IN THE SUPREME COURT OF FLORIDA

WILLIE JASPER DARDEN,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondent.

CASE NO. 69250

CLERK
BY Tanya
Deputy Clerk

RESPONSE TO PETITION FOR HABEAS CORPUS

Pursuant to this court's order of September 2, 1986, respondents request the court to deny any and all relief and summarily or expeditiously deny the instant petition for writ of habeas corpus as the grounds asserts therein are non-meritorious.

CASE HISTORY

Darden 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. 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. 1986).

Darden 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 relief in the trial

court, Darden 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. Darden ultimately presented some twenty-five constitutional claims. The magistrate ordered a hearing on the ineffective assistance of counsel claim, and same was held on October 22 and 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. Darden presented three constitutional issues involving the prosecutor's closing argument, ineffective assistance of counsel, and the 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 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 the 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).

The State of Florida filed a petition for writ of certiorari in the Supreme Court seeking review of the court's judgment regarding the Witherspoon issue. Darden also filed a petition for writ of certiorari seeking review of the remaining issues. Darden's petition was denied. _____ U.S. _____, 104 S.Ct. 2688 (1984). The state's petition was granted, the judgment of the court of appeals was vacated and the cause was remanded for reconsideration in light of Wainwright v. Witt, 469 U.S. ____, 105 S.Ct. 844 (1985). Wainwright v. Darden, ____ U.S. ____, 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) Providing its pertinent response to Wainwright v. Witt, the en banc court affirmed the district court's denial of Darden's habeas corpus petition. Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985).

A third death warrant was signed on August 8, 1985. Darden returned to state court seeking habeas corpus relief and relief pursuant to Florida Rule of Criminal Procedure 3.850. The habeas petition contended that in his 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 action, Darden 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).

Darden 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. At approximately 6:00 p.m. on September 3, 1985, the Supreme Court denied Darden's application for stay of execution. ____ U.S. ____, 106 S.Ct. 20 (1985). The petition in the district court was then activated and at 7:35 p.m. on that same day, 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 then filed an emergency motion for stay of execution and a motion for certificate of probable cause in the Eleventh Circuit Court of Appeals. At approximately 11:00 p.m. on September 3, 1985, that court denied all relief. Darden v. Wainwright, 772 F.2d 668 (11th Cir. 1985).*

At some point on the evening of September 3, 1985, Darden requested the Supreme Court to treat his previously filed application for stay of execution as a petition for writ of certiorari and at approximately 11:30 p.m., the court complied with Darden's request. By order, the court vacated the order denying the application for stay of execution, stayed the execution and granted certiorari review. Darden v. Wainwright, ___ U.S. ___, 106 S.Ct. 21 (1985).

On review of the merits in the Supreme Court, Darden raised issues surrounding the prosecutor's closing argument, the ineffective assistance of counsel both at trial and at sentencing, and the exclusion of prospective jurors. After argument, the Supreme Court issued its judgment denying relief and affirming the decision of the Eleventh Circuit of Appeal in all respects. (767 F.2d 752) Darden v. Wainwright, ___ U.S.___, 106 S. Ct. 2464 (1986).

A fourth death warrant was signed on August 5, 1986, and as a result, Darden is here seeking relief.

ARGUMENT

The essential basis of Darden's request for relief is predicated upon the fact that the Supreme Court has decided to review the judgments of the Eleventh Circuit Court of Appeals in the cases of Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985), and McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985). Both cases involve, to one degree or another, the question of

---

*Darden sought rehearing en banc in the Eleventh Circuit from the judgment of the panel denying his certificate of probable cause. That court denied rehearing en banc. Darden v. Wainwright, 776 F.2d 1057 (11th Cir. 1985). Darden sought a petition for writ of certiorari directed to this denial of rehearing and the Supreme Court denied certiorari review. Darden v. Wainwright, ___ U.S. ___, Case No. 85-6273, order entered June 30, 1986.

whether in the respective states involved, the death penalty is being unconstitutionally applied on the basis of racial, economic, geographical, and other factors of alleged discrimination. (Both of these cases have been set for argument on October 15, 1986.)

Darden's claim is that since the Supreme Court will soon be deciding the general question of the application of Florida's death penalty statute, and since his case very obviously involves the application of that statute to him, his execution should be stayed pending resolution of that issue.*

Darden says that to execute him prior to a decision in a case which the Supreme Court might rule in his favor would be, at the very least, improper. Unfortunately, whatever protective umbrella is generated by that abstract notion, it is not one within which Darden may properly seek salvation. This is true for several reasons.

First, insofar as the Hitchcock case is concerned, the only question to be resolved as it pertains to this issue will be whether the federal court, sitting in habeas corpus, properly determined that the state trial record was sufficient to dismiss this claim summarily without the need for affording Hitchcock an opportunity to prove his claim. The issue in McCleskey, which did involve a lengthy hearing in federal court, will obviously turn on the federal courts' treatment and application of evidence and the determinations of facts derived from that evidence in a constitutional context. We respectfully suggest that the very best that could come from these cases is a judgment that the constitution prohibits the imposition of the death penalty if such imposition is based on purposeful discrimination due to race, gender, geography etc., and proceeding on that premise, unless the record of proceedings does not show to the contrary, a habeas corpus applicant should be provided an opprortunity to

---

*The pendency of a case in the Supreme Court is a theory which numerous capital inmates utilized to successfully obtain stays of execution based on the issue ultimately resolved in Lockhart v. McCree, ____ U.S. ____, 106 S.Ct. 1758 (1986), which was not only expected to but also did have national impact on capital proceedings.

present evidence in support of the claim. Neither holding will or can affect Darden's case.

Secondly, as Darden has so many times contended, his trial was not only the first held in the county but probably one of the first in the state. That being true, there existed no evidence prior to that time upon which he could rely to even offer the suggestion that the statute was unconstitutionally applied to him based on past discriminatory practices. No statistical evidence existed with regards to the imposition of capital punishment based on any facts whatsoever; if any claim at all existed in this context, it necessarily would have to have been one based on a discriminatory application to his case alone. Whether the proceedings giving rise the imposition of the death sentence against Darden was the product of any form, shape or kind of discrimination was something which could and should have been raised at the very beginning of the proceedings in 1973. Prior to the publication of any of the recent statistical studies, Darden always had the opportunity and the right to question any part of the procedure which led to his conviction. Although the current capital penalty statute had not yet been approved by the Supreme Court, the fact remains that it was subsequently found to be facially constitutional and containing certain safeguards.

An accused, even in 1973, always could challenge the impanelling of a grand jury based on racial discrimination. He could always have challenged the trial jury on the same basis and there was nothing, even then, to prevent him from challenging the use of peremptory challenges based on race. Any aspect of sentencing could be challenged for any perceived constitutional defect and all of these safeguards, as well as any other, could have been raised on direct appeal.

Thirdly, and as a converse of the above, it is not unfair to view the vast history of the proceedings of this case as representing that which has already adjudicated this claim. Beginning with the signing of his first death warrant in 1979 and continuing through the multitude of state and federal proceedings occuring since, Darden has consistently suggested (and at times

directly contended) that the fact of his race played a substantial if not controlling part in his conviction and sentence. He has constantly relied on the notion of race as a specific motivating factor behind the prosecutor's closing argument and the identification of him by Mrs. Turman and Phillip Arnold. He has relied on it as a general motivating factor for the entire process which brought him to his current predicament. While he may not have echoed the identical language or parroted the current theories being presented in support of the general claim of discriminatory application of the death penalty, it is strongly suggested that he has given every court a more than fair opportunity to consider his general theme of complaint that he was convicted and sentenced to death solely because he was a black man involved in killing and attempting to kill a white person. Moreover, in his most recent federal habeas corpus petition, as well as in his presentation to the Supreme Court, Darden made much about his deprived socio-economic background, his poor family life, and general not-so-well-to-do status -- all of the factors which have been and are being relied upon to support the arguments being made in McCleskey and Hitchcock.

From the above it is clear that the current consideration of the issues involved in the Georgia and Florida cases in the Supreme Court will have neither direct nor tangential bearing on Darden's situation. Any evidence in support of the direct questions before the Supreme Court was not even in existence at the time Darden was tried. At best, therefore, the only claim of discrimination which possibly could have been made was to his conviction alone. While one could conclude that Darden never has presented the claim in which he now seeks sanctuary, one could, with equal justification, conclude that at the same time, Darden has presented the claim. It began as a general notion of racial discrimination in terms of the imposition of the death penalty and has, in recent and numerous federal and state proceedings, been refined into something as specific as the facts in this case can allow. One need only examine the record of proceedings in

this court (475 So.2d 214) to see that in his last habeas corpus petition, Darden pointedly relied upon racial negatives to support the claims made.

Habeas relief - - sought successively - - should be denied.

Respectively submitted,

JIM SMITH
ATTORNEY GENERAL

Richard W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response has been furnished by U.S. mail to Robert A. Harper, Esquire, Attorney for Petitioner, 317 East Park Avenue, P.O. Box 10132, Tallahassee, Florida, 32301-0132, this 3rd day of September, 1986.

Of Counsel