OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5319

TITLE WILLIE JASPER DARDEN, Petitioner, V. LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

PLACE Washington, D. C.

DATE January 13, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE JASPER DARDEN, :

Petitioner, :

V. : No. 85-5319

LOUIE L. WAINWRIGHT, :

SECRETARY, FLORIDA DEPARTMENT :

OF CORRECTIONS :

- -x

Washington, D.C.

Monday, January 13, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

APPEARANCES:

ROBERT A. HARPER, JR., ESQ., Tallahassee, Florida; on behalf of the petitioner.

RICHARD W. PROSPECT, ESQ., Assistant Attorney General of Florida, Daytona Beach, Florida; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Darden against Wainwright.

Mr. Harper, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT A. HARPER, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. HARPER: Thank you. Mr. Chief Justice, and may it please the Court, the prosecutor's closing argument in the Willie Jasper Darden prosecution during the final summary has been variously described as bad, as unfair, as harmful, as prejudicial, as egregious, but there is one word only that is sufficient to describe this argument in this case, and that is reversal.

The question then arises as to why the case hasn't been reversed and why is it here. And the simple answer is, the Eleventh Circuit has not and did not apply the appropriate standard announced in Caldwell versus Mississippi.

On the same date that the Darden case came down en banc from the Eleventh Circuit, July the 23rd, 1985, that court decided Tucker versus Kemp, Brooks v. Kemp, and William Tucker versus Kemp. The Tucker case has been vacated and remanded under the Caldwell decision. We raised Caldwell in the petition for rehearing which was

denied -- that opinion is found in the joint appendix at 395 -- when less than a majority of the court voted in favor of the petition for rehearing.

The Eleventh Circuit is squarely faced and apparently rejected the Caldwell standard, and we would submit that in view of the dissents, two dissents in the en banc opinion on the 27th of August, that a remand would be inaccurate, and that an outright reversal is required.

This argument is so bad it has been universally condemned. It is so bad, as the District Judge noted, even the state has not even weakly asserted anything but that it is improper.

The reviewing courts, each and every one, starting with the Supreme Court of Florida, found that the prosecutor's remarks under ordinary circumstances would constitute a violation of the code of professional responsibility.

Two Justices of the Florida Supreme Court, former Chief Justices each, described the remarks, as vituperative personal remarks upon the accused and appeals to passions and prejudice.

The magistrate who heard the evidence at the evidentiary hearing below was "convinced that the jury deliberation was substantially influenced by the

prejudicial argument."

The Eleventh -- excuse me. The United States District Judge who had a de novo hearing on the issue said no one even weakly suggested that the prosecutors' closing remarks were anything but improper. The Eleventh Circuit said that anyone attempting a textbook illustration of a violation of the code of professional responsibility could not possibly improve upon the example provided by the prosecution during Darden's trial.

We submit that this case would be universally applauded by the organized bar, and no concept should be indulged to deflect from the fact that the sentencer in this capital case was diverted from his truthfinding function.

The purpose of the Code of Professional Responsibility is universally accepted by every practicing attorney and judge. The purpose of the rules is to protect the due process rights to a fair trial. These standards are objective, and we submit that these standards are the litmus against which this prosecutor's argument should be tested, and we submit that this test in the search for the ever elusive concept called justice would require that this trial, these proceedings be reversed.

Against this test, every reviewing court, all the parties in the litigation concede that the argument is improper. The only problem is, the standard appropriate in this instance has not been applied.

The argument itself comprises 44 pages in which 27 improper arguments are interjected. There are ten attacks on the credibility of the criminal justice system itself, attacks on the Department of Corrections, attacks on the parole people for turning this man loose, and the like, nine instances of personal opinion, two instances of bolstering the argument, two outright misstatements, one interjection of race, and one attack on specific -- well, actually two attacks on specific rights.

In the order that they occur, the arguments start off with entreaties to the effect, "It could have been you, members of the jury, who had been murdered," arguments that I am convinced --

QUESTION: What is wrong with that sort of an argument, counsel? I mean, the prosecutor has got to say something.

MR. HARPER: Well, Your Honor, I think he does have to say something, but I think it has to be proper.

QUESTION: Is there some constitutional standard of propriety that you see in our cases?

MR. HARPER: Yes, sir, particularly in a death

case. I think that there -- the -- when you inflame the passions of the jury and divert them from the issue at hand, be it guilt or be it punishment, and interject things like --

QUESTION: You say, then, that the Fourteenth Amendment of the United States Constitution prohibits a prosecutor in a death case from saying to the jury, members of the jury, it might have been you who was killed?

MR. HARPER: Well, that is just one of the first instances.

QUESTION: But I take it, though, that is what you are saying.

MR. HARPER: That is one thing he said. Yes, Your Honor. And I --

QUESTION: And you say it is unconstitutional for him to say that.

MR. HARPER: What I am saying more particularly is unconstitutional is, there should be another defendant in this courtroom, but alas, I know of no charges to bring against --

QUESTION: Well, but you started out ticking off your claims as to how this prosecutor had fallen short, and I thought the first one you gave was, he said to the members of the jury, this might have been you.

Now, surely you meant that to have a constitutional dimension, didn't you?

MR. HARPER: Well, Your Honor, that golden rule argument, I was saying -- what I have said was, there were 27 instances of misconduct.

QUESTION: Well, how -- you --

MR. HARPER: And not all of them maybe rise to the constitutional level. I have some that I believe do as opposed to that one, and others that I think are stronger. "The other defendant should be the Division of Corrections," I think, is stronger.

"I wish the persons responsible for him being on the public were in the doorway and shot instead of the victim, Mr. Turman." I think arguments like, He, Darden, is a prisoner. "Mr. Turman -- that unknown defendant, namely, the Department of Corrections, is criminally negligent. And I will tell you this. I will guarantee you that if I were in the same chair as Mr. Darden, I would lie between my teeth," me, the elected official of which probably a majority of that jury voted for.

And I think there are other arguments that get even worse. "I have no contact with this case, but sometime it emotionally gets to me. There is one person on trial, he, Willie Darden, and his keepers." I think those are the kinds of things that reach constitutional

dimension, Your Honor.

And I think it goes further when he says that he, Darden, says he asked for a polygraph. "Only an incompetent lawyer would allow him to take a polygraph." Mr. Goodwill, the defense lawyer, "You didn't give my shells back," and these kind of conducts against this lawyer, slamming stuff around, berating in front of the jury, parading in front of the jury, putting the credibility of the office of the state attorney, an elected official under the constitution of the state of Florida, in issue time and time again.

"I believe Willie Darden is a murderer. I will believe that the rest of my life." That kind of argument, I submit, Your Honor, rises to the level of a constitutional violation under any standard, and in particular the Caldwell standard, which was not addressed and has not been addressed by any reviewing court today.

Those are not the only instances of misconduct, however, and as I admit, there are more and more, and it builds up time and time and time again, and the thing -- "The Department of Corrections turned him loose on the public. Can we expect them to stay in prison when they go there? Can't we expect them to stay locked up once they get there?"

"He shouldn't be out of his cell unless he has

a leash on him."

These are the kind of things, Your Honor, that are not just isolated. They are persistent time and time and time again. "Yes, there is another defendant, but I regret I know of no charge to place upon him except the public condemnation."

"Condemn them. Condemn the Department of Corrections by putting Willie Jasper Darden in the electric chair," is what that prosecutor is saying.

"He is a prisoner. He is supposed to be. Mr. Turman is dead because of that unknown defendant, the Department of Corrections. We don't have in the courtroom allowe it. He, the Department of Corrections, is criminally negligent for allowing it."

Those kind of arguments, I submit, Your Honor, rise to constitutional question. It is a direct attack on the reliability of the criminal justice system itself. Here is the executive branch challening another branch of the government, making attacks, personal attacks on counsel in the courtroom, and then going through things like, well, counsel is going to say -- try the sheriff's department.

Well, he has got notes that I gave years ago, and I used to be a defense lawyer myself, nine years. And that is not the only thing, he asked. And I think

the biggest thing about the argument is, he gave one argument -- they gave one argument, 44 pages, 27 incidences of misconduct, and during that time he says, "I guarantee you I will ask for death. There is no question about it."

The second part of the trial, "I will request you to impose the death penalty. I will ask you to advise the judge. That is the only way I know he is not going to get out on the public. That is the only way I know. It is the only way I can be sure. It is the only way anybody can be sure, because the people that turned him loose," and those arguments, I submit to you, rise to a constitutional question.

QUESTION: Your point is that that is an unconstitutional -- that argument rises to the level of a constitutional standard.

MR. HARPER: I am sorry, sir?

QUESTION: The argument that he shouldn't have been let out of the prison before, and that if he is let out again, he might be out on the public, do you say that is an improper, impermissible argument constitutionally?

MR. HARPER: Your Honor, future dangerousness is a different issue from what I am trying to say is overall, considering the total circumstances of a

racially charged courtroom setting in a rural area of mid-Florida in 1973, where the prosecutor entreats the jury during voir dire that, can you try Willie Darden as if he was white, then saying that their particular argument, that, you know, there are particular words that are permissible, but they are included in the context of impermissible argument.

I think future dangerousness is a permissible argument, but to say that the only way I know that you can protect the public is to -- and the negligent people that turned him loose, to make sure it doesn't happen again, I don't think that is proper.

QUESTION: Constitutionally impermissible? That is my question.

MR. HARPER: Your Honor --

QUESTION: Improper may be one thing --

MR. HARPER: Yes.

QUESTION: -- as a matter of good taste. Is it constitutionally impermissible to point those things out?

MR. HARPER: I think there are certain segments of the argument that pass constitutional muster, but considering the argument as a whole, the calculated and designed effect it had to inflame the jury, it was a model in its total context. It was designed and did, I

believe, violate every single article of the Code of Professional Responsibility.

QUESTION: When was this crime committed?

MR. HARPER: This crime was committed on September the 8th, 1973.

QUESTION: 1973.

MR. HARPER: Yes, sir.

QUESTION: So you think it is constitutionally impermissible for a lawyer in the courtroom to criticize the system of justice that lets this kind of a matter run that long? Constitutionally impermissible for a member of the executive branch, as you put it --

MR. HARPER: Yes, sir.

QUESTION: -- the prosecutor to be critical of the system of justice that takes 13 years to get something completed?

MR. HARPER: Your Honor, it wasn't 13 years old when he said that. The trial, of course, was four months later from the crime. The crime was committed on September the 8th, 1973. The trial was January the 17th, 1974.

As far as this trial, this proceeding dragging on this long, if that is the question you are putting to me, Your Honor, my position is that I am sworn to defend a person's rights as long as he has those rights.

In this case, Willie Jasper Darden, he will not die because of these rights he has, and these rights we have been asserting the last eight years that I have been working on this case pro bono have been reevaluated at least three times by this Court.

All three issues we have filed have been reevaluated, and the only thing that has changed in Willie Darden's case is not the facts, but the way we have had to plead in ours, and the way we have had to try to get the courts below to apply the standards that you have set out.

Our case has been, I think, very active, and it was visited by the en banc Eleventh Circuit four times.

QUESTION: Did you say it is the third time it has been here?

MR. HARPER: Yes, sir. Yes, sir, it is the third time here, but I think it is appropriate to say that the issues are more ripe now. The magistrate made certain findings below, and the District Judge made findings below that make things ripe in the sense of this. There are historical findings that have been made that are important by the judge below which are now reviewed under a clearly erroneous standard, and I think those findings, those types of things solidify the rights of Willie Darden to the relief that we are requesting.

And that isn't the only issue in the case. The exclusion of Murphy, venirium in Murphy, I think, is a perfectly viable issue. It certainly falls short of the breadth of Lockhart, but is as viable an alternative to the relief that we request on the argument. Mr. Murphy was clearly excluded applying the wrong standard of law. He was not questioned under the Adams standard, and I think it is appropriate to review the case and reverse the case on that issue by itself.

QUESTION: Well, Murphy was sitting there while the judge had made his introductory statements in that regard, wasn't he?

MR. HARPER: Your Honor, that cannot be gleaned from the record, and I would submit, Justice Rehnquist, that a contrary inference could be drawn from the record. The appendix at Page 5, the transcript at Page 6, the judge says, "All right, at this time we will take a recess for ten minutes. I would like you all back in the courtroom to proceed with the selection of the jury."

One of the jurors said, "Beg your pardon, sir? She was talking, and I couldn't hear what you said."

I don't think you can conclude from the record that Mr. Murphy heard.

QUESTION: Well, but if there is a debate on

that, I think that our cases on federal habeas review say that you presume the judge applied the correct standard.

MR. HARPER: Yes, sir, but I don't think that presumption can apply in this case, and the reason I say that are two. The findings are not fairly supported by the record, and there was an inadequate development of the material facts, and I think that the presumption of correctness that has been announced, and which really is not new law, but just a new enunciation of the proceedings under 254(b).

QUESTION: If you should prevail, counsel, on the juror Murphy issue, what is the result, vacation of the conviction or only of the death penalty?

MR. HARPER: Only of the death penalty, Your Honor.

If it please, Mr. Chief Justice, I would be willing to reserve my remaining time at this time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Prospect.

ORAL ARGUMENT OF RICHARD W. PROSPECT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. PROSPECT: Mr. Chief Justice, and may it please the Court, with regards to the first remarks that Mr. Harper made, I would like to relate to the Court

historically that nine years ago when we argued this case another lawyer appeared on behalf of Mr. Darden and gave essentially the same attack on the statements of the prosecutor.

Nothing obviously has changed. The remarks have remained the same for the past 13 years. The attacks have remained the same, and judicial treatments and considerations of the propriety of those remarks have likewise remained the same.

The only thing that has changed between nine years ago and now is the federal hearing we had in 1979 in District Court. Nine years ago I stood here and told you that although the remarks were indeed improper and no thinking person could ever hope to defend them either singularly or collectively, there was something that I thought was very compelling about the case, and that was the lack of objection.

There was no objection to the particular alleged inflammatory remarks. At that time, I knew only that there was no objection, but by virtue of the federal hearing, I know why, and the Court knows now why there was no such objection.

The lead defense counsel for Mr. Darden, Mr. Goodwill, testified at the federal hearing which, if I may digress for a moment, the federal hearing was held

for the sole purpose of determining the ineffective assistance of counsel claim. As a major premise of that challenge, the defense intended to develop the reason for failure to object.

It was their legal position that the failure to object to these arguments represented and constituted ineffective assistance of counsel. Now, obviously, Mr. Goodwill had to testify that there was no objection, but he gave as his reason the fact that apparently he and the prosecutor were old friends.

They had gone to law school together, and they had known each other approximately 13 years. When I asked him directly why there was no objection, he stated that because of his prior acquaintance with the prosecutor and by having cases against him and knowing him as a lawyer, he was confident that his remarks, if left unchecked, would rise to a level which would represent reversible error without the need of objection.

Now, this question that I asked of the gentleman was specifically responsive to the testimony presented on behalf of the defense at the federal hearing from the other lawyer, the junior attorney who was newly admitted to the bar who was assisting Mr. Goodwill. His name was Maloney.

Mr. Maloney said the reason there was no objection was because he didn't know anything that the prosecutor was saying was objectionable. Mr. Goodwill contradicted that, and specifically added that at one point in the closing argument Mr. Maloney arose as if to object and he physically restrained him.

Now, this was sworn testimony before a federal magistrate. In this particular regard, even the magistrate, the one person who Mr. Darden relied so heavily upon, made a finding of fact after hearing testimony. He rejected obviously Mr. Maloney's testimony and accepted as a finding of historical fact that the lack of objection was due to deliberate tactical choice.

Now, for the past few minutes we have obviously heard complaints about the arguments, and we have heard the requests that because of the arguments alone the conviction should be reversed.

QUESTION: Has there ever been a finding about effective assistance of counsel in this case?

MR. PROSPECT: Yes, sir.

QUESTION: There has been? I thought so.

MR. PROSPECT: That has been consistent throughout. The magistrate through the Eleventh Circuit en banc every time.

QUESTION: Well, while I have you interrupted,

do you agree that there are some arguments that get to the point where they are constitutionally impermissible?

MR. PROSPECT: If viewed by themselves under different circumstances and perhaps in a different case, yes, sir. I agree that they have no business in a courtroom in our land.

But I have to temper that answer --

QUESTION: I keep hearing that, but I have difficulty finding a case that after saying that they reversed.

MR. PROSPECT: That is true. And obviously Mr. Darden wants this to be the first one. But in answer to Justice Rehnquist's question about that, I think the standard has been developed, at least in the federal context, in United States versus Young.

Now, there the remarks weren't hardly as bad, but the concept and the standard that was applied was whether viewing the remarks alone could a determination be made that the jury was unable to properly weigh the evidence.

Now, for a moment we brush aside the fact that there was no objection, and that there was no objection for a deliberate reason. Even without that consideration momentarily the remarks were really more the product of somebody who perhaps got carried away to the point of

forgetting his professional responsibility.

As I point out in my brief, the defense counsel made a very skilfull closing argument in which he pointed out the fact of Mr. McDaniels paraling around the courtroom and slapping paper on the table, and apparently he was doing something else that wasn't demonstrated, at least not in the record.

He mentioned to the jury that Mr. McDaniel never argues the evilence or talks about the case. He wants to embarrass you into a verdict. He wants you to be harangued into a verdict, to use his words.

If I may quote, "My God, I get the impression he wants to be there to pull the switch." The jury heard this, and they saw what the prosecutor did, and only they did. We never did.

If you will remember, the record reflects that these 44 pages of closing argument were followed by an equal, if not greater, number of closing argument pages by the defense, during which I still maintain a very skilfull usage of the prosecutor's transgressions was had.

QUESTION: Was this the issue before us when it was here before?

MR. PROSPECT: Yes, sir, and only the issue.

QUESTION: And that is when you were here

before?

MR. PROSPECT: Yes, sir.

QUESTION: And we dismissed as improvidently granted?

MR. PROSPECT: Yes, sir.

QUESTION: It was just a line, no opinion?

MR. PROSPECT: Just a line, sir.

The claim today is different in that we now have the Caldwell Eighth Amendment ramification introduced. Although it hasn't been stated, I guess what the position is that this argument carried over to the sentencing phase of trial such that the recommendation and thus the ultimate sentence was not reliable in terms of the Eighth Amendment.

Now, I will just mention that the defense counsel followed that argument with a lengthy closing argument, as long or longer. At the close of that argument, the judge instructed the jury in a capital case in a first degree murder, the instructions of which are very long and involved.

At that point in time, the jury retired for, as the record reflects, two hours and ten minutes. After they returned with their verdicts, they were polled individually three times, once for each count. At that time, brief closing remarks were made by defense and

prosecution during the penalty phase of the trial.

Nothing has ever been claimed here or before that the remarks of the prosecutor during penalty phase were improper in any way. In fact, they are very brief, and if I may sum up, the prosecutor asked the jury to listen and remember the evidence that was presented at trial, and I am sure you will find after listening to the judge's instructions that Mr. Darden falls into the aggravating circumstances and doesn't fall into any of the mitigating circumstances.

At that point, the record shows that the jury deliberated for an additional 40 minutes and returned a recommendation of death. If we add all that up, we are looking at approximately four-and-a-half to five hours when the recommendation of death came after the argument which the defense maintains necessarily infected.

I think that is a factor to be considered. No court has ever held that the arguments alone under the circumstances of this case have infected the determination of guilt. Now, I submit that if that is true, then I don't see how the carryover effect could be had to the recommendation, which was only a recommendation, mind you.

If I could get back to the fact of the lack of objection, I think that is really the issue in this

case. Was that choice permissible in a capital case? As I have stated in my brief, I think that decisions of counsel obviously can bind any defendant. Decisions of counsel can obviously define -- I am sorry -- bind a capital defendant. But will those decisions, even though deliberate, will they allow a capital defendant to be -- to suffer any adverse or prejudicial effect.

And that is what I think the crux of this case is on this issue. And I have offered the standard of reasonableness, borrowing from Strickland versus Washington. Did Mr. Goodwill's decision not to object, did it represent a reasonable decision under the circumstances and facts of that case?

Now, I would like to remind the Court again that this case was indeed the first case in Polk County, Florida, in 1973. Everyone involved was relatively, if not totally, new at proceeding under our capital statute at that time.

If you accept the premise that Goodwill offered under oath that the prosecutor would go indeed to the point of reversible error, you have got to examine what possible effect he expected or hoped for. He didn't get a verdict of acquittal. That is obvious. So he wasn't successful.

But nevertheless was he reasonable in

anticipating at that time the proposition that if he allowed the prosecutor to go on, could he possibly embarrass the jury out of a verdict?

He turned everything the prosecutor said skilfully around, I submit. I think at that point in time, not using the benefit of hindsight and result-oriented thinking, I think it was reasonable. He had made other tactical choices during the proceedings.

One, which I mentioned in the brief, regarded alibi. Mr. Darden at all times wanted to present a defensive alibi, and based on their investigation, the lawyers assigned to the case could not account for his whereabouts between approximately 5:30 and 6:30 -- 6:00 o'clock, I am sorry.

That period of time was a gap. The decision was made not to go with a strong alibi defense in terms of a formal defense. The decision as revealed in the federal hearing was to let Mr. Darden take the stand, provide evidence of his alibi up to a point, and let the state provide evidence from that point after, in other words, before the gap and after the gap.

That turned out, we learned again in the federal hearing, to be a proper choice, because the prosecutor told the defense lawyer later, after the trial, that he was just hoping an alibi defense would

have been presented because he was fully prepared in rebuttal to come in and show that from where Mr. Darden said he was at a given point, there was ample time driving the routes necessary to have gotten to the furniture store, committed the crime, headed out of town on State Road -- or US 92, and had the accident, which was never disputed.

That was a good choice. Again, the choice about failing to object, while not good, was still reasonable, and I think even though this is a capital case, and I am not standing here saying that we can always provide procedural bars in capital cases. This is a serious business. I think, to borrow language from the Court in other decisions, perhaps capital defendants are entitled to as much protection as possible, but I nevertheless think in the circumstances of this case it was reasonable.

The evidence that was presented was strong. I think the jury was intelligent enough to know that the prosecutor was simply being outrageous. There is no showing that they were infected or affected by what he said. The evidence was ample.

They could have and obviously did return their verdict based only on that evidence, and I think the petitioner here, the defendant has failed to show other

than the claim how or why there is even the possibility that they were affected by the closing argument.

I think he needs to do this. I posited that position in my brief, and I think if anything is written in that regard it should be that if you are going to make that claim under facts and circumstances like this case, there should be some burden shown. I think there has been none offered and obviously none shown.

Regarding the Witherspoon issue, I cheerfully admit that the question of Caldwell was raised in the third petition for rehearing seeking the fourth en banc hearing of the Eleventh Circuit. I also note that two of the dissenters mentioned that the issue, the Eighth Amendment issue of closing argument ought to be considered in light of Caldwell versus Mississippi as well as the series of cases that the Court had come out with about the same time.

I don't believe, however, that the views of the dissenters are equivalent to a holding on the issue. I don't really think the Eleventh Circuit has ever addressed this.

But as against the possibility that some could consider they had, I would like to say that this is not Caldwell. I don't need to remind the Court what was involved there, but I will briefly emphasize that in

Caldwell that which lessened the reliability of the sentence were remarks made by the prosecutor to the jury who was the sentencer, unlike Florida.

This jury in Mississippi did the actual sentencing. The remarks were of the tenor that, ladies and gentlemen of the jury, you don't really need to worry about what you are going to do, because this case is going to be reviewed by higher authority. An objection was made, unlike here, and the trial judge reinforced that statement when he repeated to the effect, ladies and gentlemen, that is true, there will be further review of this case.

Now, for the very, I think, compelling and adequate reasons expressed in the decision, that could have left the jury with the possibility that they could have shirked their responsibility with the idea that someone after them would take care of sentencing this individual.

Thus the reliability was lessened. We don't have that here. We have got improper remarks, but we don't have misstatements of law. We have nothing going to the jury which indicated they could do anything but what they had to do. At that point it was guilt or innocence.

We don't have the trial judge reinforcing what

the prosecutor said. I realize that the rather loose claim has been made that the trial judge told the jury to listen carefully to the closing arguments, that these lawyers were trained, and that they should pay close attention.

But I don't think that hardly rises to the same level as the statements of the trial judge in the Mississippi case.

The last issue which has not been argued by Mr. Harper yet, if at all, regards the ineffective assistance of counsel.

QUESTION: May I ask, because it was argued, are you going to comment on the Witherspoon problem in your presentation? That was argued both orally and in your brief.

MR. PROSPECT: Yes, sir. Thank you for reminding me. I completely forgot.

QUESTION: And in your brief, I notice you state that the veniram Murphy told the trial judge his principles were such that he could not vote to recommend a penalty regardless of the facts, but that is not what he told the jury, is it? That was not the question that was asked, was it?

MR. PROSPECT: Of Mr. Murphy?

QUESTION: He was asked whether he could do

that without violating his own scruples.

MR. PROSPECT: His principles.

QUESTION: Yes. Do you think that is an adequate question?

MR. PROSPECT: Yes, I do. I think it is a semantic exercise to say that using the Witt standard of substantially impairing or prevent, I think when the man who sat throughout the entire examination, and I would like to step aside for one moment, there is record support.

QUESTION: I wanted to break my question in two parts. First, if you just had that question by itself, would you not agree that that is just almost verbatim the Illinois statute that was held insufficient in Witherspoon?

MR. PROSPECT: Perhaps --

QUESTION: They were asked there whether they had scruples against the death penalty.

MR. PROSPECT: Perhaps relating to the statute, but the question asked in Witherspoon had nothing to do with the statute in terms of the language. My reading of Witherspoon was that the 47 veniremen who were excused were done on the basis of one or two perfunctory questions to the effect, do you have any views against capital punishment.

QUESTION: Well, the statute provided if you have conscientious scruples against capital punishment, you can be excused for cause.

MR. PROSPECT: And I --

QUESTION: Do you think today if a venirman is asked if he has conscientious scruples against capital punishment, and he says yes, would that be sufficient to justify his using it for cause?

MR. PROSPECT: No, I don't think it would.

QUESTION: Well, why isn't that precisely the question that was asked here?

MR. PROSPECT: Because Mr. Murphy was asked, do you have any principles in opposition such that you could not participate in a recommendation of the sentence of death.

QUESTION: Without violating those principles.

MR. PROSPECT: Without violating those principles.

QUESTION: Do you think it is impossible that a person could violate his own principles if the law required him to do so?

MR. PROSPECT: Is it possible to violate?

QUESTION: Yes, that is exactly what --

MR. PROSPECT: Yes, I think it is possible.

QUESTION: Then he hasn't said you couldn't

vote against the death penalty. He has only said he can't do it without violating his principles.

MR. PROSPECT: Well, it would be my position that the violating of his principles would represent an impairment of his ability to follow the law.

QUESTION: I see.

MR. PROSPECT: That is my position on that.

QUESTION: Then I suppose you would say that the statute held invalid -- the Illinois statute held invalid in Witherspoon is now valid under the later case?

MR. PROSPECT: Yes, sir.

QUESTION: Witherspoon has been overruled, is your position. That is what it comes down to, I think.

MR. PROSPECT: I don't know I would go that far.

QUESTION: You just did.

MR. PROSPECT: If I could explain my answer, I don't think the statute was as much in issue in Witherspoon as it was the lack of questioning which trapped the statute. Had the Illinois judge elucidated on the statute and established not only the opposition to capital punishment, but also that the individual jurors involved were opposed such that they couldn't follow the law, I don't think Witherspoon would have been decided

the way it was.

If I recall Justice Stewart setting the tone of that trial --

QUESTION: In other words, you are saying if they had asked that additional question, which of course they diin't ask here, either, as to whether they could --

MR. PROSPECT: No, no, they didn't ask additional questions, but previous questions were asked at least 14 times.

QUESTION: Of this juror?

MR. PROSPECT: No, sir. To the pool, the entire pool, and two things I would like to point out. In the beginning, the trial judge explained to the entire people before 12 were selected to go into the box for individual examination, he specifically told them in language which even the defense doesn't complain about that they were all going to be asked questions regarding capital punishment, so they at least knew that something was coming in that regard.

Now, Mr. Harper faults the Eleventh Circuit as well as the District Court, the conclusion of both courts that presumably or obviously Mr. Murphy heard all questions going before the one asked of him.

Now, there is record support, a gentleman by the name of Mulroy -- I believe it is on Page 89 of the

trial transcript -- was called in after peremptory excusal, and the first thing asked of him was, could you hear the questions we have been asking all the jurors? And he says, yes, I could.

Now, it would be obviously better if the same question was asked of Murphy, but it wasn't. But I think the presumption or the logical inference can be that the circumstances of the questioning of the jurors was such that all prospective jurors, and I am talking about those before they were called into the box for individual examination not only heard the questions asked of those, they observed the people who answered in the specific way those five who were excused. They saw them step down.

QUESTION: Well, may I ask, do you think that the record before the particular question was asked of Murphy is clear enough so that if the judge had just said to Mr. Murphy, is there any reason why you can't sit in this case, and he had said no, that he could then have been -- I am sorry. I have it backwards.

He did at least have to ask this question to -- I am sorry. No, I have it backwards. I'm sorry. I shoulin't have interrupted you.

MR. PROSPECT: That is quite all right, sir. But, wherever I was, I think I was about to --

QUESTION: You are relying heavily on what was

said in the general discussion rather than on this particular question, is really what I am trying to --

MR. PROSPECT: I am relying on it, Your Honor, but I still don't abandon the position that the question is sufficient under Witt to demonstrate that Mr. Murphy could not follow the law.

QUESTION: If it weren't for Witt, would you agree it was plainly insufficient under Witherspoon. Would you not agree with that? You have to rely on Witt as in effect having overruled Witherspoon, I believe.

MR. PROSPECT: To a certain degree, but no, I believe it would have been sufficient under Witherspoon simply because we don't know the exact questions asked in Witherspoon.

QUESTION: But we do know from the first paragraph of the Witherspoon opinion that questions complying with the Illinois statute were not sufficient, and the questions complying with the Illinois statute are substantially in the language that this trial judge, who had had no experience in death cases, as I understand it, asked in this case.

MR. PROSPECT: That is true. No experience. But all courts below have consistently held that he understood the concept of Witherspoon perfectly. I might note that the question that he asked goes only to the

first part of Footnote 21 in Witherspoon. He never got to the guilt or innocence. He went right to sentence, those two concepts which were merged in Witt and, according to the opinion simplified.

Now, if I may borrow somewhat from the preceding argument, I think that it must be remembered that the objection raised here, and I think rather prophetic in light of the argument before us, the defense filed a pretrial motion contending that the state not be allowed to ask Witherspoon type questions, contending that such questions were irrelevant to a determination of guilt or innocence, but that if the court would allow those questions and if a positive response were asked, that challenges for cause not be allowed, without articulating it any more than that, and I practically stated it verbatim.

The position of the defense in '73 in light of our new statute was that now that we have a bifurcated trial, anything that the state might want to know regarding predisposition to Witherspoon has nothing to do with guilt or innocence. That was the motion. It was denied, and a continuing objection was lodged throughout the entire examination, but nothing was renewed. And I think that is critical.

No juror excused was made the object of a

statement, motion, or objection that the indiviiual was impartial, there was no objection, or request, perhaps more importantly, there was no request that the trial court continue questioning and see if the juror, whichever juror had given a response regarding opposition to capital punishment, to see if additional questioning could be had to determine rehabilitation on guilt or innocence.

In that regard, I think that the precise issue is not really raised in terms of the Grigsby concept. The excusal, I think, was proper standing by itself. The right question was asked. I don't know what the wrong standard is that they are continually harping on. But I submit that it was proper.

Now, if I could return to the last phase, I only want to say since my time is running out that -- and if I may, it will be by way of conclusion, this case in addition to being as old as it is is rather eerie.

We have a murder occurring in September of 1973. Mr. Darden was arrested that evening and was immediately appointed counsel. The record indicates both directly and I think you can draw logical inferences therefrom that the entire staff of a public defender's office in Polk County, Florida, was devoted to this first capital case.

If anyone suffered, I think, in that four-month period I think it was the other criminal defendants in that county who for all the record suggests were getting no attention to their particular cases whatsoever. The case is prophetic in that the lawyers 13 years ago decided that Witherspoon did not apply to a bifurcated trial by filing their motion. I think that was innovative and brilliant.

We have a situation where a trial judge in what can only be considered a prophetic vein told the jury that at the second phase of the proceedings they were only going to recommend sentence, and that he was going to give that recommendation, however, great weight. The great weight concept to our recommendation in Florida was embraced in Tedder versus State, and that wasn't decided until two or three years after this trial.

The trial judge told the defendant, told the jury, and told the defendant's lawyers after reading the statutory mitigating items in our statute, said that no one was limited to these things. Anything in mitigation, anything relevant was coming in. The parameters of Lockett were character and record of the accused. Here he asked for history, family causes, reputation, anything pertinent to the proper sentence.

The lawyers again perhaps being able to see in

the future asked questions of the individual jurors relating to race, what they felt about statistics showing the number of convictions and arrests for blacks versus whites, something which I believe was argued last month.

It is surprising, I think, that the amount of due process afforded to this individual has nevertheless resulted in this delay. I am not here to ask for speed. I am here only to ask for looking at this case in the context of what it was as it was tried 13 years ago.

We can't judge either the performance of counsel or the performance of the judge by standards which have evolved at this point in time, even though I might add I don't think the judge could have improved one bit between now and then.

Therefore I would ask that the Eleventh Circuit's decision in this case be affirmed in all respects.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Harper?

ORAL ARGUMENT OF ROBERT A. HARPER, JR., ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. HARPER: Yes, sir, Your Honor.

The state would apparently have Mr. Darden come forward showing some prejudice by this argument. In

other words, place some burden of showing on us which is the standard adopted by the Eleventh Circuit. We would submit that it is more appropriate that the standard is on the state to show that there was a likelihood of harm from this prejudicial argument.

It is our position that this trial, the system itself broke down. Unlike Caldwell, where the judge actively intervened and made a proper instruction, the judge was quiet and didn't say anything. As a matter of fact, when there were what has been categorized as tentative, a weak objection, the judge in one instance overruled it, and in the other instance said, proceed with the case.

QUESTION: What do you have to say about the failure of an objection? Is that correct -- the objection?

MR. HARPER: The magistrate found there was an objection, firstly, Mr. Chief Justice, and that was at -- it is in the appendix at Page 240 -- excuse me, the appendix at 214, late and tentative. I would submit that finding of fact is reviewable under the clearly erroneous standard. The District Judge, however, said that the state decision was rendered by the Supreme Court to entertain fair trial on the merits and pronouncements.

QUESTION: What does the transcript of the

trial show with respect to an objection?

MR. HARPER: Your Honor, in my opinion it shows defense counsel alternatively rising to object to the argument in two separate instances.

QUESTION: And what was the specific objection made in those two instances? Wasn't one having to do with the gun?

MR. HARPER: One -- the second objection was -- that is about the fifth time the state has said he wished the defendant would kill himself. And the first objection was to the evidence. But the second objection, I think, was clearly to the improper argument.

But as to this prejudice showing, I think it is important to note that the jury even in this case was split, and if there is such universal accord on the death penalty being appropriate -- even in the face of this argument there was a split verdict -- I think there is some -- that is some showing, at least, that the reliability of the outcome has been infringed upon.

QUESTION: Mr. Harper, how do you read the magistrate's -- is it a finding, defense counsel's objection to the prosecutor's argument was late and tentative? What does that mean?

MR. HARPER: I read it to mean that there was an objection, albeit late, albeit a little weak, but

there was an objection.

QUESTION: What about the testimony of the lawyer at the habeas hearing?

MR. HARPER: Well, there are two lawyers who have testified there, of course, Your Honor.

QUESTION: Did they claim they objected?

MR. HARPER: One said -- yes, sir. There was a conflict in the testimony between those two lawyers. Just one of them said co-counsel, Mr. Goodwill, was too intoxicated to show up, and I had to go to court one day. There was a conflict on that testimony. There was a conflict on the testimony about the objection. One said we didn't know about it. The other one said it was a tactical decision.

But in any event, I would submit --

QUESTION: What was a tactical decision?

MR. HARPER: The not objecting was --

QUESTION: So there was testimony that there was no objection.

MR. HARPER: There was an objection that he withheld objection until a later point, Your Honor. It was not testimony there was no objection, that early objections were withheld.

QUESTION: Mr. Harper, the Florida Supreme Court found, and this is on Page 50 of the joint

appendix, appellant admits that his attorney voiced but a single objection to the prosecutor's closing arguments, and that it was not directed to any of the alleged inflammatory matter, and that his attorney waited until the fifth objection -- a fifth occasion to object at all.

MR. HARPER: Yes, sir.

QUESTION: Do we have to disregard that?

MR. HARPER: Well, sir, I think there are two answers to that. First of all, the magistrate has made findings now that we are in federal habeas proceedings. Secondly --

QUESTION: But they were -- accepted by the District Court.

MR. HARPER: Yes, sir. Yes, sir. And secondly, we have the Supreme Court of Florida in any event reaching the merits of the issue, clearly. And thirdly, that is an alternative ground -- the Supreme Court never said we are applying the procedural bar. They in footnotes site Jones v. State, but they don't say we are applying a procedural bar, and indeed they can, but because counsel didn't object, it triggered a rule in Florida that this case would have to be reviewed under a fundamental error standard, under state law. It is reviewable without objection, and it had to be reviewed

by the Supreme Court under the death penalty statute. The total record had to be anyway.

So, the Supreme Court of Florida had reached the merits under either one of, whether there was or wasn't an objection. They had to and did reach the merits of the issue.

The Witherspoon argument rebuttal reply I would like to make is that the appendix failed to pick up the next line after the excusal of juror Murphy, and that is at Page -- let's see, Page 9.

It says, "All right, sir, you will be excused. (Murphy then left the box)." In the trial transcript, Page 165, the very next line is the judge saying, "Ms. Horne," the court reporter, "you will please note an objection for cause by counsel."

And I would submit that the trial judge himself enunciating that objection into the record is all that is necessary. I don't think that an experienced trial lawyer in Florida is going to say, oh, yes, sir, Your Honor, and in addition to that objection because I would like to explain further an additional grounds, I think the trial lawyers would say when a judge says your objection is noted, that is the end of it, and when the judge said, your objection for cause is noted -- it didn't say your objection, it said an objection for cause

is noted -- that is all that is necessary, and a lawyer owes his respect to a court to say nothing, and I think that is what happened here.

It is there, and that is my rebuttal and reply.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:55 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-5319 - WILLIE JASPER DARDEN, Petitioner V. LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)