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Erosion of Defendant's Right to an Impartial Jury and a Fundamentally Fair Trial--Sixth and Eighth Amemdments: Darden v. Wainwright, 106 S. Ct. 2464 (1986)

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SIXTH AND EIGHTH AMENDMENTS—EROSION OF DEFENDANT'S RIGHT TO AN IMPARTIAL JURY AND A FUNDAMENTALLY FAIR TRIAL

Darden v. Wainwright, 106 S. Ct. 2464 (1986).

I. INTRODUCTION

In *Darden v. Wainwright*,[1] the Supreme Court upheld Willie Jasper Darden's murder conviction and death sentence in Florida state court.[2] Darden appealed the result on three separate grounds, claiming, first, that one member of the jury venire had been improperly excluded for cause, based on his attitude toward the death penalty,[3] depriving Darden of his sixth amendment right to an impartial jury; second, that during the closing argument of the guilt phase of his trial the prosecutors' remarks rendered the trial fundamentally unfair, depriving the sentence of the eighth amendment's requirement of reliability;[4] and, third, that Darden was deprived of the effective assistance of counsel guaranteed by the sixth amendment.[5]

In rejecting each of Darden's claims, the Court interpreted and applied the standards it developed in past cases pertaining to each kind of challenge. Because each of the standards had recently been established or re-examined by the Supreme Court, their application in this case has considerable significance for the future determination of these types of constitutional claims.

This Note argues that the standards established by the Court to evaluate claims of improper juror exclusion for cause and prosecutorial misconduct as affecting the fairness of the trial were misapplied in this case. The Note concludes, therefore, that the Court wrongly decided these two challenges to the validity of

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1 106 S. Ct. 2464 (1986).

2 *Id.* at 2466.

3 *Id.*

4 *Id.* The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

5 *Id.* The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defence." U.S. CONST. amend. VI.

Darden's conviction and death sentence. The Note also concludes, however, that the Court correctly decided the claim of ineffective assistance of counsel because, under the circumstances of this case, the Court properly applied and satisfied the standard which it has developed to measure this type of challenge to a sentence.

II. Factual and Procedural Background

Darden was convicted in a Florida court of murder, robbery and assault with intent to kill in January 1974.[6] Under Florida's bifurcated trial system, the judge accepted the jury's nonbinding recommendation as to the penalty, and he was sentenced to death.[7]

On September 8, 1973, in a small store near Lakeland, Florida,[8] a black male fatally shot Carl Turman, robbed and sexually assaulted his wife, Helen, and severely wounded their sixteen year-old neighbor, Phillip Arnold.[9] Another neighbor later described a car she saw leaving the store just after the murder.[10] Shortly after the crimes, Darden, who was on a furlough from prison at the time, crashed his borrowed car a few miles away from the store.[11] Darden left the accident scene before police arrived and got a ride to Tampa, Florida.[12] The police suspected that the driver of the wrecked car was Mr. Turman's killer because of the proximity of the accident in time and place to the scene of the murder.[13] The car also matched the description of the one seen leaving the store.[14] The police searched the crash site and found a revolver which was the type used to shoot Carl Turman and Phillip Arnold.[15] Darden was arrested the next day in Tampa.[16] Both Helen Turman and Phillip Arnold identified Darden from photographs and at trial as the murderer.[17]

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6 *Darden*, 106 S. Ct. at 2466.

7 *Id.*

8 *Id.* at 2467. The Court sets out the facts in considerable detail—"more . . . than is normally necessary," *see id.* at 2467-68—because of the intimate connection between those facts and the way the majority decides Darden's claims.

9 *Id.* at 2467-68.

10 *Id.* at 2468.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* See *infra* note 150 for a discussion of inconclusive evidence bearing on whether this gun was actually the murder weapon.

16 106 S. Ct. at 2468.

17 *Id.* The fact that there were discrepancies in the descriptions of both witnesses, *id.* at 2468-69 n.1, and some questionable procedures followed in showing the photographs to the victims and in isolating Darden when Mrs. Turman and Phillip first saw him in person, *id.* at 2481 nn.4-5 (Blackmun, J., dissenting), is important to the dissent's disa-

The jury selection process gave rise to the first ground upon which Darden appealed his conviction and sentence. During *voir dire*, the trial court excluded several potential jurors for cause on the basis of their attitudes toward the death penalty.[18] The judge explained to the entire venire that he wanted to know whether any of them had "such strong religious, moral, or conscientious principles in opposition to the death penalty that [they] would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts . . . should be such as under the law would require that recommendation."[19] During the individual questioning, however, the judge did not specifically ask one of the excluded jurors whether he would actually be unable to recommend the death penalty regardless of the facts of the case.[20]

The second ground of appeal concerned the conduct of the prosecution during its closing argument to the jury. The prosecutors made a series of comments[21] focusing on their personal belief

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greement with the majority over whether the jury's assessment of the evidence was prejudiced by the prosecutors' comments. *See infra* text accompanying notes 149-54.

[18] *Darden*, 106 S. Ct. at 2470 n.3.

[19] *Id.* at 2469. The trial judge broadly based this statement on the language of Witherspoon v. Illinois, 391 U.S. 510 (1968), *see infra* note 90, but he failed to interpret the standard correctly.

[20] *Id.* at 2470; *see also id.* at 2484 (Blackmun, J., dissenting).

[21] " 'As far as I am concerned, and as Mr. Maloney said as he identified *this* man as an animal, this animal was on the public for one reason.' "
" 'He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.' "
" 'I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I could see him sitting here with no face, blown away by a shotgun.' "
" 'I wish someone had walked in the back door and blown his head off at that point.' "
" 'He fired in the boy's back, number five saving one. Didn't get a chance to use it. I wish he had used it on himself.' "
" 'I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time.' "
Darden v. Wainwright, 106 S. Ct. 2464, 2471-72 n.11-12 (1986)(quoting the Record)(emphasis added).
" 'I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman . . . I wish that he had been the one shot in the mouth . . . . ' "
" 'He is a prisoner. He is supposed to be. Mr. Turman is dead because of that unknown defendant we don't have in the courtroom . . . .' "
" 'I cannot help but wish that the Division of Corrections was sitting in the chair with him.' "
Darden v. Wainwright, 699 F.2d 1031, 1035 n.11 (11th Cir. 1983) (quoting the Record). Prosecutor White stated that he was " 'convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.' " Darden v. Wainwright, 106 S. Ct. 2464, 2477 (1986)(Blackmun, J., dissenting)(quoting the Appendix).

in Darden's guilt and their personal feelings toward him. Although the trial court told the jury that these remarks were not "evidence" on which they were to base their verdict,[22] it failed either to correct the prosecutors' behavior or to tell the jury to completely disregard the statements.[23]

Darden appealed his conviction and death sentence to the Florida Supreme Court, raising the claims of improper juror exclusion and prosecutorial misconduct.[24] That court affirmed his conviction,[25] and the United States Supreme Court granted certiorari[26] on the issue of prosecutorial misconduct[27] but later dismissed the writ as improvidently granted.[28]

His state remedies exhausted, Darden sought habeas corpus relief in federal district court,[29] where his petition was denied.[30] The court of appeals affirmed, first by a divided panel[31] and later by an equally divided court after rehearing en banc.[32] The same court later reversed the district court on the juror exclusion claim after a second rehearing en banc,[33] and the Supreme Court again granted certiorari, vacated the judgment and remanded to the court of appeals.[34] Upon remand and reconsideration, the court of appeals denied Darden any relief,[35] after which he applied to the Supreme

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" 'Well, let me tell you something: if I am ever over in that chair over there, facing life or death . . . I guarantee you I will lie until my teeth fall out.' " *Id.*

"I will ask you to advise the Court to give him death. That's the only way I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way anybody can be sure of it now, because the people that turned him loose—"

Darden v. Wainwright, 106 S. Ct. 2464, 2471 n.10 (1986)(quoting the Record).

22 106 S. Ct. at 2472.

23 *Id.* at 2480 (Blackmun, J., dissenting).

24 Darden v. State, 329 So. 2d 287 (Fla. 1976).

25 *Id.* at 291.

26 Darden v. Florida, 429 U.S. 917 (1976).

27 Darden v. Florida, 429 U.S. 1036 (1977).

28 Darden v. Florida, 430 U.S. 704 (1977).

29 106 S. Ct. at 2467. It was at this point in the procedural history that Darden first claimed he had been denied effective assistance of counsel. *Id.* He asserted that his attorneys had failed to present mitigating evidence prior to sentencing. *See infra* notes 165-67 and accompanying text.

30 Darden v. Wainwright, 513 F. Supp. 947 (M.D. Fla. 1981).

31 Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983).

32 Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983)(en banc).

33 Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1985)(en banc).

34 Darden v. Wainwright, 106 S. Ct. 2464, 2467 (1986). The court of appeals was instructed to reconsider in light of the decision in Wainwright v. Witt, 469 U.S. 412 (1985). *Id.*

35 Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985).

Court for a stay of execution, which was granted.[36] The Court dealt with the three separate issues raised by Darden in the order in which they related to incidents during the trial.[37]

III. The Supreme Court's Decision

A. THE MAJORITY OPINION

Justice Powell, writing for the majority, rejected each claim, affirming both the conviction and the sentence.[38] First, he found that under the standard outlined in *Wainwright v. Witt*,[39] which requires that the court determine "whether the juror's views on capital punishment would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,' "[40] the *voir dire* record in Darden's case showed that the trial court properly excluded the one juror for cause.[41] The Court granted wide discretion to the trial judge to evaluate the excluded juror and to decide, under all the circumstances of the *voir dire* questioning, whether his performance of his duty would be impaired.[42]

Second, the majority held that the trial had not been rendered fundamentally unfair by the prosecution's misconduct during closing arguments, because the context in which the remarks were made was such that the jury's deliberations were not likely to have been influenced by them.[43] Justice Powell stated that most of the improper remarks were either made in response to improper defense comments or their effect was mitigated by further remarks of the defense attorneys.[44]

Finally, the Court rejected the claim of denial of effective assistance of counsel, basing its decision on the recent case of *Strickland v. Washington*.[45] That case established a deferential standard by which a reviewing court is to judge the adequacy of defense counsel's performance. The *Strickland* standard requires the defendant to prove both that his attorney's representation was so deficient that it amounted to no representation and that his whole defense was actu-

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[36] The Court "treated [the application] as a petition for certiorari and granted [it] . . . ." 106 S. Ct. at 2467.

[37] *Id.* at 2469.

[38] *Id.* at 2475.

[39] 469 U.S. 412 (1985).

[40] *Darden*, 106 S. Ct. at 2469 (quoting *Witt*, 469 U.S. at 424).

[41] 106 S. Ct. at 2471.

[42] *Id.* at 2470.

[43] *Id.* at 2472-73.

[44] *Id.*

[45] 466 U.S. 668 (1984).

ally prejudiced by the deficiency.[46] Although there are two parts to the *Strickland* test, the Court reached only the first part, finding that Darden had failed to prove that his attorney's performance fell below "an objective standard of reasonableness,"[47] and thus he did not show that the performance was deficient.

B. THE DISSENT

Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, sharply dissented from the Court's holdings as to the claims of improper juror exclusion and prosecutorial misconduct.[48] Justice Blackmun rebuked the majority for its refusal to do anything but "wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process."[49]

The dissenting opinion concluded that the requirements of *Wainwright v. Witt* were not met in this case.[50] Justice Blackmun asserted that the trial judge evaluated the statements of the excused venireman under an incorrect legal standard, which meant that his conclusion that the juror should be excluded was unreliable.[51] Because of this error, the dissenters believed, the death sentence should have been vacated.[52]

Justice Blackmun even more harshly attacked the majority's view that the prosecutors' misconduct during their closing argument did not render the trial fundamentally unfair. He based his argument on the nature of the determination the jury had to make in this case. Justice Blackmun wrote that because the question was the credibility of Darden as against that of the eyewitnesses, the improper and highly inflammatory remarks made by the prosecutors were precisely the sort that are likely to taint the jury's delibera-

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46 *See Strickland*, 466 U.S. at 687. Specifically, the *Darden* Court stated that "petitioner must show that 'counsel's representation fell below an objective standard of reasonableness' " and that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " 106 S. Ct. at 2473-74 (quoting *Strickland*, 466 U.S. at 688 & 694).

47 106 S. Ct. at 2475.

48 *Id.* at 2476-85 (Blackmun, J., dissenting). The dissent makes no reference to the claim of denial of effective assistance of counsel, apparently concurring with the majority view that it was without merit.

49 *Id.* at 2485 (Blackmun, J., dissenting).

50 *Id.* at 2482 (Blackmun, J., dissenting).

51 *Id.* at 2483 (Blackmun, J., dissenting).

52 "In *Davis v. Georgia*, 429 U.S. 122 (1976), the Court held that the improper exclusion of one juror renders a death sentence constitutionally infirm *per se*." *Id.* at 2482 (Blackmun, J., dissenting).

tions.[53] For this reason, the dissent strongly insisted that Darden did not receive a fair trial and that his conviction and death sentence should not stand.

IV. ANALYSIS

A. THE COURT'S MISAPPLICATION OF STANDARDS FOR JUROR EXCLUSION

The Court's decision on the exclusion issue exemplifies the confusion caused by its recent modification of *Witherspoon v. Illinois*,[54] which held that potential jurors in capital cases could not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious principles against its infliction."[55] As Justice Powell noted in his majority opinion, the current standards for determining whether a juror may be, or has been, properly excluded were set forth in *Wainwright v. Witt*,[56] a recent case modifying the *Witherspoon* doctrine.[57] The Court developed the *Witherspoon* doctrine in response to its recognition that "in its role as arbiter of the punishment to be imposed," a jury which has been systematically purged of members who have any doubts about capital punishment does not constitute an impartial jury within the meaning of the sixth and fourteenth amendments.[58] The Court's development of the *Witherspoon-Witt* doctrine and application of that standard in *Darden* illustrate the present lack of clear guidelines for evaluating claims of improper juror exclusion in capital cases.

1. The Development of the Witherspoon-Witt *Doctrine*

In *Witherspoon*, the Court invalidated an Illinois statute which expressly gave the prosecution "unlimited challenges for cause" so that potential jurors who might balk at imposing the death penalty could be excluded.[59] Although the Court devoted most of its opinion to a general discussion of the principle of impartiality required of a capital sentencing jury, the decision included a statement in a

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[53] *Id.* at 2477 n.2 (Blackmun, J., dissenting).

[54] 391 U.S. 510 (1968).

[55] *Id.* at 522.

[56] 469 U.S. 412 (1985).

[57] *Darden*, 106 S. Ct. at 2469.

[58] *Witherspoon*, 391 U.S. at 518. The fourteenth amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . " U.S. CONST. amend. XIV.

[59] *Witherspoon*, 391 U.S. at 512-13.

footnote that subsequently came to be regarded as the crux of the Court's holding:[60]

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.[61]

Undoubtedly, courts have cited the footnote so often because it offered the only hint of what the Supreme Court would consider permissible grounds for exclusion for cause. The result was that the standards enunciated in that footnote became the prevalent ones against which the Supreme Court, lower federal courts and state courts evaluated claims of improper juror exclusion.[62]

In *Witt*, however, the Court disapproved of what it termed "rit-

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60 *See, e.g.*, Davis v. Zant, 721 F.2d 1478, 1486 (11th Cir. 1983)(measuring the defendant's claim of improper juror exclusion against the two-part standard of the *Witherspoon* footnote 21), *cert. denied sub. nom* Davis v. Kemp, 471 U.S. 1143 (1985); Spencer v. Zant, 715 F.2d 1562, 1576 (11th Cir. 1983)("[T]he Supreme Court recently reaffirmed that exclusion of a venireperson because of opposition to the death penalty is permitted only if the venireperson clearly indicates that he would always vote against the death penalty or that his opposition to the death penalty would impair his ability to discharge his duties as a juror: . . . " [quoting a case for its citation of footnote 21].); Hance v. Zant, 696 F.2d 940, 954 (11th Cir.)(citing footnote 21 as the "mandate" of *Witherspoon* to which the lower court must adhere), *cert. denied*, 463 U.S. 1210 (1983); O'Bryan v. Estelle, 691 F.2d 706, 709 (5th Cir. 1982)(citing footnote 21 as the only standard of improper juror exclusion); Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981)(In finding improper exclusion, the court analyzed the juror's statements according to the two prongs of footnote 21: the statements "f[e]ll far short of an affirmation by [the juror] that he would automatically vote against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from making an impartial decision as to guilt."), *cert. denied*, 455 U.S. 1003 (1982); Burns v. Estelle, 626 F.2d 396, 397-98 (5th Cir. 1980)(en banc)(holding that a juror was improperly excluded because her statements "f[e]ll short of unequivocal avowals disqualifying her under either aspect of *Witherspoon*'s two-pronged test," citing footnote 21); People v. Valesquez, 28 Cal. 3d 461, 461, 622 P.2d 952, 953, 171 Cal. Rptr. 507, 508 (1980)(citing footnote 21 as the standard set out in *Witherspoon*); People v. Gaines, 88 Ill. 2d 342, 351-52, 430 N.E.2d 1046, 1051 (1981)(citing footnote 21 as the "delineation of the permissible bases for excluding a juror" and citing several cases that adhered to that standard), *cert. denied*, 456 U.S. 1001 (1982).

61 *Witherspoon*, 491 U.S. at 522-23 n.21 (emphasis in original). The Court also emphasized that not the validity of convictions but rather, only the validity of sentences, and then only of death sentences, would be affected by the *Witherspoon* holding. *Id.*

62 Wainwright v. Witt, 469 U.S. 412, 418 (1985). *See also id.* at 868 (Brennan, J., dissenting)("The label 'dictum' does not begin to convey the status that the restrictions embodied in footnote 21 have achieved in this Court and state and federal courts over the last decade and a half.").

ualistic adherence" to a particular verbal formula[63] as a means of determining which potential jurors could properly be excluded. The Court referred to its opinion in *Lockett v. Ohio*[64] to support its implicit claim that the first part of the standard, referring to exclusion of jurors who would "automatically" vote against the death penalty regardless of the circumstances,[65] had been abandoned some years before *Witt*.[66] The focus on the word "automatically," however, glosses over the import of the *Witherspoon* standard, which permits the exclusion of a venireperson who has made "unmistakably clear" that he or she would not be able to follow the law in accordance with the judge's instructions if that involved returning a penalty of death.[67] Yet this standard was precisely the one that the Court actually applied to the validity of the death sentence in *Lockett*. "Each of the excluded veniremen in this case made it 'unmistakably clear' that they could not be trusted to 'abide by existing law' and 'to follow conscientiously the instructions' of the trial judge."[68] The first part of the *Witherspoon* standard merely stated that a court could properly exclude for cause a prospective juror who made it clear that he could never impose the death penalty, even in the presence of circumstances for which state law deemed death an appropriate punishment. In that case, the juror has indicated that he cannot follow the instructions and the applicable law. Under *Lockett* and the first part of *Witherspoon* the test for exclusion was the same.

Still, the Court in *Witt* asserted that its standards had changed "markedly" since *Witherspoon*,[69] attributing this transformation primarily to the case of *Adams v. Texas*.[70] *Adams* involved a challenge to a death sentence imposed by a jury in a bifurcated trial similar to the one at issue in *Darden*. The thrust of *Adams* involved the second

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63 *Id.* at 419. The Court quoted *Witherspoon*'s footnote 21 as the language to which "ritualistic adherence" was unnecessary. *Id.*

64 438 U.S. 586 (1978). In *Lockett*, the petitioner claimed that four venire members had been improperly excluded under the *Witherspoon* standard. *Id.* at 595. In questioning those four, the trial judge asked each "is your conviction so strong that you cannot take an oath [to judge the evidence impartially and follow the law], knowing that a possibility exists in regard to capital punishment?" *Id.* at 595-96. Simply because the trial court did not ask jurors whether they would automatically refuse to impose the death penalty, and the Supreme Court did not insist that the word "automatically" be included in the questioning, the Court in *Witt* implied that the substance of the entire first part of the *Witherspoon* test had changed. *Witt*, 469 U.S. at 419.

65 *See supra* text accompanying note 61.

66 469 U.S. at 419.

67 *See supra* text accompanying note 61.

68 Lockett v. Ohio, 438 U.S. 586, 596 (1978)(quoting Boulden v. Holman, 394 U.S. 478, 484 (1969)).

69 *Witt*, 469 U.S. at 421.

70 448 U.S. 38 (1980).

prong of the *Witherspoon* test. This prong permitted the exclusion of jurors who could not separate their beliefs about capital punishment, which was not to be considered until the penalty stage of trial, from the decision jurors had to make at the guilt stage. The negative attitudes of some jurors toward capital punishment would interfere with their impartiality at the preceding determination of guilt, and, under the second prong of *Witherspoon*, they could properly be excluded.[71] The second *Witherspoon* standard was particularly relevant to the facts of *Adams* because the sentencing system used in Texas mandated the penalty of death if the jury answered three factual questions affirmatively.[72] Justice White, writing for the Court, explicitly recognized that the "touchstone of the inquiry" was not whether potential jurors could follow instructions and the law, but whether they would be impeded in their responsibility to answer the three questions by the knowledge that the death penalty would definitely be imposed if all were answered in the affirmative.[73] In other words, the inquiry was whether "their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."[74]

The *Witt* Court incorrectly found that *Adams* significantly departed from the standards of *Witherspoon*. The Court in *Witt* attached itself to a single passage from Justice White's opinion, which did not change the substance of the *Witherspoon* guidelines, and represented it as a substantively altered test. The *Adams* Court, reviewing the prior decisions on the subject of juror exclusion, concluded that "[t]his line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[75]

The Court characterized this statement as a "general proposi-

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71 *See supra* text accompanying note 61.

72 *Adams*, 448 U.S. at 40-41.

> The jury is then required to answer the following questions based on evidence adduced during either phase of the trial: "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

Id. (quoting TEX. CODE CRIM. PROC. ANN. Art. 37.071(b) (Vernon Supp. 1979)).

73 *Id.* at 49.

74 *Witherspoon*, 391 U.S. at 522-23 n.21 (emphasis in original).

75 *Adams*, 448 U.S. at 45. The "line of cases" referred to included *Witherspoon*, *Boulden*, and *Lockett*.

tion" because *Adams* did not purport to alter the *Witherspoon* doctrine. In fact, the Court stated approvingly that the two-part test set out in footnote twenty-one of *Witherspoon* "seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths."[76] In *Witt*, Justice Rehnquist, speaking for the Court, asserted that the whole standard for evaluating the exclusion of jurors had been "simplified." He stated that *Adams* "merged" the two parts of the *Witherspoon* test.[77] Justice Rehnquist lifted that single passage out of context from Justice White's opinion in *Adams* and treated the passage as if it had revamped the *Witherspoon* two-fold standard.[78]

As part of the capital sentencing procedure at issue in *Adams*, Texas required jurors to state under oath that a mandatory death penalty resulting from affirmative answers to the three statutory questions "would not 'affect [their] deliberations on any issue of fact.' "[79] Jurors who could not take the oath were excluded. The Court held that jurors could not properly be excluded on the basis of their inability to swear this oath because whether jurors' deliberations would be "affected" by the possible imposition of the death penalty was an overly broad test.[80] This test excluded not only jurors who indicated that they would be impeded in their duty to answer the questions impartially, but it also excluded those jurors who had not made clear that they were unwilling or unable to perform that duty.

Justice White explained that "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the

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76 *Adams*, 448 U.S. at 44.

77 469 U.S. at 421. "The tests with respect to sentencing and guilt, originally in two prongs, have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing . . . ." *Id.*

78 Justice Rehnquist's attempt in *Witt* to define *Adams* as totally replacing the *Witherspoon* test seems to have more to do with his doctrinal preferences than it does with the actual *Adams* holding. In dissent in *Adams*, he complained that the decision came "at a time when this Court should be re-examining the doctrinal underpinnings of *Witherspoon* in light of our intervening decisions in capital cases . . . ." *Adams*, 448 U.S. at 52 (Rehnquist, J., dissenting).

79 448 U.S. at 40.

80 *Id.* at 50-51. The Texas scheme, Justice White said, allowed the exclusion of those

> whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme.

The exclusion of all such jurors, the Court continued, was constitutionally impermissible. *Id.*

jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty."[81] The Court in *Adams* thus reaffirmed the *Witherspoon* doctrine. *Adams* held that Texas could only exclude jurors who had made clear their inability or unwillingness to answer the questions impartially without regard to whether the death penalty would be imposed. This standard complies with the second *Witherspoon* prong, permitting exclusion of jurors who made clear their inability to make "an impartial decision as to the defendant's *guilt*."[82] The relevant inquiry in each case was whether the juror's ability to judge the guilt of the defendant would clearly be impaired by the existence of a possible death sentence.[83]

The applicable standards enunciated in *Wainwright v. Witt* and upon which the Supreme Court decided the claim of improper exclusion of a juror for cause in *Darden v. Wainwright* were based largely on either a misunderstanding or a deliberate remodeling of the Court's path since *Witherspoon*. The Court's rejection of Darden's claim reflects the confusion that results when standards for evaluating the constitutionality of the *voir dire* process are vague and inconsistent.

2. *The Misapplication of the* Witherspoon *and* Witt *Standards in* Darden

Darden based his claim of improper juror exclusion on a question asked by the trial court of one member of the venire, who was excluded for cause when he answered affirmatively.[84] The judge asked: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable *without violating your own principles* to vote to recommend a death penalty regardless of the facts?"[85] The Court ultimately held that, in the circumstances of the case, the exclusion of the juror was justified under the legal standard set forth in *Wain-*

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81 *Id.* at 50.

82 *Witherspoon*, 391 U.S. at 522-23 n.21 (emphasis in original).

83 Justice White's opinion demonstrates his adherence to the two-fold inquiry under *Witherspoon*: "If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias." *Adams*, 448 U.S. at 46. The first condition is drawn from the first prong of *Witherspoon*, which permits exclusion of jurors who will never impose the death penalty regardless of the circumstances of the case, and the second parallels *Witherspoon*'s second standard, which permits exclusion of jurors who cannot judge the evidence impartially, without "distortion or bias." *Id.*

84 *Darden*, 106 S. Ct. at 2469-70.

85 *Id.* at 2470 (emphasis added). See *infra* text accompanying notes 97-98 for a discussion of why the standard implicit in the question is incorrect.

wright v. Witt.[86] That standard was comprised of the language that the majority had taken from *Adams v. Texas*: "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "[87]

By examining the context in which Murphy, the excluded venireman, was questioned to determine whether his exclusion could be justified,[88] the Court implicitly recognized that, as Darden argued, the single question asked individually of Murphy did not reflect the proper legal standard. The Court reviewed the record of the *voir dire*, which indicated that the judge had questioned each member of the jury venire in the presence of all the others.[89] From this fact the Court concluded that even if the direct questioning of Murphy himself did not conform to *Witt* guidelines, he had heard, and presumably understood, the "correct standard" being used in the questions put to others.[90]

Even if this assumption were justified, its validity would depend on whether the trial court actually applied the correct legal standard in its questioning of the whole venire. The particular question asked of Murphy[91] did not, under *Witt*, sufficiently address whether he would be able to follow his instructions and perform his duties as a juror.[92] The Court in *Darden* used a number of examples of the questioning of other jurors, which included the qualification that their beliefs about capital punishment would prevent them from recommending it regardless of the evidence.[93]

The Court's reasoning is flawed because, as Justice Blackmun's

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86 *Id.* at 2470-71.

87 Wainwright v. Witt, 469 U.S. 412, 424 (1985)(quoting *Adams*, 448 U.S. at 45.).

88 106 S. Ct. at 2469.

89 *Id.* at 2469-70.

90 *Id.* at 2470. *But see id.* at 2484 (Blackmun, J., dissenting):

> I find implausible the Court's assumption that Murphy followed closely the day-long questioning of other jurors. But if that assumption were correct, then the Court should also assume that Murphy anticipated being asked whether his beliefs would prevent or substantially impair performance of his duties as a juror, as other jurors expressing similar sentiments had been asked.

It should be noted that, although the Court applied the *Witt* test to the trial judge's conduct of *voir dire*, the 1974 trial took place eleven years before that decision, and *Witherspoon*, decided in 1968, then provided the established standard. *See id.* at 2484 n.8 (Blackmun, J., dissenting). Although pretrial discussion on the Record showed that the judge was aware of the *Witherspoon* decision, see Darden v. Wainwright, 699 F.2d 1031, 1038 n.17 (11th Cir. 1983), it is even more difficult to maintain that his questioning of Murphy conforms to the *Witherspoon* standard than to the *Witt* test. *See infra* note 97 and accompanying text.

91 *See supra* text accompanying note 85.

92 *See supra* text accompanying note 87.

93 106 S. Ct. at 2470 n.3.

dissent points out,[94] it is questionable whether Murphy would have assumed, based on the questions asked of others, that *he* was being asked whether his principles would prevent him from recommending the death penalty under any circumstances, absent an explicit question to that effect. In the absence of the appropriate question, "Murphy was never given an opportunity to state whether his views would prevent or impair the performance of his duties."[95] The trial judge, thus, based his conclusion that Murphy should be excluded on incomplete information that did not meet the Supreme Court's requirements. Those requirements demand that the trial court determine that a juror's attitude toward capital punishment would cause an inability to perform his or her duties according to the law. Under these circumstances, the Court's holding that "the trial court's decision to exclude this juror was proper,"[96] can hardly be supported.

The trial judge demonstrated his fundamental misunderstanding of the *Witherspoon* standard when, in explaining his denial of a pretrial motion to restrict *voir dire* on the subject, he stated:

> It is my ruling if a prospectve juror states on his voir dire examination that, because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it *or if he did follow it, it would be going against his principles*, and therefore, I would rule that would be disqualification.[97]

The trial judge thus stated that he would disqualify a prospective juror who indicated that he *could* follow the law even though it would go against his principles. Any such disqualification would mean excluding a juror who had not shown he was unable or unwilling to follow the law and would be inconsistent with the *Witherspoon* standards. In the majority opinion, however, only part of the quote from the trial judge appears. The Court deleted the phrase, "or if he did follow it, it would be going against his principles."[98] With the inclusion of that phrase, it is readily apparent that the trial court had misconstrued the law. The omission of the phrase in Justice Powell's opinion indicates a disturbing willingness on the part of the

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94 *See supra* note 90.

95 Darden v. Wainwright, 767 F.2d 752, 761 (11th Cir. 1985)(en banc)(Clark, J., dissenting).

96 *Darden*, 106 S. Ct. at 2471.

97 *Id.* at 2483 n.7 (Blackmun, J., dissenting)(quoting the Appendix)(emphasis added).

98 *Id.* at 2470 n.2.

majority either to overlook or to disguise lower court errors which disadvantage a defendant.

Because the trial court in this case did not apply the correct standard, whether under *Witherspoon* or *Witt*, in excluding Murphy from serving on the jury which ultimately sentenced Darden to death, Darden's claim of improper exclusion should have been upheld by the Supreme Court. As one of the dissenting court of appeals judges explained, a factual finding—here, a finding that Murphy could properly be excluded because his beliefs would impair his ability to serve as a juror—resting on an incorrect legal standard should not be permitted to stand, because there has not been a reliable and legitimate determination of the issue depending on those facts.[99] In this case, where the issue was whether Darden's constitutional right to an impartial jury had been denied him, the Court should have been less eager to find that there was no error in the determination of the facts on which that issue depended.

B. THE COURT'S MISUSE OF THE STANDARDS APPLICABLE TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

The Court also wrongly rejected Darden's claim that the prosecution's closing argument at the guilt phase of trial "rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment."[100]

The Court applied a test first established in *Donnelly v. DeChristoforo*[101] to the allegedly prejudicial argument. Under this test, the Court asked whether the remarks had " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' "[102] Although finding that the challenged remarks were clearly improper,[103] the Court held that Darden had not been deprived of a fair trial.[104]

Justice Powell began his analysis by sketching the circumstances under which the improper remarks were made. He particularly emphasized the fact that Mr. McDaniel, the prosecutor who made most of the remarks at issue,[105] was responding to the initial summation

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99 *See* Darden v. Wainwright, 767 F.2d 752, 758 (11th Cir. 1985)(en banc)(Johnson, J., dissenting).

100 *Darden*, 106 S. Ct. at 2466.

101 416 U.S. 637 (1974).

102 *Darden*, 106 S. Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643).

103 *Id.* at 2471. Justice Powell conceded that "[the] argument deserves the condemnation it has received from every court to review it . . . ."

104 *Id.* at 2472.

105 Two lawyers divided the state's closing argument, but "[n]either prosecutor's con-

by Darden's attorney.[106] Indeed, the majority opinion appears to weigh this factor more heavily than any other in its determinination that Darden was not deprived of a fair trial. The opinion implicitly censures the defense statement, "which blamed the Polk County Sheriff's Office for a lack of evidence, alluded to the death penalty, characterized the perpetrator of the crimes as an 'animal,' and contained counsel's personal opinion of the strength of the State's evidence,"[107] thereby giving the impression that excesses of Darden's own counsel had caused the prosecution's outrageous remarks.[108]

In characterizing the prosecution's comments as caused by the defense, the majority tried to show that any prejudice to Darden was not so severe as to deprive him of a fundamentally fair trial. The approach "is used not to excuse improper comments, but to determine their effect on the trial as a whole."[109] The Court cited *United States v. Young*[110] for its discussion of the doctrine of "invited response."[111] The Court explained in *Young* that the concept is applied when a reviewing court can balance improper remarks by the prosecution against similarly inappropriate preceding defense arguments and can conclude that the jury's ability to properly judge the evidence was not prejudiced.[112] In *Young*, however, the respective defense and prosecution remarks differed qualitatively in their relation to one another from those in *Darden*.

The defense attorney in *Young* not only charged the prosecution with unfair treatment of the case and attempting to "poison" the minds of the jury,[113] but he also implied that the state had withheld evidence and accused his opponent of not believing that his client was guilty.[114] In other words, defense counsel in *Young* directed an essentially personal attack against opposing counsel. In response,

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duct was an ethical model worth emulation." Darden v. Wainwright, 699 F.2d 1031, 1033 n.2 (11th Cir. 1983).

106 *Darden*, 106 S. Ct. at 2471.

107 *Id.* (footnotes omitted).

108 See *supra* note 21 for a description of some of the "objectionable content [that] was invited by or was responsive to the opening summation of the defense." 106 S. Ct. at 2472.

109 *Id.* (citation omitted).

110 470 U.S. 1 (1985).

111 *Darden*, 106 S. Ct. at 2472.

112 *Young*, 470 U.S. at 12-13. Although stating that the preferred course would be for the trial judge to put a stop to improper remarks by one advocate before his or her opponent felt compelled to retaliate, if necessary giving the jury a curative instruction, *id.*, the Court found the idea of "invited response" a helpful guide to appellate courts which were forced to consider the "probable effect" a prosecutor's comments had had on the jury after the fact. *Id.*

113 *Id.* at 4.

114 *Id.* at 4-5.

without objecting to the comments and with no curative action by the judge,[115] the prosecutor stated his belief in the defendant's guilt.[116] He also attempted to rebut his opponent's assertion that the defendant was the only one involved in the trial to " 'have acted with honor and with integrity' "[117] by stating that he would not describe Young's conduct as acting with honor and integrity. The prosecutor then expressed disbelief that the jury could disagree.[118] In this context the Court found that although both sets of arguments breached accepted standards of advocacy,[119] those of the prosecution, when *balanced* by those of the defense, were not such as "to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice."[120]

The concept of invited response, if helpful when applied to the situation in *Young*, is not appropriate as a tool for analyzing what happened during the closing argument of Darden's trial. The crux of "invited response" is that, in a specific sense, the comments of the prosecutor were literally invited, or provoked, by those of the defense attorney. Only if the two sets of arguments deal with the same subject matter can the court balance one against the other to determine whether they mitigate one another's effect. If the remarks do mitigate each other, it may well be, as in *Young*, that the jury's deliberations were not so prejudiced as to render the trial fundamentally unfair.[121] In *Darden*, however, what the majority characterizes as having been "invited by or . . . responsive to" the defense summation[122] was a different type of argument altogether. Almost none of the prosecutors' arguments were directly responsive to anything Darden's attorney had said.[123] Instead, they consisted of "a

115 *Id.* at 5-6.

116 *Id.* at 5. The prosecutor qualified his statement somewhat by adding " 'if we are allowed to give our personal impressions since it was asked of me.' " *Id.* (emphasis omitted).

117 *Id.* This remark by defense counsel left jurors with the suggestion of generally questionable conduct on the part of the prosecution.

118 *Id.* at 5-6.

119 *Id.* at 9. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION Standard 3-5.8(b) (1979)(stating that "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."). *Accord* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1981)(stating that a lawyer shall not "state a personal opinion as to . . . the guilt or innocence of an accused.").

120 *Young*, 470 U.S. at 20.

121 *See supra* notes 110-20 and accompanying text. *See also Young*, 470 U.S. at 20.

122 *See supra* note 108.

123 Defense counsel referred to the death penalty, telling the jury, " 'they come up here and ask Citrus County people to kill the man . . . . The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they

series of utterly tasteless and repulsive"[124] expressions of personal hatred toward the defendant, a tirade against the state's parole system, a personal opinion as to Darden's guilt, a heavy-handed suggestion that Darden was lying, and a plea to the jury to recommend a death sentence to avoid future consequences of Darden remaining alive.[125]

This sustained course of misconduct, aptly described by the dissent as a "relentless and single-minded attempt to inflame the jury,"[126] was a far more egregious violation of standards of courtroom conduct than anything done by the *Young* prosecutor.[127] Nor was the conduct in *Darden* comparable to that attacked in *Donnelly v. DeChristoforo*,[128] the case which established the standard the Court used to evaluate Darden's claim.[129] In *Donnelly*, the prejudice was alleged to have resulted from two remarks made by the prosecutor, one of which may have misled the jury into believing that the defendant had offered to plead guilty to a lesser offense.[130] The Court declined to find that the single remark, which it characterized as "ambiguous"[131] and which was immediately followed by explicit in-

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do.' " *Darden*, 106 S. Ct. at 2471 n.8 (quoting the Record). This reference cannot justify as "invited response" the prosecutors' repeated expressions of their personal wish that Darden was dead. The issue of whether capital punishment should be imposed has nothing to do with wishing the defendant's head had been blown off at the scene of the crime with a shotgun. *See supra* note 21. See 106 S. Ct. at 2479 (Blackmun, J., dissenting), where the dissent makes the same argument.

Further, the defense attorney stated that the killer of Mr. Turman " 'would have to be a vicious animal' " and that the crime was " 'the work of an animal, there's no doubt about it,' " 106 S. Ct. at 2471 n.7 (quoting the Record). That statement showed only that "everyone agreed that a heinous crime had been committed. . . ." *Id.* at 2479 (Blackmun, J., dissenting). It did not invite the prosecutor to state that defense counsel had idenified Darden as an animal. *See supra* note 21.

124 Darden v. Wainwright, 513 F. Supp. 947, 955 (M.D. Fla. 1981). The description could not have been more accurate, *see supra* note 21, yet this court also rejected Darden's claim on this issue.

125 *See supra* note 21.

126 106 S. Ct. at 2478 (Blackmun, J., dissenting).

127 In addition to violating section (b) of the ABA's Standard 3.58 for prosecutors, *see supra* note 112, the argument repeatedly transgressed the following sections of Standard 3-5.8:

> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION Standard 3-5.8 (1979).

128 416 U.S. 637 (1974).

129 *See supra* text accompanying note 102.

130 416 U.S. at 640, 642.

131 *Id.* at 645.

structions from the judge to the jury to " '[c]onsider the case as though no such statement was made,' "[132] was serious enough to have prejudiced the jury.[133] In that connection, the majority observed, some types of misconduct during argument to the jury could be so obviously prejudicial that instructions from the judge not to consider them as evidence could not undo the damage.[134]

The *Darden* case exemplifies such misconduct. Although the trial judge instructed the jury that the arguments of counsel were not to be considered as evidence,[135] he also overruled defense counsel's objections to the prosecutor's lament that Darden had not been killed at the scene of the crime,[136] at the least blunting the warning to the jurors. The inflammatory nature of the repeated improper remarks suggests that only the strongest curative language, applied after the first transgression, would have been sufficient to prevent the jury from being affected in their deliberations.

Darden can also be analogized to *Caldwell v. Mississippi*,[137] although the majority opinion maintained that the principles of that case are not applicable to this one.[138] *Caldwell* involved a claim that prosecutorial comments to the jurors during the sentencing phase, minimizing their responsibility for imposing a death sentence, deprived the defendant of a fair trial.[139] The Court in *Darden* implied that the case is relevant only when precisely the same claim is being made.[140] The majority here either failed or refused to recognize that the same effect on the jury is created in each case, because the nature of the misconduct is the same. Yet, Justice Powell established that it is the effect upon the jury—whether or not they were improperly influenced by the arguments—that is the focal point of the inquiry.[141]

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132 *Id.* at 641 (quoting the Appendix).

133 *Id.* at 644. *See also Darden*, 106 S. Ct. at 2478 (1986)(Blackmun, J., dissenting).

134 416 U.S. at 644.

135 *Darden*, 106 S. Ct. at 2472; *id.* at 2480 (Blackmun, J., dissenting).

136 *See supra* note 21.

137 472 U.S. 320 (1985).

138 *Darden*, 106 S. Ct. at 2473 n.15.

139 *Caldwell*, 472 U.S. at 324-25.

140 *Darden*, 106 S. Ct. at 2473 n.15. "In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to increase the jury's perception of its role." *Id.* (emphasis omitted).

141 *Id.* at 2472-73. The weight of the evidence against Darden, according to the Court, "reduced the likelihood that the jury's decision was influenced by the argument." *Id.* The Court also asserted that the defense's rebuttal turned the improper prosecutorial comments to Darden's advantage by putting them "in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner." *Id.* at 2473.

The Court in *Caldwell* fully explained the reason that the effect on the jury is the proper focus. Justice Marshall, the author of the *Caldwell* opinion, held that the remarks of the prosecutor rendered the trial fundamentally unfair precisely because, unlike those in *Donnelly*,[142] they were "quite focused, unambiguous, and strong. They were pointedly directed at the issue that this Court has described as 'the principal concern' of our jurisprudence regarding the death penalty, the 'procedure by which the State imposes the death sentence.' "[143] The same analysis aptly applies to *Darden*. Although the misconduct occurred in *Caldwell* at the sentencing phase of trial and in *Darden* at the guilt phase, in both cases the improper comments could equally have affected the jury's deliberations. Furthermore, as the dissent pointed out, "the sentencing hearing followed immediately upon the jury's return of a guilty verdict and the State's summation consisted of less than a full page of transcript," and any effect the prosecution's arguments had on the jurors who convicted Darden surely remained with them when they sentenced him to death.[144]

The majority's hasty dismissal of *Caldwell* is symptomatic of its entire approach to Darden's case. The Court apparently chose to attach little importance to the fundamental problem that exists when a prosecutor is allowed to go on a verbal rampage of the sort that occurred here. In *Berger v. United States*,[145] the Court first dealt decisively with improper prosecutorial argument, setting a standard through its discussion of the responsibilities of an attorney for the government, whose duty "is as much . . . to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[146] Restraint is necessary, continued the Court, because the government's argument is likely to carry great weight with a jury,[147] whose members have no independent means of sifting apart the proper and improper parts of that argument. Thus, when misconduct by the pros-

142 416 U.S. 637 (1974).

143 *Caldwell*, 472 U.S. at 340 (quoting California v. Ramos, 463 U.S. 992, 999 (1983)).

144 *Darden*, 106 S. Ct. at 2480 n.3 (1986)(Blackmun, J., dissenting). *See also id.* at 2474 (the majority notes that "approximately one half-hour" elapsed between the end of the guilt phase and the beginning of the penalty phase of Darden's trial).

145 295 U.S. 78 (1935). In *Berger*, which involved a trial on charges of conspiring to counterfeit, the United States Attorney made "improper insinuations and assertions calculated to mislead the jury." *Id.* at 85. The Court found the misconduct to have been so severely prejudicial to the defendant that stern corrective measures, even if taken by the trial court, might not have been sufficient to purge the jury's deliberations of any improper influence. *Id.*

146 *Id.* at 88.

147 *Id.*

ecutor goes uncorrected, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence."[148]

The importance of these principles becomes even more clear when examined in the context of this case. The eyewitness identifications of Willie Darden by Helen Turman and Phillip Arnold[149] were probably the most important pieces of evidence against him,[150] and evidently the jury accepted this evidence. Because Darden consistently professed his innocence of the crimes,[151] the jury determination of guilt was based on their evaluation of his credibility as against that of the two eyewitnesses.[152] Thus, the barrage of remarks made by the prosecution[153] was directly related to the very issue the jury was about to decide. As the dissent cogently stated,[154] it is improbable that the graphic argument, referring to Darden as an animal who should be leashed and someone deserving of violent death, would not have prejudiced those deliberations.

Rejecting the dissent's claim that the Court had found any error in the trial to be harmless,[155] the majority held that because the trial had not been rendered unfair, there was no constitutional error at all.[156] This analysis begins with the conclusion—that the jury was not prejudiced by the prosecutor's behavior—and works backward to construct a rationale to support the desired result. Aside from the suspect craftsmanship of the technique, the fact that it simply avoids the ultimate issue is disturbing. The Court in this case, rather than deciding that the *jury* was not prejudiced by the prosecutors' remarks and would have found Darden guilty anyway, decided that the *Court* believed he was guilty. Perhaps the majority honestly believed that the conduct of the prosecution in this case, however unacceptable, would not have appreciably increased their own im-

148 *Id.* at 89.

149 *Darden*, 106 S. Ct. at 2468.

150 There was inconclusive ballistics evidence relating to a gun found near the place where Darden had crashed his car shortly after the murder, but it was not proved either that it actually was the murder weapon or that Darden had ever possessed it. *Id.* at 2482 (Blackmun, J., dissenting). The most that authorities could say was that the bullets at the site could have come from that revolver. *Id.* (Blackmun, J., dissenting). It was the type the murderer had used and contained a matching pattern of spent shells. *Id.* at 2468.

151 *Id.* at 2482 (Blackmun, J., dissenting).

152 *Id.* (Blackmun, J., dissenting).

153 *See supra* note 21.

154 *Darden*, 106 S. Ct. at 2482 (Blackmun, J., dissenting)("I cannot conclude that McDaniel's sustained assault on Darden's very humanity did not affect the jury's abiltity to judge the credibility question . . . .").

155 *Id.* at 2480. (Blackmun, J., dissenting).

156 *Id.* at 2473 n.15.

pression of Darden's guilt. That is not the question, however, that should be asked; what the Court thinks of a defendant is completely irrelevant to whether or not he received a fundamentally fair trial. Furthermore, under the circumstances of this case, the Court's subjective conclusion that the jury was not influenced by the improper closing argument is unreliable. Discussing the evaluation of prejudice upon the jury caused by an improper argument in *Kotteakos v. United States*,[157] Justice Rutledge, over forty years ago, displayed a much better understanding of the focus of inquiry than does the Court today. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."[158] The right to a fundamentally fair trial is not sufficiently protected by simply inquiring whether there was other evidence upon which the jury could base a guilty verdict, especially when, as in this case, the improper argument also affected some of that independent evidence. The circumstances of the *Darden* case are an illustration both of why constitutional limitations on the freedom of the prosecution in presenting its case are necessary and of the fact that those limitations are currently inadequate.

C. APPLICATION OF THE *STRICKLAND* STANDARD TO THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

The Court correctly disposed of Darden's third claim, that he had been denied effective representation of counsel during the sentencing phase of the bifurcated trial.[159] The Supreme Court has interpreted the constitutional guarantee of assistance of counsel for criminal defendants[160] to mean "effective" assistance of counsel.[161] Only recently, however, has the Court articulated a standard against which claims of ineffective assistance of counsel are to be measured.

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157 328 U.S. 750 (1946).

158 *Id.* at 764.

159 *Darden*, 106 S. Ct. at 2473. Darden did not raise this issue on direct appeal to the Florida Supreme Court, bringing it for the first time during federal habeas corpus proceedings. *Id.* at 2467. The court of appeals affirmed the findings of both the federal magistrate and the district court that the claim was without merit. Darden v. Wainwright, 699 F.2d 1031, 1033 (11th Cir. 1983). The magistrate, by contrast, had found that the claims of juror exclusion and prosecutorial misconduct constituted grounds for granting the writ. *Id.*

160 The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI.

161 *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71 (1932)(holding that assignment of counsel for capital defendants "at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case" amounts to denial of the assistance of counsel in violation of the sixth amendment and the fourteenth amendment's due process clause).

The Court relied on its decision in *Strickland v. Washington*[162] to determine that Darden had not been deprived of effective assistance of counsel at sentencing. The two-part *Strickland* test requires that the defendant show, first, that his attorney's performance was so deficient as to have effectively deprived him of assistance of counsel altogether, and, second, that the defense was prejudiced by the deficiency so severely as to render the result unreliable.[163] The Court in *Darden* never reached the latter part of the test, because it found that Darden had failed to show that his lawyers' performance "fell below an objective standard of reasonableness."[164]

Darden argued that his attorneys failed to present mitigating evidence before sentencing because of inadequate preparation and their misinterpretation of a Florida statute listing permissible mitigating factors.[165] Because the decision not to mitigate could be construed under the circumstances as a deliberate strategic choice of the kind competent trial attorneys might make,[166] the Court concluded that Darden failed to show that his lawyers' performance was deficient under the *Strickland* test.[167] This holding follows the Court's longstanding reluctance to "infer lack of effective counsel" where the challenged actions "might be considered sound trial strategy."[168] In other words, counsel are to be granted considerable discretion in determining, on a case-by-case basis, the appropriate range of professional behavior. Justice O'Connor, writing for the Court in *Strickland*, developed this theme further, explaining that the objective standard of reasonableness described by the Court presupposes "prevailing professional norms" among lawyers of a caliber sufficiently high to ensure that counsel, in general, will be

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162 466 U.S. 668 (1984).

163 *Id.* at 687.

164 *Darden*, 106 S. Ct. at 2475.

165 *Id.* at 2474.

166 *See id.* at 2474-75. For a discussion of the probable reasons behind such a strategy, see *infra* text accompanying note 172 and notes 174-75 and accompanying text.

167 *Id.* at 2475. The Court refuted Darden's charge of inadequate preparation by pointing out that the Record indicated a substantial amount of time spent in preparation for both the guilt and penalty phases of trial, *id.* at 2474, and declined to examine the alleged statutory interpretation because the trial court had explicitly announced that Darden would have free rein in presenting mitigating evidence. Consequently, the Court stated, it could be presumed the attorneys elected not to mitigate. *Id.*

168 Michel v. Louisiana, 350 U.S. 91, 101 (1955). In *Michel*, the defendant's experienced and respected criminal lawyer failed to file a timely motion to quash an indictment for rape on the ground of racial discrimination in grand jury selection. *Id.* at 100 & 93. The Court held that this fact, standing alone, did not show ineffective representation. *Id.* at 101. Absent some evidence of incompetence, the decision was "entirely within the discretion of [defense counsel] and there were valid reasons . . . at the time" for not filing the motion. *Id.* at 101 n.7.

able to provide the assistance promised by the sixth amendment.[169]

The likely result of such a deferential standard of competence is that a defendant raising a claim of ineffective assistance of counsel will have to prove egregious conduct on the part of his attorney to satisfy the first part of the *Strickland* test. This approach lacks consistency because it does not clarify the "objective standard of reasonableness,"[170] and, accordingly, the parameters of competent representation must be developed on a case-by-case basis.[171] In *Darden*, however, the Record convincingly indicated that the defense attorneys made a thorough investigation into the defendant's background and based their decision not to introduce the information in mitigation on the probability of it being turned against Darden by the prosecution.[172]

There can be no doubt that an attorney who failed even to conduct an investigation into mitigating factors before a capital sentencing proceeding would be held to have fallen below the elusive "objective" standard of reasonableness.[173] On the other hand, a tactical decision by an attorney not to use the results of his investigation "might reasonably be made when, for example, the defense knew the prosecution would present a more severe aggravating case

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169 466 U.S. at 688.

170 *Darden*, 106 S. Ct. at 2475.

171 *See* Note, *Sixth Amendment—Defendant's Dual Burden in Claims of Ineffective Assistance of Counsel*, 75 J. CRIM. L. & CRIMINOLOGY 755, 771 n.133 (1984). The author suggests that, particularly for a capital sentencing hearing, the lack of specific guidelines means that there should be some formal pre-sentencing supervision by the trial judge, who would examine defense counsel's preparation to determine whether efforts on the defendant's behalf were reasonable. As the author points out, this remedy could help reduce the burgeoning litigation of ineffective assistance of counsel claims. *Id.* at 771. In addition, in light of the *Strickland* holding, this method appears to be the only sort possible to ensure some review of counsel's competence.

172 *Darden*, 106 S. Ct. at 2474. *See also supra* note 167.

173 *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). In such a situation, "the potential for prejudice is too obvious to require proof." *Id.* at 350. Even under the *Strickland* test, such a grave lapse of professional responsibility would clearly have denied a defendant the right to effective assistance of counsel, because in any capital case the sentencing authority needs to have access to any information bearing on whether the defendant should be executed. "*Furman* [v. Georgia, 408 U.S. 238 (1972)(holding the death penalty as applied by Georgia and Texas 'cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments')] mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(plurality opinion).

Thus, a complete failure to investigate would both demonstrate a severely deficient performance by counsel and create a strong likelihood, if not an actual presumption, that the entire defense had been prejudiced by it.

in rebuttal to particular mitigating evidence."[174] As Justice Powell noted in *Darden*, this result was precisely what the defense attorneys anticipated. Justice Powell reviewed potential mitigating factors in Darden's case, including a psychiatric report, and concluded that the defense attorneys made a reasonable professional judgment that they would be exposing their client to greater risk by introducing them.[175]

V. CONCLUSION

In *Darden v. Wainwright*, the Supreme Court rejected three constitutional challenges to the validity of the petitioner's murder conviction and death sentence. The Court wrongly decided the claims of improper juror exclusion for cause and prosecutorial misconduct during closing argument as affecting the fundamental fairness of Darden's trial, but correctly held that he had not been denied effective assistance of counsel at sentencing. Under the facts of this case, the Court had little difficulty demonstrating that Darden had not met the Court's standard for showing ineffective assistance of counsel. The Court failed to establish, however, that Darden was not denied a fair trial because of the improper exclusion for cause of one prospective juror based on his attitude toward capital punishment. Furthermore, the egregiously prejudicial remarks made to the jury by the prosecutors also rendered the trial fundamentally unfair. The majority's decisions on these two issues indicate a serious disregard for the concept of procedural fairness to the defendant in a criminal trial and increase the possibility of continued erosion of the rights of the accused.

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174 Goodpaster, *supra* note 173, at 351.

175 *Darden*, 106 S. Ct. at 2474. Apparently the psychiatric report contained evaluations of Darden which would have been very damaging to his defense had the state been able to introduce them. *Id.* at 2475. Had the defense asserted that Darden was nonviolent, the state would have been free to introduce his prior convictions for violent offenses. *Id.* at 2474.

Similarly, in *Strickland*, the Court found that the defense attorney's decision to forego a presentencing report, because it would have introduced for the first time the defendant's prior criminal convictions, and a psychiatric report, because of rebuttal opportunity for the state, among other tactical choices, 466 U.S. at 673, "was well within the range of professionally reasonable judgments." *Id.* at 699.