No. 72087

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

WILLIE JASPER DARDEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR FOR EXTRAORDINARY RELIEF AND REQUEST FOR STAY OF EXECUTION

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COUNSEL FOR PETITIONER

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Petitioner, WILLIE JASPER DARDEN, by and through his undersigned attorney, respectfully moves this Court for an Order granting him leave to file a Petition for Writ or Error Coram Nobis in the Circuit Court for the Tenth Judicial Circuit.

As grounds for his request, the Petitioner states as follows:

I. JURISDICTION

Jurisdiction of this Court is invoked pursuant to Article V, Section 4(2), of the Florida Constitution, and Rule 9.030(a)(3), Florida Rules of Appellate Procedure.

II. PROCEDURAL HISTORY

1. The Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Citrus County, entered the judgment of conviction and the sentence now under attack, after a change of venue from the Tenth Judicial Circuit of Florida.

2. The date of the judgment of conviction is January 18, 1974.

3. The sentence is that Defendant be put to death by electrocution.

4. Defendant was indicted for one count of first degree murder September 26, 1973, to which he pled not guilty. Trial was had before a jury which heard Defendant's plea and convicted him on January 18, 1974. Defendant was sentenced to death by the court on January 23, 1974, after the jury recommended death.

5. Defendant appealed from the judgment of conviction and sentence. The Supreme Court of Florida affirmed his sentence and conviction on February 18, 1976, in Darden v. State, 329 So.2d 287 (Fla. 1976). Rehearing was denied on April 4, 1976. A petition for writ of certiorari was filed in the United States Supreme Court.

6. The United States Supreme Court granted Defendant's motion for leave to file in forma pauperis and petition for writ of certiorari on November 1, 1976, in 429 U.S. 917 (1976). The Court restricted certiorari to the first of three questions, the issue of improper prosecutorial closing argument, on November 4, 1976. The petition was dismissed as improvidently granted on April 19, 1977.

7. On May 18, 1979, the governor of the state of Florida signed a death warrant. Willie Darden was scheduled to be executed on May 23, 1979.

8. On or about May 21, 1979, the Defendant filed a Motion for Post Conviction Relief, pursuant to Fla. R. Crim. P. 3.850 in the Circuit Court of the Tenth Judicial Circuit. Said motion was denied by Judge John Dewell on May 21, 1979.

9. On May 21, 1979, the Florida Supreme Court affirmed the trial court's denial of Defendant's 3.850 motion and denied a stay of execution, in 372 So. 2d 436 (Fla. 1979). Rehearing was denied on May 30, 1979.

10. On May 22, 1979, The United States District Court for the Middle District of Florida, Judge Terrell Hodges, stayed Defendant's execution, upon the filing of a petition under 28 U.S.C. sec. 2254. A supplemental petition was filed on September 10, 1979, and a hearing was conducted before a magistrate on September 22-23, 1979.

11. On April 10, 1981, United States Magistrate Paul Game, Jr., the Middle District of Florida, issued a Report and Recommendation recommending that the writ be granted.

12. On May 8, 1981, the habeas corpus petition was denied by the district court, Darden v. Wainwright, 513 F. Supp. 947 (M.D. Fla. 1981).

13. The denial of relief by the district court was appealed to the United States Court of Appeals for the Eleventh Circuit. The denial was affirmed 2-1 in a panel decision issued on February 14, 1983, and corrected March 9, 1983, in 699 F.2d 1031 (11th Cir. 1983).

14. Petition for rehearing and suggestion for en banc consideration was filed in the Eleventh Circuit on or about March 3, 1983. On July 1, 1983, the Court affirmed the panel decision by a vote of 6-6, in 708 F.2d 646 (11th Cir. 1983).

15. Petition for rehearing en banc was filed in the Eleventh Circuit on or about July 22, 1983.

16. On August 5, 1983, the Governor of the State of Florida signed a death warrant, and Petitioner was scheduled to be executed on September 7, 1983.

17. On September 1, 1983, the Eleventh Circuit, on its own motion, vacated the earlier panel decision and the en banc affirmance of it, granted en banc reconsideration, and stayed Petitioner's execution in 715 F.2d 502 (11th Cir. 1983).

18. On February 22, 1984, the Eleventh Circuit, in an en banc decision, voted 7-5 to grant habeas relief to petitioner, in 725 F.2d 1526 (11th Cir. 1984).

19. The State filed a petition for certiorari to the United States Supreme Court.

20. On February 19, 1985, the United States Supreme Court granted certiorari, 105 S. Ct. 1158, vacated the Eleventh Circuit's 7-5 en banc decision, and remanded the case for further consideration in light of Wainwright v. Witt, 105 S. Ct. 844 (1985).

21. On remand, the Eleventh Circuit affirmed the district court's original denial of habeas corpus relief, in Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985)(en banc).

22. On August 8, 1985, the Governor of the State of Florida signed a third death warrant. Petitioner's execution was scheduled for September 4, 1985. The Governor's warrant was in violation of the orders of the Eleventh Circuit, inasmuch as the stay entered September 1, 1983, was still in effect.

23. Petition for rehearing was filed in the Eleventh Circuit on August 16, 1985, and Supplemental Petition for Rehearing was filed on August 20, 1985. On August 27, 1985, the Petition for Rehearing was denied, with dissent. 772 F.2d 666 (11th Cir. 1985) (en banc).

24. On August 28, 1985, Petitioner filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court alleging ineffective assistance of appellate counsel. The Petition was denied on August 29, 1985. 475 So. 2d 214 (Fla. 1985).

25. On August 29, 1985, Petitioner filed a Motion for Post-Conviction Relief in the Circuit Court of the Tenth Judicial Circuit of Florida. The Circuit Court denied relief which denial was affirmed by the Florida Supreme Court on September 3, 1985. 475 So. 2d 217 (Fla. 1985).

26. On September 3, 1985, Petitioner filed a second habeas corpus petition in the United States District Court for the Middle District of Florida, Tampa Division, which was denied on

the same date. The Eleventh Circuit later affirmed the denial on September 3, 1985. 772 F.2d 668 (11th Cir. 1985).

27. On September 1, 1985, Petitioner requested a stay of execution in the United States Supreme Court, so as to allow him to prepare and file a petition for writ of certiorari, seeking review of his first habeas corpus petition. On September 3, 1985, the Supreme Court denied the application for a stay. 106 S.Ct. 20 (1985). On the same date, September 3, upon request of Petitioner to consider the stay application as a petition for a writ of certiorari, the Court granted the petition, vacated its earlier order of the same date denying a stay and granted the application for a stay "pending the sending down of the judgment of this Court." 106 S.Ct. 21 (1985).

28. On September 13, 1985, the State of Florida petitioned the Supreme Court to dissolve its stay order of September 3, 1985, as "improvidently granted." The motion was denied on October 5, 1985. 106 S.Ct. 223 (1985).

29. On June 23, 1986, the Supreme Court affirmed the denial of habeas corpus relief to Petitioner.

30. On July 18, 1986, Petitioner filed a Petition for Rehearing in the Supreme Court.

31. On August 5, 1986, the Governor of the State of Florida signed another death warrant, this one in violation of the United States Supreme Court's stay of September 3, 1985. Petitioner's execution was scheduled for September 3, 1986.

32. On or about August 11, 1986, the State of Florida filed a "Motion for Issuance of Mandate or Alternatively Motion for Order of Clarification" in the United States Supreme Court, to allow the then barred execution. The Motion was denied by Mr. Justice Powell on August 3, 1986.

33. On August 29, 1986, Petitioner filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court, raising a "McCleskey/Hitchcock" claim. Since a stay from the United States

Supreme Court was in effect, the then scheduled execution did not occur, and Mr. Darden's petition received normal, nonexpedited consideration in the Florida Supreme Court -- until the Governor of Florida signed another death warrant.

34. The United States Supreme Court denied Petitioner's Petition for Rehearing September 3, 1986. On September 25, 1986, while the McCleskey/Hitchcock habeas corpus action was pending in the Florida Supreme Court, a death warrant was signed. Execution was scheduled October 21, 1986.

35. Mr. Darden requested a stay on October 1, 1986, from the Florida Supreme Court, attendant to the pending habeas corpus action. The stay and habeas corpus relief was denied Friday, October 3, 1986.

36. On Tuesday, October 14, 1986, Mr. Darden filed a Motion to Vacate Judgment and Sentence in the Circuit Court of the Tenth Judicial Circuit of Florida. That motion contained a claim that trial counsel was ineffective for failing to discover necessary alibi witnesses. The Florida Supreme Court would not hear the claim, because of procedural default. Darden v. State, 496 So.2d 136 (Fla. 1986). Mr. Darden presented the claim to federal district court. The petition was denied. The Eleventh Circuit Court of Appeals stayed the execution, but ultimately denied relief. Darden v. Wainwright, 825 F.2d 287 (11th Cir. 1987). A petition for writ of certiorari was filed in the United States Supreme Court January 2, 1988. The Governor signed a death warrant, and the United States Supreme Court stayed that execution.

37. The petition for writ of certiorari was denied four days ago. The Governor signed another warrant two days ago.

III. PRELIMINARY STATEMENT

1. After the United States Supreme Court's decision in Darden v. Wainwright, 106 S. Ct. 2464 (1986), witnesses came

forward with evidence that "support[ed] the alibi that petitioner could not have been in two different places at the same time," Darden v. Dugger, 825 F.2d 287, 293 (11th Cir. 1987), and which if true demonstrated that Mr. Darden was innocent. Mr. Darden challenged his trial counsel as being ineffective for not discovering the innocence witnesses, but this Court found that claim to be procedurally barred. Darden v. State, 496 So. 2d 136 (Fla. 1986). Mr. Darden then filed a petition for writ of habeas corpus in the federal district court alleging that trial counsel had been ineffective in failing to investigate the time of the offense which was, as it turns out, at a time of day which precludes a finding that Mr. Darden is guilty.1/ The federal district court judge, without hearing from the new witnesses, summarily dismissed this claim as an abuse of the writ. The court of appeals found no abuse of discretion, and affirmed the district court's actions. Darden v. Dugger, supra. Thus, due to procedural matters, and not due to the merits of Mr. Darden's claims, the witnesses who will support his innocence have not been heard.

2. Mr. Darden's case is unprecedented because of its complex procedural history, and because of the starkly simple reason why that history has occurred -- many learned jurists believe his trial was unfair, and he is possibly innocent. This Court is thoroughly familiar with the procedural history, and with the judicial disunity that has become the case's legacy. See, e.g., Darden v. Wainwright, 106 S. Ct. 2464 (1986). The

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1. Doubt about Mr. Darden's guilt leaps just from the trial transcript, unaided by the new evidence. The trial judge actually found as a mitigating circumstance at capital sentencing that Mr. Darden was believable in his testimony before the judge and jury that he was innocent. Darden v. Wainwright, supra, 106 S.Ct. at 2482 (Blackman, J., dissenting). The jury's sole job was to assess "the credibility of three witnesses -- Helen Turman and Phillip Arnold, on the one side, and Willie Darden, on the other," and Mr. Darden lost this credibility contest only after an "egregious" and "shameful" diatribe by the prosecutor in summation to the jury. Id.

prior treatment of an ineffective assistance claim is important to the innocence and new evidence issue in this proceeding, and the earlier treatment of those claims is next presented.

3. No evidentiary hearing has ever been conducted on Mr. Darden's claims in state court. No evidentiary hearing anywhere has been conducted regarding the new evidence. However, in his habeas corpus petition filed in federal court in 1979, Mr. Darden alleged, inter alia, that trial counsel was ineffective in preparing the alibi defense, because counsel did not interview or present important witnesses (the new witnesses were not then known), most notably witness Christine Bass.2/ Ms. Bass testified at a hearing before the United States Magistrate that Mr. Darden was outside of her house on the day of the offense between 4:00 and 5:30 p.m. having automobile trouble. The magistrate analyzed her testimony, and the testimony of trial counsel, and concluded that counsel had not been ineffective in not presenting Ms. Bass' testimony at trial because:

> The Public Defenders believe that the crime had been committed between 6:00 and 6:15 P.M. (H 235) and the accident occurred between 6:15 and 6:30 P.M. (H 213) The call concerning the homicide was received by the Lakeland Police Department at 6:31 P.M. (H 235); the accident was reported to the Hillsborough County Police Department at 6:32 P.M. (H 239-240). Mr. Johnson indicated that it was the opinion of the defense that there was not a good alibi defense on behalf of Petitioner because of the gap of time between when he was last seen prior to the accident, and the time when the crime occurred. (H 232) Attempts to locate anyone who could verify Petitioner's testimony concerning the repair of his car's muffler had been unsuccessful. (H 237)
>
> Mr. Goodwill indicated that Petitioner did not provide the defense with any information which could account for his presence from 5:30 to 6:35 PM; (H-291) Mr.

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2. The new witnesses, presented in the current petition, were not presented in 1979. It was not until 1986 that these witnesses discovered the importance of their knowledge and came forward. See Darden v. Dugger, 825 F.2d 287, 293, fn. 17 (11th Cir. 1987).

> Goodwill further indicated that the evidence which was available to the defense did not preclude Petitioner from having been the assailant. (H291).
>
> . . . .
>
> With regard to defense counsels' decision to call Petitioner as the sole defense witness, Mr. Johnson testified that this decision was a calculated trial tactic, planned for the purpose of giving defense counsel the final closing argument before the jury. (H 236) Having already concluded that there was no real valid alibi defense which could be made on behalf of Petitioner (H 236), defense counsel believed that presenting a poor alibi was worse than no alibi at all. (H 236)

Without any written analysis of the claim, the federal district court adopted the Magistrate's findings. Darden v. Wainwright, 513 F. Supp. 947, 963 (M.D.Fla. 1984). The Eleventh Circuit Court of Appeals never specifically addressed the 1979 claim in any of its opinions granting or denying relief to Mr. Darden. The original panel simply found that counsel was not ineffective, without discussing the actual allegations. Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir. 1983). The en banc court never mentioned the specifics of the claim, but simply affirmed the magistrate without comment, Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983); Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984); Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985), while struggling and writing about other issues.3/

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3. The federal district court in 1986, in rejecting the new evidence claim, acted as if the Eleventh Circuit Court of Appeals had thoroughly addressed the claim in previous opinions: "This claim has been exhaustively litigated . . . ." Darden v. Dugger, 825 F.2d 287, 293 (11th Cir. 1987). In fact, a claim that trial counsel was ineffective vis-a-vis alibi was litigated before the magistrate in a brief hearing in 1979 but it was hardly "exhaustive" litigation (Christine Bass), and the court of appeals has never worked up a sweat over the issue.

The claim that counsel was ineffective for not learning when the crime occurred has never been litigated, even before the Federal Magistrate, yet the Eleventh Circuit court, while acknowledging that the new witnesses "support the alibi," Darden v. Dugger, 825 F.2d 287, 293 (11th Cir. 1987), and without requiring a hearing, "found" that this new information "does not alter what has been determined regarding counsel's performance as a matter of law." Id., fn. 19.

4. New evidence, separate and apart from the 1979 proceedings, now strongly supports Mr. Darden's innocence claim. The United States Supreme Court believes the perpetrator arrived at the scene of the crime at 5:30 p.m.: "On September 8, 1973, at about 5:30 p.m., a black adult male entered Carl's Furniture Store near Lakeland, Florida." Darden v. Wainwright, 106 S.Ct. 2464, 2467 (1986). Ms. Christine Bass is prepared to affirm without any hesitation that Mr. Darden, who she did not previously know, was outside her house with car trouble from 4:00 p.m. to 5:30 p.m. on the day of the offense. Her testimony to that affect was accepted as true by the magistrate in the 1979 proceeding, but it was deemed unimportant, because, according to the magistrate (but not the Supreme Court), the crime occurred thirty to forty-five minutes later. The new evidence is that the crime did not occur at 6:00, 6:15, or 6:30 p.m. Reverend Sam Sparks is prepared to testify that he and Reverend Sprowls arrived at the scene of the offense at exactly 5:55 p.m. They went in response to a telephone request for assistance from Ms. Turman, which was made after the offense. He will testify that the post-offense telephone request occurred before 5:30 p.m. Rev. David Hess will testify regarding how and when Sparks, Sprowls and Bass realized that Mr. Darden is innocent.

5. Mr. Darden was thus in front of Mrs. Bass's house when the offense occurred. He is innocent. Trial counsel was aware of Mrs. Bass's corroborative testimony. However, trial counsel did not interview Reverend Sparks or Reverend Sprowls and so failed to learn the significance of Mr. Darden being outside of Mrs. Bass's residence at 5:30 p.m., and decided the offense occurred at 6:00 p.m. to 6:15 p.m.. Two ministers could have told them otherwise, had they known the significance of their information.

6. The pre-trial and trial testimony is not inconsistent with Mr. Darden's 4:00-5:30 p.m. alibi. Trial counsel simply was

wrong about the time of the crime. The significant elements of the time sequence are: 1) time of the perpetrator's arrival at the Turman store (the scene of the homicide), 2) time of Mr. Turman's shooting, 3) time the perpetrator left the scene, and 4) time of Mr. Darden's automobile accident near the scene.

7. Since Mr. Darden was in fact at Ms. Bass's house until 5:30 p.m., he is not guilty if the time of the offense leaves insufficient time for travel to the scene. If the true culprit's arrival at the scene of the offense occurred later than 6:00 p.m., then it is at least conceivable that Mr. Darden could have been at the scene upon leaving Mrs. Bass's house at 5:30 p.m. If someone first heard shots or saw Mr. Turman injured "around six o'clock," the perpetrator would have to have been at the store by 5:45 or 5:50 p.m. The truth is that no witness who testified would say for sure what time anything happened. Such a critical and dispositive fact received incredibly sloppy (or calculated) treatment. Given Mr. Darden's and Mrs. Bass's information, trial counsel's obligation was to determine what the other evidence revealed with regard to the time of the culprit's arrival at the scene of the offense.

IV. FACTUAL BASIS FOR THIS PETITION: NEW EVIDENCE

A. Pre-trial "Time"

1. At a pre-trial evidentiary hearing on a defense motion to suppress evidence, defense counsel questioned George Elliot, an officer with the Polk County Sheriff's Department, about the events leading up to Mr. Darden's arrest. In these pretrial questions, it was established that the officer believed that the offense occurred at 5:30 p.m.:

> Q. All right, sir. Go on then. After Hillsborough County had conveyed this information to you that the driver reportedly was Willie Darden.

A. Yes sir. That they would attempt to pick him up later, that he wasn't there at that time and----

Q. But they would----

A. ----as far as we knew, he was still en route between where he caught a ride to this address. I mean, he caught a ride from the Lakeland Lounge and he was still proceeding west the last information we had.

Q. And you got this information about 6:30, an hour after the shooting?

A. Approximately.

(January 9, 1974, pre-trial hearing, pp. 40-41)(emphasis added). Appendix F. The day after this testimony, Mr. Darden filed "Notice of Intention to Claim Alibi," thereby informing the state of the alibi witness (Christine Bass), and that Mr. Darden's whereabouts at 5:30 p.m., at a location at least twenty minutes away from the offense (if you are driving fast), could be proven. Suddenly, "6:30, an hour after the shooting," began to get murkier, but this went unnoticed by defense counsel. Even so, the "trial" time supports what the ministers would now say.

B. Trial "Time"

1. The trial "time" witnesses were uniformly uncertain about time. The most important witness, however, said that the offense could have been as early as 5:00 or 5:30 p.m., when Mr. Darden was nowhere around. Ms. Turman said:

Q. All right. Start and tell the Jury what happened on that date.

A. At somewhere between 5:00, 5:30 and 6:00, I can't remember the time, this colored man came--was in the store, as I was--

(R. 200). Trial counsel, not knowing the new evidence, on cross-examination tried to get Ms. Turman to say that the offense occurred at 6:00 p.m, but she would not:

Q. All right. Now what time did you say that Mr. -- that this man came into your store the first time.

A. Between 5:30 and 6:00.

Q. All right. Do you recall telling Officer Kent but it was six o'clock or possibly a little after?

A. I don't recall saying after.

Q. Is it possible, though, it was six o'clock more than 5:30, close to six o'clock?

A. Its possible.

(R. 233). Ms. Turman testified that the perpetrator looked around for a bit, left, and shortly thereafter returned and committed the offense.

2. Edith Hill, one of Ms. Turman's neighbors, testified, sort of, about the time of the offense. Her "time" could only have been based on post-shooting (not the first "browsing") events, because shots were what made her become aware. Thus, she had no idea when the perpetrator arrived or how long he was present in the store before the shooting:

Q. About what time was it?

A. Well, it was somewhere around six.

Q. Around 6:00 p.m.

A. I didn't notice the time.

Q. 6:00 p.m.?

A. Pardon?

Q. Afternoon, p.m.?

A. Yes, sir, it was in the afternoon.

(R. 294).

3. Mr. James Stone testified that he was almost involved in an automobile accident with Mr. Darden, the state's story being that Mr. Darden was fleeing the scene. Try as the state might, Mr. Stone just would not say the times needed to blunt an alibi:

Q. What were you doing about 6:00 p.m. in the evening?

A. I was on my way back home from the beach with my family, St. Pete Beach.

. . . .

Q. Sir, approximately what time was this accident, to the best of your knowledge?

A. Approximately around six o'clock, somewhere around that time.

. . . .

Q. Okay. You said around six o'clock when this took place. Did you happen to glance at your watch?

A. I did not have no time on me or my wife either.

. . . .

Q. Would it have been possible for the time to have been, say, 5:30?

A. We had just--like I said, it was around that time, ... It could have been anywhere from 5:30, anything around that time. That's why I say around six.

(R. 308, 313, 324, 326).

4. Mr. Darden is prepared to prove the following. Four witnesses (Christine Bass, Reverend David Hess, Reverend Sam Sparks, and Reverend Earl Sprowls) provide evidence that would have prevented a conviction and/or death sentence, and the affidavits of three of these witness are included in the appendix. (See Appendix A, B, and C.) Their knowledge is reproduced here virtually in total:

1. Christine Bass:

1. In October, 1979, I testified in the Federal Court in Tampa, Florida, that Willie Darden was in front of my house from 4:00 to 5:25 p.m. on September 8, 1973.

2. Other than the time I testified in Federal Court, the time he was brought by the witnesses, including myself, who were waiting outside his trial, in the courthouse in Bartow at his trial, and the afternoon of September 8, 1973, when Mr. Darden came to my door to ask me to call a wrecker for him, I have never seen Willie Darden.

3. Between 1979 and 1985, I continued to speak from time to time with people about my personal knowledge of Willie Darden's exact location from 4:00 to 5:30 p.m. on September 8, 1973.

4. In mid-1985, I met Reverend David Hess through his hospital ministry at the hospital where I work. I told him my concerns about

the case and we talked several times about it when he would come to the hospital on his patient calls.

5. Sometime in May or June of 1986, Reverend Hess remembered that his friend Reverend Sam Sparks had been over to see Mrs. Turman very shortly after the crime had happened. It was then we realized that Reverend Sparks may well be the missing link in the whole chain of events concerning Willie Darden and his being convicted for Mr. Turman's murder. Reverend Hess urged me to get in touch with Reverend Sparks. He said Reverend Sparks is the key to this whole thing.

6. On June 27, 1986, I first made contact with Reverend Sam Sparks. I reached him by telephone and told him what I knew: that Willie Darden was unquestionably in front of my house from 4:00 until very close to 5:30 the afternoon of the murder. After I told him this, Reverend Sparks said, "Then it couldn't be him that committed the crime." He told me he was certain he was at the Turman's store at 5:55 that afternoon and it had to have been more than a half hour after the crime happened that he got to the store.

App. C.

2. Reverend Sam Sparks:

1. My name is Reverend Sam Sparks. I was Pastor of the First Church of the Nazarene in Lakeland, Florida from October, 1973 until June, 1981.

2. On September 8, 1973, at approximately 5:30 p.m., I received a telephone call from Reverend Earl Sprowls, my predecessor at the church. He said something to the effect that Mr. Turman had been shot over at the Turmans' furniture store and asked if I could meet him over at the store at once. I asked him to pick me up.

3. I stood out on the curb and waited for Rev. Sprowls, who lived roughly 5 miles away. Soon, he arrived and we drove over to the Turmans' which was probably another 3 miles.

4. I was conscious of the time because I had a very important appointment at 6:30. I am positive that from the time Rev. Sprowls called me until the time we arrived at the Turmans' store was about 25-30 minutes.

5. When we arrived at the Turmans', I mentioned to Rev. Sprowls that I really needed to be back home by 6:30. I looked at my watch and it was 5:55. I always keep my watch on the correct time and it was correct on that afternoon.

6. At the time we arrived I noticed the Sheriff's car around behind the place as well as 2 or 3 other police cars. I can't say now whether they were police or sheriff's or what. In any case, there were several law enforcement vehicles there and a number of officers.

7. It was pandemonium there at the store when we got there. The police were busy talking to people and all. Our concern was with Mrs. Turman who was stunned and quite beside herself.

8. I don't know whether Mr. Turman was still there at that time or whether he had been taken out.

9. Based on when I got the call from Rev. Sprowls and what time it was when we got over to the Turmans' there is simply no way in heaven the crime could have occurred after 5:30. In fact, I would say it had to be no later than 5:00 or 5:15.

10. I was never interviewed by the police or by the lawyers for Mr. Darden concerning any of this.

11. Frankly, I never knew there was any significance to the information I had until I found out that Mrs. Christine Bass swore that Willie Darden was in front of her house up until 5:30 that afternoon. If this is true, there is absolutely no way he could have committed the crime over at the furniture store. It's just not possible.

12. In May or June of 1986, Reverend David Hess, who performs hospital ministry for the All Saints Episcopal Church, came to see me. He voiced some concerns about whether Willie Darden had actually committed the crime at the Turmans' store and urged me to talk to Mrs. Christine Bass, who he said could definitely place Darden in front of her house at 5:30 on that afternoon. I knew if this was the case, he could not have committed the crimes.

13. I was somewhat hesitant initially because I always assumed Willie Darden had done the crimes. My impression, from the publicity and all and what was presented in the media was that he had confessed, which I am now told was not the case. In short, everybody considered it to be an open-shut case.

14. Shortly after Rev. Hess came to see me, I got a call from Mrs. Bass. She said she was certain Mr. Darden was in front of her house from 4:00 p.m. until 5:25 or 5:30 the afternoon of the murder. I knew then he couldn't have done it because the crime had to have happened some time before 5:30.

App. A.

3. Reverend David A. Hess:

1. My name is Reverend David A. Hess. I serve as Minister for the All Saints Episcopal Church Hospital Ministries.

2. The day after James Turman was shot at his furniture store on September 8, 1973, Reverend Sam Sparks mentioned to me that he had gone by the store right after the crime occurred to check on Mrs. Turman who was a member of his church. I have known Sam Sparks for 43 years.

3. At the time, and for many years after Mr. Turman was killed, I gave little or no thought to what Rev. Sparks had told me, other than feeling what a tragedy it was for the family.

4. In 1985, I began doing hospital calls for All Saints Episcopal Church in Lakeland.

5. Somewhere around the summer of 1985, I met Christine Bass, who works in the Chaplain's office at Lakeland Regional Medical Center.

6. During the course of my visiting the hospitals and my interaction with Mrs. Bass, she told me of her interest in the Willie Darden case.

7. In approximately June of 1986, after several conversations with Mrs. Bass concerning Mr. Darden's whereabouts on the afternoon Mr. Turman was shot, I came to a sudden and urgent realization. I remembered that Rev. Sparks had been by the furniture store right after the crime and it struck me that he might have important information that could help pin down the time of the intrusion and shootings.

8. As soon as I realized this, I contacted Mrs. Bass. I told her, "Chris, why didn't I think of this? Sam Sparks is the key."

9. I then put Rev. Sparks and Mrs. Bass in touch with one another.

10. I have to say, it took a while for me even to entertain the notion that the wrong man might have been arrested and convicted.

11. It was not until I came to understand the import of Mrs. Bass' testimony that I realized it mattered, in any legal sense, that Sam Sparks had been over at the Turmans right after the crime. Other than Mrs. Bass, I was the only person who realized the significance of putting together Rev. Sparks' experience and Mrs. Bass' account of Mr.

> Darden being at her house at 5:30 until the two of them compared notes just recently. I am thankful that I have been able, after so many years, to bring together the two individuals having this crucial information and regret that it has taken until now for it all to add up.

App. B.

V. LEGAL BASIS FOR RELIEF

1. The requirements for error coram nobis upon the basis of newly discovered evidence are well-settled in this State. The newly discovered evidence must be (a) genuinely new evidence, not just a new opinion drawn from evidence already known, (b) that was not know by the trial court, by the party, or by counsel at the time of trial, (c) which could not have been discovered by the use of due diligence, and (d) which, had it been known to the trial court, would conclusively have prevented the entry of the judgment. Hallman v. State, 371 So.2d 482, 484-85 (Fla. 1979); Scott v. Wainwright, 433 So.2d 974, 975-76 (Fla. 1983); Riley v. State, 433 So.2d 976, 979-80 (Fla. 1983). In the discussion that follows, Mr. Darden demonstrates that the foregoing newly discovered evidence satisfies the first three requirements of Florida law with respect to error coram nobis. With respect to the fourth requirement, that the new evidence would have conclusively prevented the entry of the judgment, Mr. Darden believes that his evidence meets this requirement as well, but, if it does not, he submits that this Court's analysis cannot end at that point, for the conclusiveness requirement establishes an impossible threshold with respect to newly discovered evidence that pertains to capital sentencing determinations. The Court cannot sanction such a result under the Constitution. The eighth amendment requires not only that there be a meaningful state remedy for after-discovered evidence but also that the State provide new sentencing trials where the after-discovered evidence would have been relevant, material, and significant in

determining the appropriateness of the death sentence in a particular case.

2. The first three requirements for error coram nobis are indisputably met by the newly discovered evidence presented herein. First, the newly discovered evidence is genuinely evidence. It is the testimony of four individuals who make it physically impossible for Mr. Darden to have committed the offense.

3. Second, the new evidence obviously was not known to the trial court, to Mr. Darden himself, or to his then-trial counsel prior to or during the trial. Mr. Darden's trial counsel, despite his reasonable investigative efforts, did not know that witnesses existed who could have exonerated Mr. Darden.

4. Third, Mr. Darden's trial counsel exercised due diligence in investigating. In Florida, the exercise of due diligence means that a lawyer has done "everything reasonable within his power" to investigate and discover available evidence. Clair v. Meriwether, 127 Fla. 841, 174 So. 591, 594 (1936). See also Ogburn v. Murray, 86 So.2d 796, 798 (Fla. 1956) (en banc) (reaffirming the Court's adherence to Clair v. Meriwether). Thus, the inquiry into "due diligence" is substantially the same as the constitutional inquiry into whether counsel has provided effective assistance: "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 2065 (1984).

5. When Mr. Darden challenged trial counsel's actions as unreasonable for failure to find the alibi witnesses, the trial court made the following findings:

> In the past few weeks two witnesses have come forward voluntarily. Their sworn statements are to the effect that they went to the scene of the crimes a minimum of twenty to twenty-five minutes after the murder. Their claimed time of arrival, at the scene was approximately thirty minutes after the Defendant was allegedly last seen

> by the alibi witness. The pre-trial, trial and post-judgment proceedings herein amply show that defense counsel zealously, vigorously and diligently, but unsuccessfully sought to locate witnesses who would corroborate the Defendant's alibi. These new witnesses and their testimony were unknown to the Defendant and his attorneys after diligent search and inquiry.
>
> Therefore, the Court finds that the failure to locate these or other witnesses (if any exist) fixing an earlier time of the crime was not the result of ineffectiveness of counsel or of lack of diligence.
>
> The Court does not reach the question of the effect of the new evidence because that is not a proper matter for consideration in a 3.850 motion. It can only be presented in an error coram nobis petition to the Florida Supreme Court.

App. E. The due diligence requirement of error coram nobis is, therefore, satisfied.

6. The fourth requirement of error coram nobis in our State -- that the newly discovered evidence "conclusively would have prevented the entry of the judgment," Hallman v. State, 371 So.2d at 485 (emphasis in original) -- is also satisfied. Plainly alibi witnesses (i.e. -- the victim's minister), in combination with time of offense witnesses, would have supported Mr. Darden's own believable testimony, and would have prevented a finding of guilt. Short of that, no death penalty would have been imposed, with such evidence.

7. However, if this Court believes the "conclusiveness" test is not met, then this Court should determine whether its error coram nobis rule is at fundamental cross-purposes with the eighth amendment. Any rule of procedure that allows unreliable capital convictions to occur, see Beck v. Alabama, 477 U.S. 625 (1980), or to stand, or which produces unreliable death sentences, violates the eighth amendment, and a conclusiveness test does just that. The following discussion focuses primarily on sentencing, but the same considerations apply to the guilt determination here. Mr. Darden is cognizant of the history of this issue before this Court. See Hallman v. State, 371 So.2d at

486-87 (Overton, J., concurring in part and dissenting in part, joined by Boyd, J., and Hatchett, J.); Riley v. State, 433 So.2d at 981 (Overton, J., concurring in part and dissenting in part); id. at 982-983 (Boyd, J., dissenting); Tafero v. State, 447 So.2d 350 (Fla. 1983) (Overton, J., dissenting, joined by Boyd, J.). Mr. Darden urges, nonetheless, that the Court reconsider this issue in light of decisions from the United States Supreme Court concerned with the role of post-trial review of death sentences, Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871 (1984), and in light of the terribly unjust results for Mr. Darden if there is no remedy for what is, in light of the newly discovered evidence, an arbitrary imposition of the death sentence.

8. Because of the nature of a capital sentencing determination, the use of a conclusiveness test with respect to newly discovered evidence creates a barrier that cannot be overcome. Unlike the decision as to guilt or innocence, the capital sentencing decision cannot be made simply on the basis of whether there is evidence in the record to support each of the elements of the charged crime. Rather, a capital sentencing decision involves a judgmental and evaluative process. First, if aggravating factors are found, these factors must be "weighed" to determine whether they are "sufficient" to warrant the imposition of the death sentence. After that evaluation has been accomplished, mitigating factors must then be "weighed" to determine whether they "outweigh" the aggravating factors found to exist. Even then, a death sentence is never required, despite the finding of aggravating factors in a case where no mitigating factors are found. The capital sentencing decision is thus an evaluative process, in which a large measure of subjective judgment is involved. As this Court has taught for more than a decade,

> [i]t must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of

> aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

9. The process of capital sentencing decision-making is so inherently a "reasoned judgment" that this Court has held that it "cannot know" whether a capital sentencing determination based upon the consideration of both aggravating and mitigating factors would have been different if the jury or the judge had not had before it even one of several aggravating factors. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). If this Court itself cannot determine whether the result of a sentencing determination would be the same under Elledge's circumstances, how can a capital defendant ever show conclusively that the failure of the jury or judge to consider mitigating evidence would produce aa different result? It is important to note that the sentencing judge in this case found, as mitigating, Mr. Darden's protestations of innocence.

10. As a practical as well as legal matter, a capital defendant can never meet such a burden. So long as at least one "sufficient" statutory aggravating circumstance exists, the capital sentencer in Florida is authorized, at least in theory, to impose the death sentence. "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statutes section 921.141(7), F.S.A." State v. Dixon, 283 So.2d at 9. Accordingly, the only way that newly discovered evidence could conclusively prevent the imposition of the death sentence is for that evidence to demonstrate that there are no aggravating factors. See Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3431 n.4 (1983) (Stephens, J., joined by Powell, J., concurring

in the judgment).

11. Mr. Darden submits that the eighth amendment cannot tolerate such a result any more than it can tolerate the non-availability of a meaningful appellate review of a capital sentencing decision. While this question has never been decided, Mr. Darden submits that it can and must be decided, upon the basis of established eighth amendment principles.

12. The starting point for this analysis is the oft-noted, but still-honored observation that there is a "significant constitutional difference between the death penalty and lesser punishments." Beck v. Alabama, 447 U.S. 625, 637 (1980).

> From the point of view of the defendant, it is different in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 2800, 305 (1976). It is, accordingly, "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra. "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' [the Supreme Court has] invalidated procedural rules that tended to diminish the reliability of the sentencing determination." Beck v. Alabama, 447 U.S. at 638.

13. One of those procedural rules referred to in Beck as diminishing the reliability of the sentencing determination is a rule that precludes "the sentencer in all capital cases from giving independent mitigating weight to aspects to defendant's character and record and to circumstances of the offense

proffered in mitigation. . . ." Lockett v. Ohio, 438 U.S. at 605. Because such a procedural rule "creates the risk that the death penalty will be imposed in spite of factors which a call for a less severe penalty[,] . . . [w]hen the choice is between life and death, that risk is unacceptable and incompatible with commands of the eighth and fourteenth amendments." Id. Accordingly, the rule is now settled that the exclusion of relevant mitigating evidence, or the failure as a matter of law to consider such evidence, is constitutionally reversible error. Lockett v. Ohio, Eddings v. Oklahoma, supra.

14. This same underlying concern for the reliability of the capital sentencing decision is what led Justice Stevens to declare unequivocally in Pulley v. Harris "that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman v. Georgia, . . . and hence that some form of meaningful appellate review is constitutionally required." 104 S. Ct. at 881-82 (emphasis supplied). While the majority in Pulley declined to make the express declaration made by Justice Stevens, the majority's analysis of the issue before it conceded as much. Faced with the question in Pulley whether the eighth amendment requires that there be comparative proportionality review of death sentences on appeal, the majority framed its answer to the issue presented so as to rule that proportionality review is not required, while conceding that some form of meaningful appellate review is required. 104 S.Ct. att 877, 879. After Pulley, therefore, it is apparent that the eighth amendment requires "some form of meaningful appellate review."

15. If meaningful appellate review is required under the eighth amendment, we submit that meaningful error coram nobis procedures are required as well. The reason for this is simple, but compelling. Appellate review, by its terms, is limited to an assessment of legal error on the basis of the record created in

the trial court. As this Court has held, it reviews that record to "determine if the jury and judge acted with procedural rectitude in applying Section 921.141 and our case law." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Appellate review thus does not encompass errors of fact, for such errors necessarily require matters outside the record. Instead it is the province of error coram nobis to remedy errors of fact. "The function of a writ of error coram nobis is to correct errors of fact, nor errors of law." Hallman v. State, 371 So.2d at 485.

16. That the eighth amendment's underlying concern for reliability requires a meaningful error coram nobis remedy, as well as meaningful appellate review, is further confirmed by the time-honored place of error coram nobis in our jurisprudence. Coram nobis has been recognized since the sixteenth century as an essential, common law appellate remedy. Janiec v. McCorkle, 52 N.J.Super. 1, 144 A.2d 561, 568 (1958). Its creation was the result of the failure of the common law courts to resolve errors of fact on appeal. United States v. Morgan, 346 U.S. 502, 507 (1954). This common law creation was transported to this country and utilized from our nation's earliest days. See, e.g., Strode v. Stafford Justices, 23 Fed. Cas. 236, 1 Brock 162 (C.C. Va. 1810) (death of one party prior to rendition of judgment).

17. While of limited use, coram nobis has persisted as a remedy to prevent injustice in the state courts. See, e.g., Sanders v. State, 85 Ind. 318 (1882); Davis v. State, 200 Ind. 88, 161 N.E. 375; Nickels v. State, 86 Fla. 208, 98 So. 502 (1923); Hallman v. State, supra. That it has a vital function in the federal courts as well was made clear in United States v. Morgan, supra. The Court recognized in Morgan that even though there were provisions for a motion for a new trial and for habeas corpus, a writ "in the nature of" coram nobis was essential to decide questions of fact outside the record where the defendant had already served his sentence. 346 U.S. at 512. The federal

courts still recognize the "salutory function" that coram nobis serves. See United States v. Dellinger, 657 F.2d 140, 144 (7th Cir. 1981).

18. The central reason that error coram nobis has persisted as a post-trial remedy is that it serves as a "remedy against injustice when there is no other avenue of judicial relief," People v. Bennett, 323 N.Y.S.2d 616, 617 (N.Y.Sup. Court 1971), affirmed, 283 N.E.2d 747 (1971). This is nothing less than concern for "considerations of fundamental justice," Janiec v. McCorkle, 144 A.2d at 571, and a reflection of the common law rule that there must be "a remedy wherever there is a wrong." State v. Tellock, 264 Minn. 185, 118 N.W. 2d 347, 350 (1962). Compare Zeigler v. State, ___ So.2d at ___, 9 F.L.W. (S.C.O.) at 257 (The unavailability of error coram nobis to the capital defendant "would have the unfortunate result of leaving an appellant with no remedy when there is possible misconduct or bias on the part of the trial judge relating to sentencing and discovered after the trial. The law does not intend such unjust results, particularly in the case of a death sentenced individual.") Error coram nobis thus fills a procedural gap and its vitality is due to its capacity to prevent a "miscarriage of justice." See Comment, Coram Nobis and The Convicted Innocent, 9 Ark.L.Rev. 118, 128 (1954). See also Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48 (1943).

19. Accordingly, coram nobis is a necessary adaptive mechanism to accommodate serious challenges to the truth, as this Court so adequately noted in Ex parte Welles, 53 So.2d 708, 711 (Fla. 1951).

> The very essence of judicial trial is a search for the truth of the controversy. When the truth is discovered, the pattern for dispensing justice is obvious. All that we are importuned to do at this time is to open the way for the trial court to examine and correct its record with reference to a vital fact not known to the court when the judgment of conviction is entered.

The antiquity of the remedy does not impair its importance even today, because "[i]t is primarily in extraordinary situations that its utility will be appreciated, [and] in a proper case the urgency of the need will demonstrate its usefulness." Comment, The Writ of Error Coram Nobis -- Kentucky's Answer to the Expanding Federal Concept of Procedural Due Process in Criminal Cases, 39 Ky. L.J. 440, 447 (1950-51). Because of this critical function in the process of doing justice, it should come as no surprise that Florida's error coram nobis remedy was viewed more than forty years ago by the Supreme Court as Florida's response to the Supreme Court's mandate that the States provide a "corrective judicial process," Mooney v. Holohan, 294 U.S. 103, 113-14 (1934), for state criminal convictions. See Hysler v. Florida, 315 U.S. 411, 415 (1941).

20. If Florida's error coram nobis remedy was seen by the United States Supreme Court as a response to that Court's demand that "[a] State . . . furnish a corrective process to enable a convicted person to establish that in fact a sentence was procured under circumstances which offend 'the fundamental conceptions of justice which lie at the basis of our civil and political institutions'" Taylor v. Alabama, 335 U.S. 252, 272 (1948) (Frankfurter, J., concurring), then surely that remedy can be shaped to provide a meaningful remedy for after-discovered evidence.

21. If, as we have argued, the eighth amendment does require a meaningful error coram nobis remedy with respect to the capital sentencing determination, there is no doubt that a standard can be articulated to replace the conclusiveness standard in relation to such determinations which takes into account both the eighth amendment concern and the concern for finality. Indeed, that standard has already been articulated by Justice Overton and by Chief Justice Boyd in their separate opinions in Hallman v. State. If the newly discovered evidence

pertaining to a capital sentencing decision is "a material and relevant factor which should be considered in determining the appropriateness of the sentence," and "would be a significant but not controlling factor in determining the appropriateness of the death sentence in [a particular] cause," 371 So.2d at 487, leave should be granted to the error coram nobis petitioner to allow the petitioner to file his pleading in the trial court. This formulation of the standard takes into account the eighth amendment concerns that "material and relevant" factors in mitigation not be ignored in the death sentencing process, Lockett v. Ohio, as well as the State's "need for finality in judicial proceedings," Hallman v. State, 371 So.2d at 485, by requiring that the newly discovered evidence be "significant . . . in determining the appropriateness of the death sentence [in a particular] cause," 371 So.2d at 47. Under this formulation, there is a clear limiting principle -- of significance -- as well as an accommodation of the critical need for reliability.

REMEDY REQUESTED

Mr. Darden, for the reasons stated herein, respectfully requests this Court to grant permission for the filing of this Petition with the trial court, thereby directing the trial court to proceed to a full and fair determination of the facts presented herein. Mr. Darden would further request that this Court stay his execution to allow consideration of the Petition to proceed in an orderly and judicious manner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 10 day of March, 1988.

_____
Attorney