

T.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 20, 1986

Re: No. 85-5319-Darden v. Wainwright

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 3, 1986

Re: No. 85-5319-Darden v. Wainwright

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

September 3, 1985

MEMORANDUM TO THE CONFRENCE

Re: A-181, Darden v. Wainwright

I vote to grant the application for a stay of execution.

HAB.

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

September 10, 1985

MEMORANDUM TO THE CONFERENCE

Re: No. 85-5319, Darden v. Wainwright

Bill Rehnquist, in his memorandum of September 9, suggested that it might be helpful for each of us to express views about this case. So I, too, am "weighing in."

1. I realize that serious questions have been raised about the Rule of Four. John did so, as I recall, in his Madison Lecture at NYU in 1984. Now Lewis is obviously thinking about a Rule of Five for these stressful death penalty cases. I, for one, would be reluctant to depart from the Rule of Four so far as any petition for certiorari or jurisdictional statement is concerned. It is my understanding that the Rule rests on a representation made by Chief Justice Taft and others to Congress at the time the Court was vested with general discretionary jurisdiction over certiorari petitions. There, of course, was no legal "consideration" for this promise, but it has been honored over the years. Also, it seems to me, it has worked very well. It effects, to be sure, minority control of the calendar, but I have always viewed the grant of certiorari as a preliminary judgment that a case raises serious issues that deserve this Court's full, and collegial, attention. The idea that a Rule of Five should be adopted in capital cases strikes me as especially pernicious, since it suggests that the Eighth Amendment concerns implicated by the death penalty are less compelling than the other issues we face.

2. As all of you know, my position with respect to capital cases is that I shall vote to grant a stay pending the resolution here of the defendant's first federal habeas. I recognize, as Bill Rehnquist points out, that there is no specific constitutional provision to this effect, but I am persuaded that in a capital case a defendant deserves considered treatment in this Court of his first federal habeas. And despite the passage of time, a good bit of which was occasioned by the action of this Court in its DIG of some time ago, this appears to me to be Darden's first federal habeas. That every multi-judge opinion in this case has evoked a strong dissent, that the Eleventh Circuit has repeatedly gone en banc, and that this Court has granted certiorari on various issues in this case three times, far from suggesting to me that Darden has engaged in some kind of abuse of the writ, shows that the case raises troubling issues.

3. You will recall, I must assume (for I notified you), my struggle with the Supreme Court of Missouri about prematurely set execution dates. See McDonald v. Missouri, ____ U.S. ____ (1984) (Blackmun, J., in chambers). In McDonald and each of its companion cases, the State Supreme Court, as soon as it had affirmed on direct appeal a judgment of conviction in a capital case, itself set the execution date within the time allowed by our Rule 20.1 for the filing of a petition for certiorari. I refused to let this Court be pushed into premature review of the petitions for certiorari, and I stayed those executions with the announcement that I would continue to stay every similarly set execution until review here was completed. I would not allow that court to rush us to judgment. I have had no trouble with the Supreme Court of Missouri since then. If we make clear to the States that this Court will insist upon having sufficient time adequately to review first federal habeas petitions, we shall eliminate the current incentive States possess to set execution dates that force hasty review of often problematic cases.

4. Darden at least claims that he is innocent of the charges against him. This may appear to be somewhat unusual, for in a majority of these capital cases the killing is admitted, and the issue centers on some asserted defense for the killing. His claim of innocence is at least colorable. I am also convinced that there is error in the Darden record. The issue, for me, then, is whether that error rises to constitutional significance. It may not, but the presence of the error led to my vote to grant. Two of you, of course, already have judged the case on the merits when you announced that there is no merit whatsoever in the case. I may reach that conclusion ultimately, but I certainly am not prepared to reach that conclusion on the papers presented to us initially.

5. I do not like to be rushed to judgment by the setting of an execution date, no matter who sets it. I shall oppose--indeed, I resent--the necessity of our reviewing a petition for certiorari within 12 hours of its filing here, whether that time limit is occasioned by the state court or by this Court or by a Member of it. I do not recall in the years I have been here being forced to review certiorari petitions under pressure of this kind, except perhaps in an occasional election case. In my view, capital cases should be treated with the same consideration, and on the same schedule, as other petitioners receive.

6. There is, of course, a good bit to be said against these last-minute midnight appeals. I am gratified by what I think is beginning to appear, namely, a tendency on the part of the lower courts to stay the execution themselves and not pass the buck to us. That is where the primary responsibility should lie, and that, I hope, is where the responsibility is being assumed.

7. The Court as an institution would surely appear intellectually and morally bankrupt if we were to announce that a petitioner's claims are worthy of review but that we would abandon our responsibility to perform such review if the State chooses to execute in the meantime. I think allowing an execution under such circumstances would do far more to discredit this Court than any delay in allowing a proper execution could ever entail. The situation then would exemplify Charles Dickens' observation made through the mouth of Mr. Bumble in Oliver Twist.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 27, 1986

Re: No. 85-5319, Darden v. Wainwright

Dear Bill:

I shall be glad to undertake the dissent in this case.

Sincerely,

Harry

Justice Brennan

cc: Justice Marshall
Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 21, 1986

Re: No. 85-5319, Darden v. Wainwright

Dear Lewis:

In due course, I shall undertake a dissent in this case.

Sincerely,

Harry

Justice Powell

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 02 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE BLACKMUN, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection, but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

I

A

The Court's discussion of Darden's claim of prosecutorial misconduct is noteworthy for its omissions. Despite the fact that earlier this Term the Court relied heavily on standards

[1] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. ——, —— (1985) (slip op. 7); *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

pp. 1, 2, 7, 8

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 5 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

I

A

The Court's discussion of Darden's claim of prosecutorial misconduct is noteworthy for its omissions. Despite the fact

[1] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. ——, —— (1985) (slip op. 7); *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

STYLISTIC CHANGES
+ pp. 2-4

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 10 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1986

Re: No. 85-5319, Darden v. Wainwright

Dear Lewis:

I shall make the last sentence of part I on page 13 of my dissent read "Because I believe that he did not have a trial that was fair, I would reverse Darden's conviction; I would not allow him to go to his death until he has been convicted at a fair trial."

Sincerely,

Harry

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1986

Re: No. 85-5319, Darden v. Wainwright

Dear Chief:

Your circulation of June 13 necessarily prompts a response. If your circulation in this case is retained, I shall append the enclosed footnote to the last line of part II on page 17 of my dissent.

Frankly, I prefer not to indulge in this exchange of views. If, by chance, you should withdraw your writing, the footnote, too, will be withdrawn.

Sincerely,

HAB

The Chief Justice

cc: The Conference

pp. 13, 17-18

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 18 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 19 1986

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

August 29, 1985

Darden v. Wainwright

MEMORANDUM TO THE CONFERENCE:

Darden is scheduled to be executed at 7:00 a.m. on Wednesday, September 4. No papers have yet been filed in this Court. In view of the intervening long Labor Day weekend, it may be helpful for you to have the enclosed memorandum prepared by my clerk Mike Mosman that summarizes the long and rather complex history of this case.

I am referring the case to the Conference and requesting the Clerk to circulate all papers that may be lodged or filed promptly to each of the Chambers.

L.F.P., Jr.

ss

cc: Joseph F. Spaniol, Jr., Esquire

To: Mr. Justice Powell August 29, 1985

From: Mike

Re: Incoming Application for a Stay of Execution, Darden v. Wainwright

An execution date has been set for Willie Darden for September 4, 1985 at 7:00 a.m. At the time of this writing no stay application has been lodged or filed with the Court, but with time so short I will write a preliminary memo now and supplement it on arrival of the stay application.

PROCEDURAL HISTORY

Willie Darden was convicted for the murder of a man in front of the man's wife inside the small store he was robbing. He also shot a 16 year-old boy several times. He was sentenced to death in Florida state trial court on January 23, 1974. His conviction and sentence were affirmed by the Fla. S. Ct. in 1976. He petitioned for a writ of cert. on three issues; the in-court identification, the exclusion of prospective jurors under Witherspoon, and the prosecutor's closing arguments. Cert was granted and then subsequently limited to the closing argument issue. After briefs and oral argument the Court dismissed the writ as improvidently granted.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

September 3, 1985

Willie Darden v. Wainwright

MEMORANDUM TO THE CONFERENCE

This is a supplement to the memorandum to the Conference of August 29, 1985, outlining the procedural history of the case. As noted therein, Darden has filed with this Court twice before. The first time was immediately following the Florida Supreme Court's affirmance of Darden's conviction and sentence. Cert was granted and subsequently limited to the issue of the prejudicial effect of the prosecutor's closing argument. After oral argument, the petition was dismissed as improvidently granted. 430 U.S. 704 (1977). The second time followed the CA11's en banc decision to grant Darden habeas relief on Witherspoon grounds. Florida petitioned for cert, and Darden opposed any grant of cert, but cross-petitioned for cert with the argument that it would be unfair to grant cert on the Witherspoon issue without also granting cert on Darden's claims of ineffective assistance of counsel and prejudicial closing argument by the prosecutor. Darden's petition was denied, 104 S.Ct. 2688 (1984). Florida's petition was granted and GVR'd in light of Wainwright v. Witt, 105 S.Ct. 844 (1985).

Willie Darden is scheduled to be executed at 7:00 a.m., Wednesday, September 4, 1985. On Friday, August 30, 1985, the CA11 denied his application to stay the mandate and the execution pending application for certiorari. The CA11 mandate issues today, and the former stay dissolves today. On Sunday, September 1, 1985, Darden filed with this Court an application for a stay of execution pending filing of a petition for certiorari.

Darden advances four arguments in support of his stay application. Each of these has been relied on before. He contends (i) that the prosecutor's closing argument violated due process under Donnelly v. DeChristoforo, 416 U.S. 637 (1974); (ii) that he was denied eighth amendment protections under Caldwell v. Mississippi, 105 S.Ct. 2633 (1985); (iii) that certain members of the jury panel were improperly excused under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 105 S.Ct. 844 (1985); and (iv) that he received ineffective assistance of counsel.

Darden's contention that the prosecutor's closing argument violated due process under Donnelly has been fully and correctly dealt with below. He argues that the decision in Caldwell requires a different analysis than the courts below have given this claim. While Donnelly is grounded on due process protections, the decision in Caldwell is based on the eighth amendment. I do not think that Caldwell requires a different analysis of Darden's case than that already engaged in by the courts below.

Darden has now raised a variation of his Caldwell argument in the Florida courts. The state circuit court denied Darden's motion yesterday. At 10:00 a.m. this morning Darden's appeal of that denial was before the Florida Supreme Court. If the Florida Supreme Court also denies that motion, Darden will raise the issue in a second federal habeas petition today. I do not think that this "new" issue is a substantial one.

Darden's Witherspoon claim has been reviewed by the CA11 after remand. The CA11 en banc decision upholding Darden's Witherspoon claim was GVR'd in light of Witt. On remand, the CA11, again en banc, reversed the prior opinion. I believe that the latest CA11 decision on Darden's Witherspoon claim is the correct result. Darden's ineffective assistance claim also has been fully and correctly dealt with below.

I am voting to deny the application.

L.F.P.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

September 3, 1985

Darden v. Wainwright

MEMORANDUM TO THE CONFERENCE:

My vote is to deny Darden's application for a stay of the Eleventh Circuit's judgment.

L.F.P., Jr.

ss

September 4, 1985

85-5319 Darden v. Wainwright

Dear Colleagues:

The experience of last evening disturbs me - perhaps all of us.

At the time most of us voted (probably all of us), the only operative document before us was an application for a stay. This had been filed here (not simply lodged) following adverse decisions on a last-minute filing by Darden in the Florida courts. At the time the application was filed, I am not even sure a petition for habeas corpus had then been filed with the DC. Certainly no action by the DC had been taken until yesterday afternoon. At about 9:11 p.m., after the DC had denied Darden's requested stay, counsel simply filed a letter requesting that his application for a stay be treated as a petition for certiorari. The letter did not identify the court to which cert was to be granted. My understanding is that the Clerk's Office decided that the application for a stay, in light of counsel's letter, could be viewed as cert addressed to a CA11 decision of July 23, 1985. The Clerk's view was later approved by the Chief Justice.

Prior to receipt of counsel's letter, when only the application for a stay was before us, there were five votes to deny and four votes to grant. In this posture of the case, there would have been no stay of execution. Apparently when this became evident, and after the letter from counsel had been received, the four who had voted for a stay also voted to grant certiorari.

With all respect, it seems to me that this was more than a little unusual and sets a precedent that will be followed - at least by counsel - in other capital cases involving the first cert application to this Court in a federal habeas corpus case. Moreover, cert was granted, not on a cert petition in any proper sense, but only on an application for a stay. It was granted yesterday afternoon at a time when the Court of Appeals had not acted. Indeed, the Clerk's Office did not receive word from CA11 until 11:22 p.m., last night. This unusual grant was done without the

benefit of discussion in Conference, and I am not at all sure it was done in accordance either with our Rules or precedent.

If the Rule of Four can be so easily exploited, I am inclined to think we should reconsider that Rule and possibly - as many have suggested in recent years - adopt a Rule of Five. Heretofore, I have always opposed this change even though experience tells us that the Rule of Four results each Term in our taking more than a few cases that probably did not require Supreme Court review.

In sum, I think this development requires our careful discussion during the Conferences that commence on September 30. I add that this case illustrates how easily the system is manipulated in capital cases. Darden was sentenced to death 12 years ago. His trial and sentence have been reviewed multiple times in state and federal cases over the intervening years, including twice by this Court. No one suggests that he is innocent - a fact that all too often under our law is irrelevant. As I said in a talk at a CAll Conference two or three years ago, unless the habeas corpus statute is substantially changed - as Carl McGowan, Dan Meador and others have suggested - the states should rescind their capital punishment laws. I have no doubt as to the constitutionality of capital punishment, but I have grave doubts as to whether it now serves the purposes of deterrence and retribution, the principle purposes we identified in Gregg.

Sincerely,

lfp/ss

October 9, 1985

85-5319 Darden v. Wainwright

Dear Chief:

In view of the history of this case, my vote is to deny the motion to dissolve the stay.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

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

From: **Justice Powell**

Circulated: March 20, 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[March ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright* v. *Witt*, 469 U. S. —— (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

I

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court for Citrus County, Florida, in January 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a nonbinding recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and the sentence. Petitioner made several of the same arguments in that appeal that he makes here. With re-

May 21, 1986

85-5319 Darden v. Wainwright

Dear Chief:

Yesterday, when Bill Brennan and Thurgood were circulating memos urging in the Straight capital case that we "hold" it for Darden, I thought we had a Court in that case. When I checked my file, I found that you have not joined me. I circulated my opinion on March 20.

You may recall that Darden is a capital case from Florida in which the defendant was convicted of capital murder in 1974(!) and has been up here a couple of times in his numerous repetitive litigations. It occurs to me that you may have overlooked Darden.

It would have been helpful yesterday when I was answering WJB and TM if I had been certain that we had a Court in Darden.

Sincerely,

The Chief Justice

lfp/ss

06/06

Stylistic Changes Throughout.
pp. 12-14

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

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 7 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright* v. *Witt*, 469 U. S. —— (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

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

Stylistic Changes Throughout.
p. 12

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 13 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

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

[June 16, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright* v. *Witt*, 469 U. S. —— (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

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85-5319

Re Darden v. Wainwright

Supreme Court of the United States

Memorandum

6/23, 1986

Chief,

I inadvertently failed to mention your concurring opinion in Darden

Sorry about this!

Rubens it worked!

Lewis

Notes exchanged on the Bench when I announced the Court's decision in this case

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Darden v. Wainwright, No. 85-5319

1. Darden v. Wainwright, No. 85-6273

This petition is Darden's second federal habeas petition, which was filed before the opinion was handed down in No. 85-5319. For the facts of the case generally, please refer to the opinion. This petition raises two issues. First, petr claims that the Florida sentencing statute that describes the aggravating circumstance of "heinous, atrocious or cruel" is too vague and does not sufficiently narrow the class of murderers subject to the death penalty. He contends that Godfrey v. Georgia, 446 U.S. 420 (1980) at the least requires such a statute to have a limiting construction by the State Supreme Court. The Florida Supreme Court has placed a limiting construction on the statute, see State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Petr contends, however, that despite the limiting construction, the "heinous" factor has become a means of making capital punishment possible in almost every first degree murder case, and that his case illustrates the point. He notes that in his case, the victim died instantly, and the sexual assault of the victim's wife occurred after death or unconsciousness of the victim. Petr's second contention is that the Florida sentencing system at the time of his trial had the effect of violating Lockett v. Ohio, 438 U.S. 586 (1978) (holding that the sentencer cannot be precluded from considering any relevant mitigating factor). Florida lawyers and judges almost uniformly considered Florida's statutory list of mitigating factors to be exclusive, and therefore were not permitted to introduce into evidence nonstatutory mitigating evidence.

Because the opinion in 85-5319 does not deal with either of petr's claims, and because the claims themselves do not have merit, I will vote to deny the petition. Petr's claim that the "heinous" factor was applied, despite Dixon, in violation of Godfrey is an abuse of the writ. Petr's first federal habeas petition was filed in May, 1979. This same argument was made in Proffit v. Florida, 428 U.S. 242, 255-256 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). In petr's state habeas petition last year, he made the argument that his appellate counsel was ineffective for failing to raise this issue on appeal, and cited seven cases

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Darden v. Wainwright, No. 85-5319

2. Sireci v. Florida, No. 84-6895

Petr was tried and convicted for the murder of the owner of a used-car lot. On direct appeal, petr argued that the Florida sentencing system, as interpreted by most lawyers and judges, had the effect of violating Lockett v. Ohio, 438 U.S. 586 (1978), by limiting the introduction and consideration of mitigating evidence to certain specific categories listed in the statute, see Fla. Stat. §921.141 (1975). The Florida Supreme Court rejected petr's claims, citing Songer v. State, 365 So. 2d 696 (Fla. 1978) (holding that §921.141 was a nonexclusive list of mitigating factors and that other factors could be considered). Petr then filed a Florida Rule 3.850 motion for post-conviction relief in state court. In this motion, petr again contended that Lockett had been violated, this time alleging additional facts particular to his case. Petr's motion was denied, and the Florida Supreme Court aff'd, holding that the Lockett claim had been raised and rejected on direct appeal and hence was foreclosed under state law. Under Florida law, issues that either were raised or could have been raised on direct appeal are foreclosed from review in collateral relief proceedings. Smith v. State, 457 So. 2d 1380 (Fla. 1984).

The opinion in Darden says nothing about petr's claim. In addition, the claim, before us on appeal from denial of state habeas relief, is procedurally barred. This petition should be denied, after which petr is free to make these same argument on federal habeas. The extent to which his arguments are similar to No. 85-6756, Hitchock v. Wainwright, in which cert has been granted from an en banc decision of the CAll considering the same general Lockett argument raised here, can be determined at that time. My vote, therefore, will be to deny the petition.

Sincerely,

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

September 3, 1985

MEMORANDUM TO THE CONFERENCE:

Re: A-181 - Darden v. Wainwright

I vote to deny the application for stay of execution in the above case.

Sincerely,

WHR/lag

HAB

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

September 9, 1985

Re: No. 85-5319 Darden v. Wainwright

MEMORANDUM TO THE CONFERENCE

I have read Lewis', John's, and Bill's comments about capital case procedures in this Court, comments which arose out of the stay granted in this case last week. Thinking that it might be helpful for all of us to express at least tentative views, I submit mine herewith. If forced to choose between Lewis' proposal, which to my mind would represent an otherwise unwelcome departure from the tradition which allows four out of nine members of the Court to bring a case here for review, and Bill's, which to my mind would in capital cases turn the Court over to a minority of four at least in the short term, I would choose Lewis' proposal. But if my understanding of existing procedures is correct, I think that the position for which he contends is already consistent with our Rule in the great majority of capital case stay applications which we get, and for those in which it isn't I don't feel that a change is warranted.

I think it highly desirable to focus on what present procedures are, if only to evaluate the necessity for a change. We have been living in reasonable peace and harmony for several years with the rule that it requires five votes to grant a stay in any sort of case, and for a good deal longer period of time than that with the rule that four votes are sufficient to grant a writ of certiorari to a Court of Appeals to review its judgment. Since our authority to grant a "stay" is not an independent one, but comes from the "All Writs Act" which requires that a writ be in aid of existing jurisdiction, all "stay" applications must logically be framed in terms of ultimate review by this Court on certiorari. There is naturally going to be some "tension" between the Rule of Five required for a stay and the Rule of Four required to grant certiorari.

My understanding of the "test" to be applied by the Court in deciding whether or not to grant a stay is that the

Court must be satisfied that four Justices will vote to grant a petition for certiorari in the case, and that the petitioner has a reasonable probability of success on the merits. "[T]here must be a significant possibility of reversal of the lower court's decision," White v. Florida, 458 U.S. 1301, 1302 (Powell, J., in chambers); "[T]here is a fair prospect that a majority of the Court will conclude that the decision below was erroneous," Corsetti v. Massachusetts, 458 U.S. 1305, 1305-6 (Brennan, J., in chambers).

If the typical capital stay application came to us accompanying a normal petition for certiorari to review the judgment of the Court of Appeals there could obviously be some very hard cases presented, as Lewis' and Bill's memos both indicate. If four are determined to grant certiorari, I do not think, as Lewis apparently does, that one of the five who feel certiorari should not be granted is necessarily bound to change his vote in order to prevent the case from being moot. If each of the five is of the opinion that there is no reasonable prospect of success on the merits, it seems to me that they are not obligated to vote to grant the stay. A contrary result would simply mean that four Justices out of a total number of nine could frustrate the effectuation of the will of the majority: for example, if Bill's and Thurgood's views on capital punishment were shared by two additional Justices, such a hypothetical combination could vote to grant certiorari in every death case because they sincerely believed that the infliction of the death penalty was unconstitutional under all circumstances even though five members of the Court were satisfied that it was not unconstitutional. The conflict between the "Rule of Four" and the requirement that five votes are required for a stay comes down to this -- either the tail wags the dog or the doctrine of mootness prevents the Court from hearing a rare capital case in which four have voted to grant.

However logical this result may be, I realize that it has an aura of an unpalatability about it, with the five who are satisfied that there is no prospect of success on the merits contemplating accusations that they let someone go to his death even though certiorari had been granted in his case. If the majority of our capital case stay applications were of this sort, I would think perhaps a change would be warranted in order to avoid last minute decisions of great importance made under staggering time pressure.

But on reflecting about what I recall from the numerous stay applications that we have passed upon in the preceding two or three terms, I think that the present case is a

"sport," in that the so-called petition for certiorari sought to review a judgment of the Court of Appeals for the Eleventh Circuit rendered on the merits with written opinions. It seems to me the far more typical case we get is one, like Pinkerton, where the District Court has denied the petitioner's habeas application and refused to issue a certificate of probable cause, and the Court of Appeals has denied both a stay and a request for issuance of a CPC, albeit with a written opinion. In the latter situation, in order to review the merits of petitioner's claim, the writ of certiorari would have to be addressed to the District Court before judgment, as it was in Barefoot v. Estelle, 463 U.S. 880 (1983). In hashing all of this out at the time of the discussion about the stay application in Barefoot, see 459 U.S. 1169, I think it was agreed by all of us that past practice required five votes to grant certiorari before judgment. I haven't the slightest doubt that it should take a majority to grant certiorari before judgment, where our Rules provide that it will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court." Rules of the Supreme Court, 20.

If I am right as to my recollection of the posture of most of the capital stay applications that we get, we quite properly operate under a requirement of five votes not merely to grant a stay, but to grant certiorari in the great majority of these cases because any review of the merits would require a grant of certiorari before judgment in the Court of Appeals. I think cases like the present one are unusual, and so long as the five retain their power to refuse to grant a stay because they are satisfied that there is no reasonable prospect of success on the merits, I do not see why we should depart from our Rule that Four is enough to grant certiorari.

I am as unhappy as anyone with the feeling that the capital defense lawyers are subtly switching the cart and the horse, so that instead of the grant of stay being ancillary to the granting of a petition for certiorari, the granting of certiorari becomes a means to obtain a stay. But I would prefer to wait and see what happens before moving on the basis of my present impressions.

I think Bill's proposal would exacerbate the possibilities already existing under the present system that four Justices could in effect control the operations of the Court at least in the short run. While Bill suggests that his "Rule of Four" in capital case stay applications be limited to the first federal habeas corpus, I think there

are several problems with this. In the first place, in this very case, Darden's cross petition for certiorari raising most of the issues which he raised earlier this week was denied last Term after having been held for Wainwright v. Witt. If one may be said still to be "on" his first petition for federal habeas five or six years after it was filed, it is difficult to see how this is much of a limiting principle. Nor as the law presently stands is there any requirement that a capital defendant have filed, much less have exhausted, his first federal habeas petition before he may be executed. I know that Harry and John have on occasion expressed the view that this should be done, but if it is done at all it seems to me it should be done by Congress and not by this Court. When Congress has not even required a federal habeas review for a capital defendant, I think it would be presumptuous of us to impose our own requirement to that effect. As recently as two years ago, Byron writing for five of us in Barefoot v. Estelle, 463 U.S. 880 (1983), said:

> "With respect to the procedures followed by the Court of Appeals in refusing to stay petitioner's death sentence, it must be remembered that direct appeal is the primary avenue of review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."

In conclusion, I do not in any sense underestimate the desirability of eliminating last minute pressures, particularly since it has been Lewis and Byron rather than the rest of us who have borne the primary brunt of them. But I have a feeling that no mere change in our Rules is going to eliminate this sort of thing, because we are simply the top layer of the federal judicial system and if we don't act other federal courts will act notwithstanding. In the long run, I think a wise change would be a rule requiring a capital defendant, if he seeks federal habeas, to seek it within a given period of time after his conviction has become final on direct review. With such a change, it would be this sort of rule, rather than the state's setting of a date for execution, which starts the defense lawyers' time clock running and supplies the necessary incentive for

orderly federal habeas procedure. I gather that it is this sort of idea which Lewis urges in his memo.

Sincerely,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 24, 1986

Re: No. 85-5319 Darden v. Wainwright

Dear Lewis,

Please join me.

Sincerely,

Justice Powell

cc: The Conference

85-5319

Darden v. Wainwright

Supreme Court of the United States
Memorandum

6/23/86, 19

Lewis —

I think your bench statement for in Darden v. Wainwright was excellent

WHR

Notes exchanged on the Bench when I announced the Court's decision in this case

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 3, 1985

Re: A-181 - Darden v. Wainwright

Dear Chief:

My vote is to grant the application for a stay of execution.

Respectfully,

The Chief Justice

Copies to the Conference

cc: Mr. Joe Spaniol
Clerk of the Court

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 3, 1985

Re: A-181 - Darden v. Wainwright

Dear Chief:

If the application for a stay is denied, please add the following dissenting statement:

"JUSTICE STEVENS, dissenting.

"Because this Court has not yet had an opportunity to review the denial of applicant's first petition for a federal writ of habeas corpus, I would grant the application for a stay of execution to enable this Court to consider whether to grant certiorari in the normal course of business."

Respectfully,

The Chief Justice

Copies to the Conference

HAB

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 5, 1985

Re: 85-5319 - Darden v. Wainwright

Dear Lewis:

Because I agree with much of what you have written in your letter of September 3, 1985, I believe I should explain why I voted to grant certiorari in this case.

My original vote to grant the stay of execution was based solely on my view that since the applicant was seeking an opportunity to have the Court grant certiorari to review denial of relief on his first federal habeas corpus petition, we should give the applicant the same time to present his case as would be available to any other litigant. I reached that conclusion without reading the entire application that had been filed.

When I learned that counsel had submitted (or was about to submit) a letter requesting that the stay application be treated as a petition for cert I was, at first, inclined to deny the request as procedurally improper. On reflection, however, I concluded that, since counsel really had no other choice after the denial of the stay application, I had an obligation to read through the application and determine whether there was sufficient merit in the case to justify a grant of cert. I therefore had the stay application delivered to me at home and spent well over two hours studying it late in the evening and found myself troubled by three questions.

Of greatest importance was my concern about the plainly improper closing argument of the prosecutor which had prompted us to grant cert some years ago. My recollection of the reasons for our "DIG" at that time was not entirely clear, but I was concerned that

we might then have acted partly on the ground that the federal question was not properly before us on review of the Florida Supreme Court's opinion. (I have since confirmed this recollection by examining the brief on the merits filed by Florida in 1976 which does argue that the issue was not presented as a federal question to the Florida Supreme Court, and therefore that this Court was without jurisdiction, and further, that as a matter of State procedure, the petitioner had waived any objection by failure to make adequate objections in the trial court.) Since the DIG came before the development of the Michigan v. Long doctrine, the state ground problem may have had an impact on our voting. It is, of course, not unusual for us to decide not to review a serious question presented on direct review because we consider that it may be more adequately dealt with on federal habeas.

The fact that we had granted certiorari to review this question before therefore actually cut in opposite directions. On the one hand, it supported the conclusion of those who voted against a stay of execution that the issue had already been found to be without merit. On the other hand, the fact that the argument had moved the Court actually to grant cert (and I believe to generate some sentiment in favor of a summary reversal) supported the view that it would be inappropriate to allow the execution to go forward without further study.

The second question that troubled me was that I found that trial counsel had failed to adduce any evidence of nonstatutory mitigating circumstances because under Florida law as it was then interpreted by the State Supreme Court, only statutory mitigating circumstances could be considered. In its most recent opinion in this litigation the Florida Supreme Court found this point insignificant because the trial judge had informed the jury that nonstatutory mitigating circumstances could be considered. I found this response somewhat unsatisfactory because I could not understand how the jury could rely on nonstatutory mitigating circumstances unless counsel had brought them to the jury's attention.

Thirdly, I noted that Judge Tjoflat had concurred in the Eleventh Circuit's disposition on the separate ground that there was a Rose v. Lundy problem in view of the petitioner's failure to exhaust certain issues. Because I have serious doubts about whether the exhaustion requirement should be applied with the same rigidity in a capital case as may well be appropriate in noncapital cases, this aspect of the case troubled me even though I recognized that Judge Tjoflat's vote was not critical to the judgment of the Eleventh Circuit.

In all events, after wrestling with the countervailing considerations that you have identified, I concluded that there was enough substance to the case that I would vote to grant.

With respect to the merits, I thought that the magistrate made a valid point when he noted that the trial judge's overruling of defense counsel's objection tended to indicate to the jury that the prosecutor's vouching argument was proper. You will recall that, among other things, the prosecutor had argued:

> "I am convinced, as convinced as I know that I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Truman, that he robbed Mrs. Truman, and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life."

This is a blatant example of the kind of advocacy that The Chief Justice was describing at page 7 of the Young slip opinion where he wrote:

> "The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach by either counsel."

In short, although perhaps a full Conference discussion might have persuaded me to vote to deny, on the basis of what I had to work with on Tuesday

night, I concluded that the petition has sufficient merit to warrant our review.

Respectfully,

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

September 12, 1985

Re: 85-5319 - Darden v. Wainwright

Dear Chief:

Just for the record, I would like to add these comments about the procedural issues associated with this case.

1. In my opinion it is often appropriate to deny review of a state court's decision in a criminal case because the federal issues can best be explored by a federal district court in a federal habeas corpus proceeding.

2. In my opinion, neither the denial of certiorari, nor the dismissal of the writ as having been improvidently granted, constitutes a disposition on the merits.

3. Although a number of other scholars agree with the interpretation of the legislative history of the 1925 Judiciary Act expressed by you and by Thurgood--that the Court in effect made a promise to Congress that the Rule of Four would not be changed--the actual record amounts to nothing more than a description of the existing practice coupled with the expectation that the practice would continue to be followed in the foreseeable future. Changes in the character of our docket in the last sixty years have prompted the Court to change a number of the practices that were described to Congress in 1925, and we surely are free to change the Rule of Four without violating any promise to Congress. Nevertheless, I agree with you and

Thurgood that the tradition is one that we should do our best to preserve.

Respectfully,

The Chief Justice

Copies to the Conference

P.S. I was surprised to receive the enclosed letter from Senator East this morning. On the assumption that you will decline the invitation to which he refers, I of course will do the same.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 21, 1986

Re: 85-5319 - Darden v. Wainwright

Dear Lewis:

I shall await the dissent.

Respectfully,

JPS

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1986

Re: 85-5319 - Darden v. Wainwright

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

September 3, 1985

MEMORANDUM TO THE CONFERENCE:

Re: A-181 Darden v. Wainwright

My vote is to deny the application for stay of execution.

Sincerely,

Sandra

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 21, 1986

Re: 85-5319 Darden v. Wainwright

Dear Chief,

At Conference I did not vote in this case because I wanted to read the entire record in light of the fact specific nature of the issues. I have now done so and my vote is to affirm the conviction and sentence.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

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

March 21, 1986

No. 85-5319 Darden v. Wainwright

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference