

IN THE SUPREME COURT OF FLORIDA

WILLIE JASPER DARDEN,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

NO. 72088

FILED
MAR 14 1986
CLERK OF THE COURT
By JC

RESPONSE

COMES NOW Respondent, Richard L Dugger, Secretary, Florida Department of Corrections, by and through undersigned counsel, and files the following Response to Petition for Writ of Habeas Corpus, and as grounds, would show:

I. CASE HISTORY

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court of Citrus County, Florida, in January, 1974. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. **Darden v. State**, 329 So.2d 287 (Fla. 1976).

Petitioner sought a petition for writ of certiorari in the United States Supreme Court based on issues surrounding the in-court identification, the exclusion of prospective jurors, and the prosecutor's closing arguments. That petition was granted on November 1, 1976. **Darden v. Florida**, 429 U.S. 917 (1976). By order dated January 10, 1977, the court limited review to the sole issue dealing with the prosecutor's closing argument. **Darden v. Florida**, 429 U.S. 1036 (1976). That issue was briefed

and orally argued, and on April 29, 1977, the court entered an order dismissing the writ of certiorari as having been improvidently granted. **Darden v. Florida**, 430 U.S. 704 (1977).

A death warrant was signed by the governor of Florida on April 18, 1979. After unsuccessfully seeking review in the trial court, Petitioner then sought federal habeas corpus relief in the United States District Court for the Middle District of Florida, Tampa Division. On May 22, 1979, that court stayed the execution and assigned the case to a Magistrate. Petitioner ultimately presented some twenty-five (25) constitutional claims. The Magistrate ordered a hearing on the ineffective assistance of counsel claim, and said hearing was held on October 22-23, 1979. Approximately a year and a half after the hearing, the Magistrate filed a report recommending that relief be denied on all claims except the ones concerning the prosecutor's closing arguments and the excusal of prospective jurors--the "Witherspoon" issue. Both parties filed objections to the report and ultimately the District Court issued its memorandum opinion rejecting the Magistrate's findings regarding the above-mentioned issues, and denied relief on all grounds presented. **Darden v. Wainwright**, 513 F.Supp. 947 (M.D. Fla. 1981).

The judgment of the District Court was appealed to the Eleventh Circuit Court of Appeals. Petitioner presented three constitutional issues: the prosecutor's closing arguments, ineffective assistance of counsel, and excusal of prospective jurors. On February 14, 1983, the court affirmed the judgment of the District Court by a divided panel. **Darden v. Wainwright**, 699 F.2d 1031 (11th Cir. 1983). Rehearing **en banc** was sought and granted, and on July 1, 1983, because the **en banc** panel was equally divided, six-to-six, by operation of the law the decision of the District Court was affirmed. **Darden v. Wainwright**, 708 F.2d 646 (11th Cir. 1983). A second petition for rehearing **en**

banc was filed on July 22, 1983. (On August 5, 1983, a second death warrant was signed by the governor of Florida.) The second petition for rehearing was granted, and the execution was stayed. **Darden v. Wainwright**, 715 F.2d 502 (11th Cir. 1983). The Court of Appeals then rendered an **en banc** decision which affirmed the District Court on issues surrounding the closing argument, and the ineffective assistance of counsel, and reversed on the "Witherspoon" issue. **Darden v. Wainwright**, 725 F.2d 1526 (11th Cir. 1984).

Respondent filed a petition for writ of certiorari in the United States Supreme Court seeking review of the Eleventh Circuit's decision regarding the "Witherspoon" issue. Petitioner also filed a petition for writ of certiorari seeking review of the remaining issues. Darden's petition was denied, 104 S.Ct. 2688 (1984). The Respondent's petition was granted, the judgment of the Court of Appeals was vacated, and the cause remanded for consideration in light of **Wainwright v. Witt**, 469 U.S. ____, 105 S. Ct. 844 (1985). **Wainwright v. Darden**, 105 S.Ct. 1158 (1985).

On remand by opinion dated July 23, 1985, the **en banc** court of the Eleventh Circuit issued its judgment, voting ten-to-two, to reinstate the original panel opinion (699 F.2d 1031). The **en banc** court affirmed the District Court's denial of Darden's habeas petition. **Darden v. Wainwright**, 767 F.2d 752 (11th Cir. 1985).

A third death warrant was signed on August 8, 1985. Petitioner returned to the state court seeking habeas corpus relief and relief pursuant to Fla.R.Crim.P. 3.850. The habeas petition contended that on direct appeal to the Florida Supreme Court, counsel provided ineffective assistance. Relief was denied, **Darden v. State**, 475 So.2d 214 (Fla. 1985). In his motion to vacate, Petitioner raised seven claims. Relief was

denied in the trial court and that denial was affirmed on appeal, **Darden v. State**, 475 So.2d 217 (Fla. 1985).

Petitioner then filed an application for stay of execution in the United States Supreme Court, and "lodged" a petition seeking federal habeas corpus relief in the United States District Court, Middle District of Florida. On September 3, 1985, the Supreme Court denied Darden's application for stay of execution, **Darden v. Wainwright**, 106 S.Ct. 20 (1985). The petition in the District Court dismissed the petition with prejudice as an abuse of the writ. **Darden v. Wainwright**, Case No. 85-1420-Civ-T-10 (M.D. Fla. 1985). Darden, in Claim V, argued a **Caldwell v. Mississippi**, *infra*, violation but more importantly, in Claim VI he asserted that H.A.C. was not constitutionally applicable to his case. He appealed to the Eleventh Circuit, however when certiorari review was granted by the United States Supreme Court in **Darden v. Wainwright**, 106 S.Ct. 21 (1985), he abandoned this claim.

Petitioner then filed an emergency motion for stay of execution and a motion for certificate of probable cause with the Eleventh Circuit Court of Appeals. All relief was denied September 3, 1985. **Darden v. Wainwright**, 772 F.2d 668 (11th Cir. 1985). A petition for writ of certiorari was filed in the United States Supreme Court directed to the denial of rehearing. Review was denied, **Darden v. Wainwright**, 106 S.Ct. 3309 (1986).

On September 3, 1985, Petitioner requested the Supreme Court to treat his previously filed application for stay of execution as a petition for writ of certiorari. The court, that day, vacated the order denying the application for stay of execution, stayed the execution, and granted certiorari review. **Darden v Wainwright**, 106 S.Ct. 21 (1985).

On the merits before the Supreme Court, Petitioner raised issues challenging the prosecutor's closing argument, the ineffective assistance of counsel both at trial and at sentencing, and the exclusion of prospective jurors. The Supreme Court denied relief and affirmed the decision of the Eleventh Circuit Court of Appeals in all respects, specifically holding that **Caldwell v. Mississippi**, 105 S.Ct. 2633 (1985), and Darden's Eighth Amendment argument was unconvincing. **Darden v. Wainwright**, 106 S.Ct. 2464 (1986).

A fourth death warrant was signed August 5, 1986. Since rehearing of this Court's judgment had been filed, the stay of execution previously entered was still in force. This Court denied rehearing on September 3, 1986, and although the period of warrant still had time remaining, Petitioner was not executed.

On August 29, 1986, Petitioner filed a petition for habeas corpus in the Florida Supreme Court seeking relief based on the grant of review of the issues involved in **Hitchcock v. Wainwright**, 77 F.2d 1514 (11th Cir. 1985), and **McCleskey v. Kemp**, 753 F.2d 877 (11th Cir. 1985). On October 3, 1986, the Court denied relief holding that such a claim was improperly sought in habeas corpus and should be presented in a motion to vacate in the trial court. **Darden v. Wainwright**, 495 So.2d 179 (Fla. 1986).

A fifth death warrant was signed on September 24, 1986, setting the execution for October 21, 1986.

Petitioner returned to the trial court in Florida via a motion to vacate under Rule 3.850, Fla.R.Crim.P., raising the **McCleskey/Kemp** issue and a claim of ineffective assistance of counsel. Relief was denied by the trial court and the Florida Supreme Court affirmed said denial, holding that said Petitioner was procedurally barred as a matter of law from obtaining relief, **Darden v. State**, 496 So.2d 136 (Fla. 1986).

A third petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, was filed in the United States District Court, Middle District of Florida, Tampa Division. Therein, Petitioner raised only three issues. One, that he was entitled to relief pursuant to a "McCleskey/Hitchcock" issue; two, that his lawyer rendered ineffective assistance of counsel by failing to develop alibi information; and three, that there were impermissibly suggestive in-court identifications by the two eye-witnesses to the murder. District Court Judge Hodges denied relief on all grounds, dismissing the third petition as an abuse on October 16, 1986. An appeal was filed challenging said finding, and on August 5, 1987, the Eleventh Circuit Court of Appeals, affirmed the denial of federal habeas corpus relief based on abuse of discretion, *Darden v. Dugger*, 825 F.2d 287 (11th Cir. 1987). No petition for rehearing was filed.

A sixth death warrant was signed January 8, 1988, setting the execution for February 3, 1988.

A petition for writ of certiorari was filed in the United States Supreme Court raising the aforementioned claims. The court granted a stay of execution on January 29, 1988. On March 7, 1988, the petition for writ of certiorari was denied by the Supreme Court, and the stay of execution automatically terminated.

A seventh death warrant was signed on March 8, 1988, setting the execution for March 15, 1988 at 7:00 a.m.

See attached appendix A for a detailed listing of all claims which Darden has raised in the various state and federal courts.

II. FACTS

The Eleventh Circuit Court of Appeals, in its most recent opinion, 825 F.2d at 288-290, detailed the facts as they appear

in four different courts which have previously reviewed this case. See *Darden v. Wainwright*, 477 U.S. 197, 106 S.Ct. 2467, 91 L.Ed.2d 144 (1986); *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir. 1983); *Darden v. Wainwright*, 513 F.Supp. 947 (M.D. Fla. 1981); *Darden v. State*, 329 So.2d 287 (Fla. 1976).

The crucial facts germane to the instant issues are as follows:

On September 8, 1973, at about 5:30 p.m., Petitioner entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights in a juvenile home, had awakened at about 5:00 p.m., had a cup of coffee at the store with his wife, and returned home to let their dogs out for a run. Mrs. Turman showed Petitioner around the store. Petitioner stated that he was interested in purchasing about \$600.00 worth of furniture for a rental unit, and asked to see several items. He left the store briefly, stating that his wife would be back to look at some of the items.

Petitioner returned a few minutes later, asked to see some stoves, and inquired about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to an area of the store where some box springs and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door, Mrs. Turman screamed while Petitioner reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, Petitioner tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. Petitioner left Mr. Turman face up in the rain and told Mrs. Turman to get down on the floor, approximately five (5) feet from where her husband lay dying. While she begged to go to her husband, Petitioner told her to

remove her false teeth. Petitioner unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighboring family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her 16 year old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Mr. Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip, not knowing what she meant, asked Petitioner, who he could see because the light bulb inside the door was on, to help him get Mr. Turman inside. Petitioner replied, "Sure, buddy, I will help you." As Phillip looked up, Petitioner was pointing the gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away and was shot a second time in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. Mrs. Hill testified that she heard four shots fired--a single shot then three in a row--at approximately 6:00 p.m. Mrs. Hill had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

Darden v. Dugger, 825 F.2d 287, 288-289 (11th Cir. 1987)

At trial, John Stone testified that at approximately 6:00 p.m. on September 8, 1973, he was on his way home from the beach with his family when he was in a near accident on Highway 92. (Trial record 307-308) The car that nearly hit his drove off the road, slid, went into a ditch and hit a telephone pole (Trial record 310). Mr. Stone went back to the accident scene to see if the driver was hurt and he saw Petitioner crawling out of the

passenger side of the car. Petitioner pulled his shirt off and then walked in front of the car to check for damage to the car. (Trial record 324) As Mr. Stone approached, he observed Petitioner reach down and zip up his pants and buckle his belt buckle (Trial record 313).

Mary Simmons was driving towards Plant City that day near the Lakeland Lounge when she saw that a man had run off the highway. (Trial record 330) She offered to give him a ride and testified that she picked Petitioner up at about 6:30 p.m. (Trial record 331) She recalled the time because she had been listening to the radio station and the news had just ended. (Trial record 331-333).

At trial, both Mrs. Helen Turman and Mr. Phillip Arnold positively identified Petitioner as the man who shot Mr. Turman and shot Mr. Arnold. Mrs. Turman testified that prior to trial, she only saw Petitioner on two occasions: on the day of the crime, September 8, 1973, and then again at a preliminary hearing held September 13, 1973. At the preliminary hearing and at the trial, Mrs. Turman had no difficulty identifying Petitioner. Mrs. Turman testified that Petitioner had been in the store for approximately ten to fifteen minutes and she was able to observe him, and that there was no question in her mind that Petitioner killed her husband (Trial record 231). Although she testified on cross-examination that she did not remember, nor could she describe the clothing he wore in great detail, she always remembered faces, especially of her customers, and that she was good at remembering faces (Trial record 232). Mrs. Turman also testified that although she saw no photos, nor was she asked to pick out Petitioner in a line-up, she had no difficulty identifying Petitioner. She indicated that between the time of the crime and the day of trial, she had not read newspaper accounts, nor seen pictures of Petitioner in the newspaper (Trial

record 216). She was also able to point out differences in Petitioner's appearance at the time of trial from that of his appearance at the time of the crime. She testified that at trial he had grown a goatee, and that his hair was not combed down like it had been the day of the crime. She also indicated that he had lost weight (Trial record 225, 278-279). On cross-examination, Mrs. Turman testified that after Petitioner left the store, she called the police, checked her husband's condition, and then called her sister and her pastor (Trial record 242).

Phillip Arnold, at trial, positively identified Petitioner as the person who tried to kill him. He also was able to identify differences in Petitioner's appearance at the trial from that of the day of the shooting. He testified that the man who shot him was a heavy-set dark man with neat hair, dark colored pants and a dull, light shirt which had a ring around the collar. (Trial record 443). At trial, Mr. Arnold testified that Petitioner appeared to have lost weight, that his hair was different, and that he had a little beard which he had not had before (Trial record 493). During the course of Mr. Arnold's testimony, defense moved to have all evidence concerning Arnold's identification of Petitioner in his photo line-up excluded. The trial court granted said motion, however, allowed an in-court identification of Petitioner. (Trial record 487).

On October 22 and October 23, 1979, Petitioner presented testimony in an evidentiary hearing regarding whether his trial counsel rendered ineffective assistance of counsel for failing to totally investigate an alibi defense. One of the contentions supporting this claim was that defense counsel had available to him, the testimony of Christine Bass who could have testified that between 4:00 p.m. and 5:30 p.m. on September 8 1973, Willie Darden was in front of her house. The Eleventh Circuit Court of Appeals in **Darden v. Wainwright**, 699 F.Supp. at 1037 (11th Cir. 1983), stated:

We have carefully examined the record in this case and found that the performance of Darden's defense counsel, during either the guilt or penalty phase of the trial, did not fall below the "reasonably effective assistance" standard.

During the course of the federal hearing on October 22 and October 23, 1979, defense counsel testified that a decision not to put on Christine Bass and other witnesses for an alibi defense was based on the reasoned decision between defense counsel and Petitioner. The United States Supreme Court affirmed the Eleventh Circuit Court's finding that defense counsel, Mr. Goodwill, rendered effective assistance of counsel. Specifically, this Court held:

. . . Defense counsel engaged in extensive preparation prior to trial, in a matter that included preparation for sentencing. Mr. Jack Johnson, head of the public defender's office at the time, stated to the habeas courts that "I would say we have expended more man hours on this case than any case to my knowledge." (Record 320) Mr. Goodwill, an experienced trial lawyer, testified that he "spent more time on this case than I spent on . . . any capital case I have been involved in, probably more time than any case I have ever been involved in." (cite omitted) That included time investigating petitioner's alibi and driving petitioner around the scene of events to establish each point of his story. Counsel obtained a psychiatric report on petitioner, with an eye toward using it in mitigation during sentencing. Counsel also learned in pre-trial preparation that Mrs. Turman was opposed to the death penalty, and considered the possibility of putting her on the stand at the sentencing phase. The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing.

Darden v. Wainwright, 106 S.Ct. at 2472.

On October 10, 1986, two affidavits were prepared, one by Rev. Sparks and the other by Rev. David A. Hess on behalf of Petitioner. Rev. Sparks stated in his affidavit that on September 8, 1973, at approximately 5:30 p.m., he received a telephone call from Rev. Earl Sprowls, his predecessor at the First Church of Nazarene in Lakeland, Florida. Rev. Sparks indicated that Rev. Sprowls asked him to go with him over to the Turman's furniture store because Mr. Turman had been shot. Rev. Sparks affidavit reflected that:

When we arrived at the Turmans', I mentioned to Rev. Sprowls that I really needed to be back home at 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.

* * *

Based on when I got the call from Rev. Sprowls and what time it was when we got over to the Turmans there was 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.

* * *

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.

Rev. Hess' affidavit reflected that based on his conversations with Rev. Sparks and his conversations with Christine Bass, he put Rev. Sparks and Mrs. Bass in touch with one another. Specifically, he stated:

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.

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.

III. STATEMENT OF THE ISSUES

(A)

WHETHER THE TRIAL COURT ERRED IN FINDING THE CRIME WAS CRUEL, HEINOUS AND ATROCIOUS.

(B)

WHETHER THE JURY WAS MISLED AND CONFUSED REGARDING ITS SENSE OF RESPONSIBILITY DURING THE PENALTY PHASE OF THE PROCEEDINGS.

IV. REASONS FOR NOT GRANTING THE WRIT

Mr. Darden files this successive petition for habeas corpus asserting claims which could have and should have been raised at trial and if properly preserved, on direct appeal. **Witt v. State**, 465 So.2d 510, 513 (Fla. 1985). (Habeas not available to present issue which should have been raised on appeal).

A.

Darden has previously attempted to litigate the finding of cruel, heinous or atrocious in a previous petition for state habeas corpus relief via an unsuccessful challenge to his Sixth Amendment right to effective assistance of appellate counsel on direct appeal. **Darden v. Wainwright**, 475 So.2d 214, 216 (Fla. 1985). Darden may not now revive a defaulted claim merely by alleging a separate and distinct constitutional provision was violated where the underlying facts remained unchanged. See

Sullivan v. State, 441 So.2d 609, 612-613 (Fla. 1983); **Dobbert v. State**, 456 So.2d 424 (Fla. 1984); **Christopher v. State**, 489 So.2d 22, 25 (Fla. 1986); **Card v. State**, 512 So.2d 829, 830 (Fla. 1987); **Francois v. Wainwright**, 470 So.2d 685 (Fla. 1985) and **Aldridge v. State**, 503 So.2d 1257, 1258 (Fla. 1987), wherein this Court held changing the facts to support a second challenge to ineffective assistance was procedurally barred from even being raised in a successive Rule 3.850 motion. The same is true for successive habeas petitions. **Sullivan v. State, supra.** Moreover, a decision of an intermediate federal court of appeals is a totally insufficient basis for a stay of execution even where certiorari has been granted by the United States Supreme Court and the issue is pending. (**Maynard v. Cartwright**, Case No. 87-121, (issue of whether H.A.C. is too broadly applied in Oklahoma in light of narrowing required by **Godfrey v. Georgia**, ___ S.Ct. ___ (1980)). Inapplicable to present case. See, **Kennedy v. Wainwright**, 483 So.2d 424, 427 (Fla. 1986). (Court declined to issue stay pending consideration of **Lockhart v. McCree**, 476 U.S. 162 (1986)).

B.

The same argument applies to Darden's second issue which is an attempt to relitigate his **Caldwell v. Mississippi**, 105 S.Ct. 2633 (1985) claim which has been considered and rejected by this Court. **Darden v. State**, 475 So.2d 217, 221 (Fla. 1985). See Appendix, paragraph G, issue VI. The Court disposed of this claim stating:

Darden also attempts to show that as in **Caldwell**, the jury was misled as to its role in the sentencing process. In **Caldwell**, the court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellate review. We do not find such egregious misinformation in the record of this trial, and also note Mississippi's capital punishment statute vests in the

jury the ultimate decision of life or death, whereas, in Florida, a decision resides with the trial judge. *Id.*

This claim should be dismissed on procedural grounds as a successive petition asserting the same or similar grounds for relief. *Francois v. State, supra; Card v. Dugger, supra,* Likewise, the fact that the United States Supreme Court has granted certiorari in *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified*, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, ___ U.S. ___ (March 7, 1988), offers no basis for a stay of execution in this case. *Kennedy v. Wainwright, supra.* Darden sits in a unique position. Not only is this issue wanting, but the United States Supreme Court has specifically so held in *Darden v. Dugger*, 91 L.Ed.2d 144 (1986), wherein the court ruled on the merits that *Caldwell v. Mississippi, supra,* was distinguishable. See footnote 15, 91 L.Ed.2d at 158.

Darden has presented two claims which constitute abuse of the writ and should be dismissed on procedural grounds as such.

V. Conclusion

Respondent respectfully asks the Court to dismiss the instant petition as an abuse of the writ and deny Darden's request for a stay of execution.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

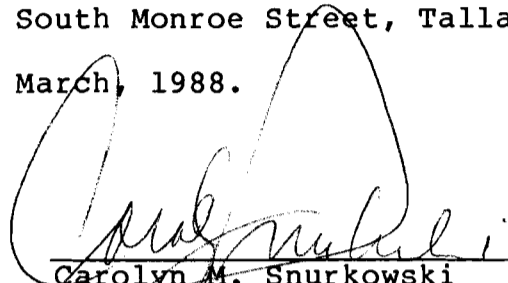

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of of the foregoing Response has been furnished counsel for Petitioner by hand delivering a copy of the same to the Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13th day of March, 1988.



Carolyn M. Snurkowski
Assistant Attorney General
OF COUNSEL

APPENDIX "A"

Procedural History Of The Issues Raised

A. **Darden v. State**, 329 So.2d 287 (Fla. 1876), Case No. 45,056.

Points Raised on Direct Appeal

I.

Statement of Issues

- I. Systematic exclusion of blacks from jury venire.
- II. Exclusion of perspective jurors for cause under **Witherspoon** as violations of constitutional right to:
 - (a) Due process
 - (b) Equal protection
 - (c) Sixth Amendment right to a representative jury.
- III. Medical examiner comment on other murders during his testimony at trial.
- IV. Suggestive identification of Darden by Mrs. Turman.
- V. Suggestive identification of Darden by Phillip Arnold.
- VI. Admission of gun found near scene of accident.
- VII. Inflammatory closing argument by prosecutor.
- VIII. Unconstitutionality of Florida Death Penalty Statute 921.141.

B. **Darden v. Florida**, 429 U.S. 917 (1976), Petition for Certiorari.

Issues Presented

- I. Inflammatory closing argument of prosecutor.
- II. Suggestive identification of Darden by Mrs. Turman.
- III. Suggestive identification of Darden by Phillip Arnold is violative of due process clause.
- IV. Exclusion of jurors for cause under **Witherspoon v. Illinois**, 391 U.S. 510 (1968).

C. **Darden v. Wainwright**, 513 F.Supp. 947 (M.D. Fla. 1981),
Darden's first initial federal habeas petition.

Issues Presented

I. Ineffective assistance of counsel.

II.

(a) General challenge to constitutionality of
921.141.

(b) Death penalty constitutes cruel and unusual
punishment.

(c) Disproportionality of death penalty as to
Darden.

(d) Limitation and opportunity to present evidence
resulted in fundamentally unfair proceeding.

(e) Inflammatory closing argument of prosecutor
unduly influenced jury to impose death.

D. **Darden v. Wainwright**, 699 F.2d 1031 (11th Cir. 1981);
Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983); **Darden v.**
Wainwright, 715 F.2d 502 (11th Cir. 1983); **Darden v. Wainwright**,
725 F.2d 1526 (11th Cir. 1984).

Issues Presented

I. Closing argument, guilt in penalty proceedings.

II. Ineffective assistance of counsel at guilt and penalty
proceedings.

III. Exclusion of jurors for cause under **Witherspoon, supra**.

E. **Darden v. Wainwright**, Petition for certiorari.

Issues Presented

I. Inflammatory closing argument.

II. Ineffective assistance of counsel in guilt and penalty
phase.

F. **Darden v. Wainwright**, 475 So.2d 214 (Fla. 1985), Habeas petition filed in Florida Supreme Court, Case No. 67,555.

Issues Presented

I. Ineffective assistance of appellate counsel.

(a) Failure to attack trial court finding of cruel, heinous and atrocious.

(b) Failure to attack allocation of burden of proof regarding juries weighing of mitigation and aggravation (defendant required to prove mitigating outweighed aggravating).

G. **Darden v. State**, 475 So.2d 217 (Fla. 1985), Appeal of 3.850, Case No. 67,571.

Issues Presented

I. Use of non-record psychological evaluation without waiver of defendant's privilege against self-incrimination.

II. Ineffective assistance of counsel for lack of preparation for sentencing.

III. Jury was not instructed to find death an appropriate penalty after weighing factors in aggravation and mitigation.

IV. Jury was not properly instructed on how to consider mitigation or non-statutory mitigation.

V. Florida Supreme Court failed to properly consider evidence in mitigation and non-statutory mitigation.

VI. Trial court's instruction to jury undermined jurors sense of responsibility for advisory sentence under **Caldwell v. Mississippi**, 472 U.S. 320 (1985).

VII. The prosecutor's grossly unfair closing argument renders death sentence unreliable under **Caldwell v. Mississippi**, *supra*.

H. Second petition for federal habeas corpus relief, Case No. 85-709 filed September 1, 1985 for Middle District of Florida.

Issues Presented

I. The trial court used non-record psychological report in imposing death without obtaining waiver of privilege against self-incrimination.

II. Florida Supreme Court did not consider non-statutory mitigating evidence where trial court found two non-statutory mitigating factors.

III. Darden was denied individualized sentencing proceeding as required under **Lockett v. Ohio**, 435 U.S. 586 (1978).

IV. The statement of trial court judge and instructions to jury caused jurors to feel a diminished sense of responsibility for recommending death. **Caldwell v. Mississippi, supra.**

V. Grossly unfair closing argument of prosecutor violated **Caldwell v. Mississippi, supra.**

VI. Appellate counsel was ineffective for failure to challenge trial court finding of cruel, heinous and atrocious and supreme court employed standardless review of trial court finding of cruel, heinous and atrocious.

I. **Darden v. Wainwright**, 477 U.S. 197 (1987), Brief of the United States Supreme Court on October 29, 1985.

Issues Presented

I. Improper inflammatory closing argument of prosecutor.

II. Exclusion of jurors for cause under **Wainwright v. Witt**.

III. Ineffective assistance of counsel (Darden did not raise ineffective assistance of appellate counsel for failure to raise trial court finding of cruel, heinous and atrocious or burden shifting issues presented in state court and United States District Court below).

J. **Darden v. State**, 496 So.2d 136 (Fla. 1986), Florida Supreme Court, Case No. 69,250.

Issues Presented

I. Discriminatory application of death penalty in Florida.
McCleskey v. Kemp, 107 S.Ct. 1756 (1987); **Hitchcock v. Florida**.

K. Rule 3.850 filed October 21, 1986.

Issues Presented

I. Darden is innocent, ineffective assistance of counsel for failure to investigate and discover witnesses to establish alibi defense.

II. Discriminatory application of Florida death penalty.
McCleskey v. Kemp, supra.

L. Third habeas petition, Case No. 86-1456, Middle District of Florida.

Issues Presented

I. Ineffective assistance of counsel for failure to investigate alibi defense and present testimony of Dr. David Hess and Christine Bass at trial.

II. Suggestive identification procedures regarding Mrs. Turman's identification of Darden.

III. Discriminatory application of Florida death penalty statute. **McCleskey v. Kemp, supra**.

IV. Statement on exhaustion, procedural default and abuse of the writ.

M. **Darden v. Dugger**, 825 F.2d. 287 (11th Cir. 1987), Appeal, Eleventh Circuit Court of Appeals.

Issues Presented

I. Improper finding of abuse of the writ.

II. Failure to investigate alibi defense.

III. Grossly suggestive identification procedure of Darden by Mrs. Turman.

IV. Reconsideration of **McCleskey/Hitchcock** as to the racially discriminatory application of Florida's death penalty statute.

N. **Darden v. Dugger**, Case No. 87-6173, **denied**, March 7, 1988.

Issues Presented

- I. Abuse of the writ to suggestive identification procedure.
- II. Claim of innocence.