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# No Execution If Four Justices Object

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## NO EXECUTION IF FOUR JUSTICES OBJECT

*Eric M. Freedman\**

### I. DRIVING A NAIL WITH A SCREWDRIVER IN CAPITAL CASES

Today's Supreme Court defines its role as choosing from the thousands of cases pressed upon it annually those very few that will best serve as vehicles for the resolution of legal issues of general importance.<sup>1</sup>

#### A. Ordinary Cases

(1) The necessary consequence is that some litigants will seek review and fail to attain it for reasons having nothing to do with the merits of their claims (e.g., the Court desires to have the issue percolate for a while in the lower courts or in the public arena),<sup>2</sup> and will find on reading the ruling in the case of some later party that their position was entirely correct. The prior litigants will then believe with good reason that justice was not done in their cases.<sup>3</sup>

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1. See Edward A. Hartnett, *Questioning Certiorari Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1733-35 (2000).

2. A number of such considerations are listed in a lucid inside look at the certiorari consideration process, Stephen M. Shapiro, *Certiorari Practice The Supreme Court's Shrinking Docket*, MAYER BROWN'S APP., <http://www.appellate.net/articles/certpractice.asp> (last visited Mar. 4, 2015). For a more formal, extended, and current discussion, see STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 4 (10th ed. 2013).

3. Cf. H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES

(2) The Court ameliorates this inevitable harshness through several mechanisms. When a litigant seeks review by certiorari, a self-imposed Rule of Four, dating back to at least 1925, provides that four votes are sufficient to grant the petition.<sup>4</sup> Four votes then suffice to defer action on pending petitions arguably raising the same question.<sup>5</sup> Moreover—and critically—regardless of how a case arrives at the Court, it is subject to a process whose basis is that a judicial body should behave judiciously. The procedures of the Court seek to provide assurance that the ultimate disposition (which ninety-nine percent of the time will be to rebuff the litigant)<sup>6</sup> is reached after the case has been given, or at minimum appears to have been given, as much attention as warranted.

### B. Capital Cases

(1) The necessary consequence of the Court's institutional limitations has an ineluctably harsher impact in capital cases than in other cases.<sup>7</sup> There may be little the Court can do about this problem.<sup>8</sup>

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SUPREME COURT 221 (1991) (observing that in interviewing Justices, “[i]t is remarkable how many of my informants used ‘case’ and ‘issue’ interchangeably. . . . [I]t is the issue, not the case[,] that is primary.”).

4. See SHAPIRO ET AL., *supra* note 2, at 325-29; Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 36 U. PA. L. REV. 1067, 1068-73 (1988); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10-14 (1983).

5. See *infra* notes 26, 44. This process has for some time been sufficiently transparent to allow public comment by interested outsiders, notably John Elwood's *Relist Watch*, which appears regularly at SCOTUSBLOG.COM. See John Elwood, SCOTUSBLOG, <http://www.scotusblog.com/author/john-elwood> (last visited Mar. 14, 2015). The Court began publishing additional details when it revised its website on October 6, 2014.

The Court has explicitly recognized that its power to “hold” cases, like its power to summarily grant certiorari, vacate the judgment below, and remand the case for further consideration, and its power to grant stays pending some future legal development, is a mechanism to “alleviate[] the ‘[p]otential for unequal treatment’ that is inherent in our inability to grant plenary review of all cases raising similar issues.” *Lawrence v. Chater*, 516 U.S. 163, 166-68 (1996) (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)).

6. See SHAPIRO ET AL., *supra* note 2, at 61-62, 237-38.

7. This has been clear since shortly after the resumption of capital punishment in the wake of *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). During the seven years before Justice Scalia wrote the opinion for a unanimous Court in favor of the petitioner in *Hitchcock v. Dugger*, 481 U.S. 393, 394, 399 (1987), Florida executed at least thirteen men whose certiorari petitions presenting the identical claim had been denied. See 2 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 2073 n.50 (6th ed. 2011); see also *Stringer v. Black*, 503 U.S. 222, 237 (1992) (stating that the Fifth Circuit had “made a serious mistake” five years earlier in rejecting the claims of two prisoners whose certiorari petitions were denied and who were executed). Between the time of the Court's ruling in *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 319-28 (1989), that the Texas capital punishment system unconstitutionally restricted the presentation of mitigating evidence, see also *Penry v. Johnson (Penry II)*, 532 U.S. 782, 796-804 (2001) (re-iterating this holding), and its ruling in *Tennard v. Dretke*, 542 U.S. 274, 283-88 (2004), that the Fifth Circuit had

(2) Once the government—which is also the prisoner’s litigation adversary—has chosen to set an execution date, the ordinary ameliorative mechanisms do not work.<sup>9</sup> This is a problem the Court can and should solve. Capital cases under warrant differ from all other cases.<sup>10</sup> They require institutional treatment reflecting that simple truth.

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erroneously “invoked its own restrictive gloss on *Penry I*,” one which “ha[d] no foundation in the decisions of this Court,” and was inconsistent with the principles underlying *Penry I*, an estimated forty prisoners who presented that claim were executed. See Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court’s Patience*, N.Y. TIMES, Dec. 5, 2004, at 1.

8. “Little,” however, does not mean “nothing.” For example, the Court at one time followed an internal, if unpublicized, practice of discussing every capital case in conference. See PERRY, JR., *supra* note 3, at 92-97. If it still does, the leading treatise on the Court fails to record the fact. See *infra* note 53.

9. Both the appearance and the substance of an orderly deliberative process inevitably erode. Vivid examples appear in *Lowenfeld v. Butler*, 485 U.S. 995, 995-1000 (1988) (Brennan, J., dissenting from 5-4 order denying a stay which would have permitted consideration of petitioner’s “insanity claim in an atmosphere that was not itself lunatic”) and *Woodard v. Hutchins*, 464 U.S. 377, 381-83 (1984) (Brennan, J., dissenting from 5-4 order vacating stay). For other examples see Parts II & III below. Despite the heroic efforts of a Clerk’s Office whose unbiased and professional support for both sides in capital proceedings under warrant is, for good reason, universally applauded, the Court in such situations operates in an environment inimical to high-quality judicial decision-making:

“Although the Court’s staff works hard to collect the opinions and briefs in capital cases in advance of execution dates, the Justices may not receive the actual stay papers until shortly before the execution itself. Petitions sometimes arrive only hours beforehand, and (particularly during the summer recess) the Justices may be spread across the globe.”

Tom Goldstein, *More Thoughts on Death Penalty Stays*, SCOTUSBLOG (Oct. 19, 2007, 12:56 PM), <http://www.scotusblog.com/2007/10/death-penalty-stays>; see Adam Liptak, *To Beat the Execution Clock, the Justices Prepare Early*, N.Y. TIMES, Sept. 24, 2012, at A19; Tony Mauro, *Predawn Justice at High Court; 5 a.m. Order in Voting Case Rare—but Not New*, NAT’L L.J. (Oct. 27, 2014), <https://global.factiva.com/hp/printsavews.aspx?pp=Print&hc=Publication>.

Moreover, the Court ordinarily lacks the benefits to its processes that flow from the previous thoughtful consideration of the issues below because the lower courts have themselves been operating under like pressures. See, e.g., *Lowenfeld*, 495 U.S. at 999.

10. For purposes of the following discussion, then, the line of distinction is not between capital cases and all others; it is between capital cases in which the government has set an execution date and all others.

The relevant group is fairly small. Of course, every execution is preceded by the setting of a date. And of course there is ordinarily litigation seeking to stay the execution. But there were only thirty-five executions in 2014, see *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Feb. 11, 2015), although there are approximately 3035 inmates on Death Row. See *Death Row USA*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-usa> (last visited Mar. 4, 2015). A significant majority of them will eventually attain judicial relief or be otherwise removed from the system by a means other than execution. See Frank R. Baumgartner and Anna W. Dietrich, *Most death penalty sentences are overturned. Here’s why that matters*, WASH. POST, March 17, 2015, [http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/?tid=hpModule\\_ba0d4c2a-](http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/?tid=hpModule_ba0d4c2a-)

If the Court pretends otherwise, then, as at least three decades of sorry experience show, individuals live or die for reasons that are freakishly arbitrary and clouded in secrecy. That seriously damages the appearance and reality both of equal justice under law and of sound judicial decision-making.

The Justices have long been aware of all this—and have pointed it out to each other publicly and privately, sometimes in forceful language, for decades—as have litigants and commentators.<sup>11</sup> But the Court has been unwilling to address the situation, even as recent legal developments have made the problem worse.<sup>12</sup>

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[86a2-11e2-9d71-f0feafdd1394](#). During 2013, for example, 115 inmates left Death Row, but only thirty-nine did so by execution. See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 248448, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 1 fig.1, 2 (2014). Thus, depending on the date-setting practice followed by the sentencing jurisdiction, an inmate may well enter and exit Death Row without ever having litigated under warrant. Indeed, as noted *infra* note 43 (describing the recommendation for an automatic stay by a committee chaired by Justice Powell), there is substantial professional agreement that this is the desirable course of events. For our purposes, non-warrant capital cases do not differ from any other sort of litigation.

When capital litigation occurs under warrant, however, there is a heightened risk of the Court taking actions that are less fully considered than they should be. See *supra* note 9; *infra* notes 56, 58. The purpose of providing a special rule for those cases is to reduce that risk.

11. For a summary of this history, see *infra* Part II.

12. In the past, the issue has most commonly been considered in the context of certiorari review of Circuit dispositions of federal habeas corpus petitions brought in the District Courts. But capital prisoners may quite properly seek relief by commencing other sorts of actions in the lower courts, see ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913, 923-24, 1030-31 (2003) [hereinafter ABA GUIDELINES] (giving examples), or in the Supreme Court, see *infra* note 75 (discussing original writs of habeas corpus), and they have done so with increasing frequency over the past fifteen years.

Lawsuits under 42 U.S.C. § 1983 (2012) are a common instance. See, e.g., *Bradley v. Pryor*, 305 F.3d 1287, 1289-90 (11th Cir. 2002) (holding that action seeking DNA samples for testing to establish the innocence of capital prisoner properly brought under § 1983, rather than as habeas corpus petition). In an area that has been the source of a number of recent episodes relevant to this idea, the statute has been used to challenge States' lethal injection protocols in the wake of the confusingly-written and swiftly-outdated decision in *Baze v. Rees*, 553 U.S. 35 (2008). See SHAPIRO ET AL., *supra* note 2, 934-36; Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1346, 1347 & n.93, 1348-54 (2014); Adam Liptak, *Moratorium May Be Over, but Hardly the Challenge*, N.Y. TIMES, April 17, 2008, at A26. Section 1983 actions are also the appropriate tool for bringing structural attacks on state post-conviction systems, see *Skinner v. Switzer*, 131 S. Ct. 1289, 1296, 1298-1300 (2011) (decided on merits after grant of stay pending disposition of the petition for writ of certiorari in *Skinner v. Switzer*, 559 U.S. 1033 (2010)); *Dist. Att'y's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 59-60, 65-67 (2009), and capital inmates use the statute for that purpose as well. See, e.g., *Barbour v. Haley*, 471 F.3d 1222, 1224, 1232 (11th Cir. 2006) (rejecting § 1983 challenge to Alabama's failure to provide capital inmates with post-conviction counsel while commenting: "If we lived in a perfect world, which we do not, we would like to see the inmates obtain the relief they seek in this case.").

In addition, in revising the statutory framework for dealing with capital habeas corpus petitions in 1996, Congress provided a number of procedural advantages to states that created "a

Adhering to the issue-oriented spirit of the Idea format and eschewing any pretense to an exhaustive presentation:<sup>13</sup>

◆ Part II summarizes the recent and prior history of the problem.

◆ Part III proposes a rule that in any capital case, regardless of its procedural posture, the votes of four Justices are sufficient to stay the execution, irrespective of whether those four Justices are ready to vote for plenary review of the case. The stay extends to any other cases held for the first one.

◆ Part IV urges the Court, in addition to implementing my proposal, to be transparent (a) in the rationale for the disposition of particular cases, and (b) in the formulation and publication of whatever solution it adopts.

## II. WHERE WE ARE AND HOW WE GOT HERE

The set of problems to which this Idea responds is illustrated by the Court's troubling actions in the case of the late Leon Taylor.

Taylor, a Death Row inmate, was one of a number of plaintiffs in a § 1983<sup>14</sup> challenge to Missouri's lethal injection protocol which remained undecided in the Eighth Circuit for some ten months. During

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mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners [and] . . . provide[d] standards of competency for the appointment of such counsel." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1222 (codified at 28 U.S.C. § 2261(b) (2012)). See *Lindh v. Murphy*, 520 U.S. 320, 327 (1997) (describing Chapter 154 of 1996 Act). Whether a state qualified for these benefits was initially litigated in the context of capital prisoners' habeas corpus petitions. See Eric M. Freedman, *Add Resources and Apply Them Systemically Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1100-01 n.11 (2003). But, unhappy that the judicial decisions had uniformly been adverse to the states, see *id.*, Congress in 2005 amended the 1996 statute to provide that the determination as to whether states qualified would be made by the Attorney General of the United States. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250-51 (2006). Under the amended statute, prisoners seeking to litigate Chapter 154 issues must do so in administrative law actions against the Attorney General. See 28 U.S.C. § 2265(c)(1) (2012); see also *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C13-4517, 2014 WL 3908220, at \*8-13 (N.D. Cal. Aug. 14, 2014) (granting injunction under the Administrative Procedure Act against rules the Attorney General had promulgated to implement Chapter 154).

These developments increase the probabilities that when the Court considers whether to halt or permit an execution, it does so not just outside the context of a habeas action, but also outside the context of a certiorari petition. See *infra* Part III.C.

13. See Mark L. Movsesian, *Introduction A Good Idea*, 33 HOFSTRA L. REV. 1121, 1121 (2005).

14. 42 U.S.C. § 1983 (2012).

that period, the State sought to execute several of the plaintiffs, a divided Court of Appeals denied stays of execution pending its disposition of the appeal,<sup>15</sup> and the inmates were denied Supreme Court stays in summary 5-4 orders.<sup>16</sup>

When this happened in Taylor's case, he sought to file with the Court a motion for reconsideration of the order denying the stay. The document recounted much of the history described below, asserted that the order "may in practical terms mean a nullification of the Rule of Four,"<sup>17</sup> and called on the Court "to seek the views of all interested parties respecting an amendment of its Rules so it may take the initiative in remedying an anomaly that does it no credit."<sup>18</sup> The Clerk refused to file the motion, stating that the Court would not accept motions for reconsideration of denials of stays by the full Court; counsel thereupon sought an order directing the Clerk to file her motion.<sup>19</sup> That relief was denied about an hour later.<sup>20</sup> Taylor was executed that night.<sup>21</sup>

This suboptimal judicial performance was not an isolated case. The problems highlighted by *Taylor* are not new ones.<sup>22</sup> As indicated

15. See *Zink v. Lombardi*, 772 F.3d 1151, 1152 (8th Cir. 2014) (en banc) (Bye, J., joined by Murphy and Kelly, JJ., dissenting) (dissenting from the denial of a stay of execution of Paul Goodwin and citing prior cases).

16. In addition to Taylor's own case, *Taylor v. Lombardi*, 135 S. Ct. 701 (2014), see *Storey v. Lombardi*, 191 L.Ed. 2d 151 (2015), *Goodwin v. Lombardi*, 135 S. Ct. 780, 780 (2014); *Ringo v. Lombardi*, 135 S. Ct. 40, 40 (2014); *Worthington v. Lombardi*, 135 S. Ct. 22, 22 (2014), all of which resulted in the execution of the petitioners. See *Execution List 2015*, DEATH PENALTY INFO. CENTER <http://www.deathpenaltyinfo.org/execution-list-2015> (last visited Mar. 24, 2015); *Execution List 2014*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited Mar. 5, 2015).

The Eighth Circuit eventually decided the pending appeal on March 6, 2015, ruling adversely to the inmates. See *Zink v. Lombardi*, 2015 U.S. App. LEXIS 3550 (8th Cir. Mar. 6, 2015). One of the surviving plaintiffs, Cecil Clayton, then sought a stay of his execution pending the filing and disposition of a certiorari petition; the application was denied on 5-4 vote and he was executed. See *Clayton v. Lombardi*, 2015 U.S. LEXIS 1837 (U.S. Mar. 17, 2015); Timothy Williams, *Missouri Executes Killer Who Had Brain Injury*, N.Y. TIMES, March 18, 2015, at A18.

17. Motion for Reconsideration of Order Denying Stay of Execution, at 1, *Taylor v. Lombardi*, 135 S. Ct. 701 (2014) (No. 14A532).

18. *Id.* at 6.

19. See Motion for an Order Directing the Clerk to File the Attached Petition for Rehearing and Certification Pursuant to Rule 44.2, *Taylor v. Lombardi*, 135 S. Ct. 701 (2014) (No. 14A532) (observing that the relevant Court rules, Rule 22 (regarding stay applications) and Rule 44 (regarding motions for reconsideration), contain no language supporting the Clerk's position).

20. See *Taylor v. Lombardi*, 135 S. Ct. 701, 701 (2014) (reading in its entirety: "Motion to direct the Clerk to file a petition for rehearing of order denying application (14A532) for stay of execution of sentence of death denied.").

21. See Brett Barrouquere, *Missouri Executes Leon Taylor for 1994 Slaying of Gas Station Attendant*, HUFFINGTON POST, Nov. 19, 2014, [http://www.huffingtonpost.com/2014/11/19/missouri-executes-leon-taylor\\_n\\_6183144.html](http://www.huffingtonpost.com/2014/11/19/missouri-executes-leon-taylor_n_6183144.html).

22. In fact, they even arose some ten years ago in the particular context of a challenge to

above,<sup>23</sup> and as counsel tried to call to the Court's attention in her rejected motion, they have bedeviled the Court for at least thirty years. A few selected episodes should suffice to make the point.

On September 1, 1985, a Florida Death Row inmate named Willie J. Darden, who was scheduled to be executed at 7 A.M. on September 4, filed an application for a stay of execution pending the filing and consideration of a petition for certiorari directed to the adverse decision of the Eleventh Circuit on an appeal arising from his first petition for a federal writ of habeas corpus.<sup>24</sup> During the day on September 3 (the Tuesday after Labor Day), four Justices voted to grant the stay.<sup>25</sup>

The four votes would have been enough to grant a petition for certiorari, but . . . [a] stay of execution . . . required a majority, five votes. At 6:05 that evening, the Court informed Darden's lawyer that there would be no stay of execution. . . . Darden's lawyer, recognizing that he had the support of four justices, sent a letter requesting that the Court treat the stay application as a petition for certiorari. The four who had voted for a stay now voted to grant the case. That meant that the Court would, sometime later that fall, be hearing an appeal from a dead man.

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Missouri's lethal injection protocol. *See* *Brown v. Crawford*, 544 U.S. 1046, 1046 (2005) (denying stay of execution on 5-4 vote).

23. *See supra* text accompanying note 11.

24. For an account of the *Darden* episode, see LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 165-74 (2005); Revesz & Karlan, *supra* note 4, at 1074-81. Box 457 of the Harry Blackmun Papers in the Library of Congress contains considerable further documentation that has not yet been fully exploited by scholars. All of the internal Court memoranda cited in the next paragraph of this footnote and *infra* notes 43, 45, 55, 56, and 93 are to be found there. Copies of those documents, as well as the memorandum cited *infra* note 97, are available from the reference desk of the Hofstra Law Library.

In *Darden*, the Eleventh Circuit denied a motion for an en banc rehearing "on August 27, 1985, and the CA 11 directed that the mandate would issue and the stay would dissolve at 9:00 a.m. on September 3, 1985, the day before the scheduled execution." Memorandum from Mike [Michael W. Mosman], on Incoming Application for a Stay of Execution, *Darden v. Wainwright* to Mr. Justice Powell, Supreme Court of the U.S. 2 (Aug. 29, 1985) (on file with the *Hofstra Law Review*) (annexed to Memorandum from Justice Lewis F. Powell, Jr., Supreme Court of the U.S., on *Darden v. Wainwright* to the Conference 1 (Aug. 29, 1985) (on file with the *Hofstra Law Review*)). Justice Powell supplemented this report in a Memorandum to the Conference dated September 3, 1985. Memorandum from Justice Lewis F. Powell, Jr., Supreme Court of the U.S., on *Willie Darden v. Wainwright* to the Conference 1 (Sept. 3, 1985) (on file with the *Hofstra Law Review*). He advised his colleagues that on August 30, 1985, the Court of Appeals denied Darden's application for a stay of its mandate and of his execution pending the filing of a petition for certiorari. *Id.* He further advised them that on "September 1, 1985, Darden filed with this Court an application for a stay of execution pending filing of a petition for certiorari." *Id.*

25. *See* GREENHOUSE, *supra* note 24, at 167.

At one minute to midnight on September 3, Powell yielded and provided a fifth vote to grant the stay.<sup>26</sup>

The practice followed in *Darden* did not last long,<sup>27</sup> and its abandonment proved to be the first step into the current morass. In *Hamilton v. Texas* in 1990, the Court refused to stay petitioner's execution despite four votes for certiorari,<sup>28</sup> and he was executed without Court review of the merits of his claim.<sup>29</sup> In *Herrera v. Collins*,<sup>30</sup> just as in *Darden*, when petitioner found that his stay motion had received four but not five votes, he promptly sought to have the papers treated as a certiorari petition; but the motion was denied over four dissents,<sup>31</sup> and when later the same day he filed an actual certiorari petition, the result was an order granting the petition, but adding, "The order of this date denying the application for a stay of execution of sentence of death is to remain in effect."<sup>32</sup> At the last moment, however, the Court was rescued from its own fecklessness when the Texas Court of Criminal Appeals entered a stay<sup>33</sup> until the Supreme Court could decide the merits, as it eventually did.<sup>34</sup> "This was a lucky last-minute

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26. *Id.*; see *Darden v. Wainwright*, 473 U.S. 928, 928 (1985); see also *Straight v. Wainwright*, 476 U.S. 1132, 1132, 1133 & n.2 (1986) (denying stay of execution despite four votes to hold case pending resolution of *Darden*, while noting "the Court has ordinarily stayed executions when four Members have voted to grant certiorari"); *infra* note 44 and accompanying text (discussing stays where sufficient number of Justices wish to hold). Meanwhile, inside the Court, the *Darden* episode set off a lengthy, but ultimately inconclusive, debate among the Justices as to the rule they should adopt to deal with such circumstances. See GREENHOUSE, *supra* note 24, at 168-72. An earlier account, written without the benefit of the subsequently-released Blackmun Papers, appears in Mark Tushnet, "The King of France With Forty Thousand Men" *Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163, 172-79.

27. See SHAPIRO ET AL., *supra* note 2, at 939 ("[I]t is clear that by the early 1990's, the Court had moved away from the practice . . .").

28. See *Hamilton v. Texas*, 497 U.S. 1016, 1016-17 (1990) (Brennan, J., dissenting) ("Four Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted. For the first time in recent memory, a man will be executed after the Court has decided to hear his claim").

29. See *Hamilton v. Texas*, 498 U.S. 908 (1990).

30. 502 U.S. 1085 (1992).

31. *Id.*

32. *Id.*

33. The action is noted at *Ex parte Herrera*, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992) (en banc). This case arose because a lower Texas court entered another execution date for Herrera while his case was still before the Supreme Court. *Id.* The Texas Court of Criminal Appeals stayed that execution date as well, while pointedly recalling *Hamilton* and suggesting that the Justices should be solving their own self-created problem, rather than putting a "Texas death row inmate . . . in the position of having to ask the highest court in Texas for criminal matters to delay his date with death until they decide his case." *Id.*

34. See *Herrera v. Collins*, 506 U.S. 390, 398, 418-19 (1993).

escape for Mr. Herrera, but it is no way to run a judicial system.”<sup>35</sup> Nor was it an isolated instance.

In June of 2007 Christopher Scott Emmett, who was denied a stay by a 5-4 vote<sup>36</sup> was granted one by the Governor of Virginia, who “recognizing that basic fairness demands that capital defendants be given the opportunity to complete the legal appeals process prior to execution, granted petitioner a reprieve to afford us the opportunity to give the petition the careful consideration that it clearly merited.”<sup>37</sup> As a result, he was alive in October, when the Court granted him a stay of execution until the Court of Appeals decided his challenge to Virginia’s lethal injection protocols.<sup>38</sup> Clarence Edward Hill was not so lucky. Hill sought to challenge Florida’s lethal injection protocols, but on September 20, 2006 he was denied a stay of execution by a 5-4 vote<sup>39</sup>

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35. Eric M. Freedman, *Can Justice Be Served by Appeals of the Dead?*, NAT’L L.J., Oct. 19, 1992, at 13; see also Ira P. Robbins, *Justice by the Numbers The Supreme Court and the Rule of Four—Or Is It Five?*, 36 SUFFOLK U. L. REV. 1, 17-20 (2002) (discussing cases and describing their results as “unprincipled,” and leading to “striking injustice”).

36. *Emmett v. Kelly*, 551 U.S. 1128, 1128 (2007).

37. *Emmett v. Kelly*, 552 U.S. 942, 942 (2007) (statement of Stevens & Ginsburg, JJ. respecting denial of certiorari on October 1, 2007). During the same period, the Court demonstrated in another Virginia case that it could accomplish this result without relying on the good graces of the Governor. In *Lovitt v. True*, 545 U.S. 1152, 1152-53 (2005), the Court granted a stay of execution on the filing of a certiorari petition in June, considered the matter over the summer, and in October denied the petition, thereby dissolving the stay. See *Lovitt v. True*, 546 U.S. 929, 929 (2005). For a similar sequence of events see *Bower v. Texas*, 135 S.Ct. 1197 (2015) (granting stay on February 5, 2015 pending consideration of certiorari petition) and *Bower v. Texas*, 2015 U.S. LEXS 1842 (March 23, 2015) (denying certiorari over three dissents on March 23, 2015, thereby dissolving stay).

In *Lovitt’s* case, his execution was re-set for November, 2005, but the day before it was to take place he was granted a commutation to life without parole. See David Stout, *Clemency Stops an Execution in Virginia Governor Warner Points to Evidence That Was Discarded*, N.Y. TIMES, Nov. 30, 2005, at A19.

38. See *Emmett v. Johnson*, 552 U.S. 987, 987 (2007) (granting stay on October 17, 2007); Robert Barnes & Jerry Markon, *Supreme Court Halts Va. Inmate’s Execution Ruling Could Lead to National Hiatus in Lethal Injections*, WASH. POST (Oct. 18, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101701870\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101701870_pf.html). The Court of Appeals ultimately upheld the Virginia protocols in a 6-4 en banc ruling in July of 2008, and Emmett was executed. See Bill McKelway, *Emmett Executed for ‘01 Killing Man Loses Final Appeals and Dies by Injection for Bludgeoning Co-worker*, RICHMOND TIMES-DISPATCH (July 25, 2008, 1:09 AM), [http://www.richmond.com/news/article\\_d914ecfd-d1ae-507f-a50f-031ec52b51e1.html?mode=print](http://www.richmond.com/news/article_d914ecfd-d1ae-507f-a50f-031ec52b51e1.html?mode=print).

39. See *Hill v. McDonough*, 548 U.S. 940, 941 (2006). In the Eleventh Circuit, Hill had sought an injunction under the All Writs Act against his execution pending the consideration by the Court of Appeals of the District Court’s dismissal of his § 1983 action. *Hill v. McDonough*, 464 F.3d 1256, 1257-58 (11th Cir. 2006) (per curiam). The Circuit Court did not reach the merits of his challenge, but instead ruled that Hill’s dilatory litigation conduct disqualified him from equitable

and was executed.<sup>40</sup> He was dead when the Court, without recorded dissent, denied his certiorari petition on October 16, 2006.<sup>41</sup>

### III. THE IDEA AND ITS RATIONALE

I propose that in any capital case, regardless of its procedural posture, an execution will be stayed if four Justices so desire.<sup>42</sup> This proposal applies irrespective of the route by which the case reaches the Court, and irrespective of whether those four Justices are ready to vote for plenary review of the case.<sup>43</sup> Executions in capital cases that are

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relief. *Id.* at 1259. I accordingly suggest that the Justices may have considered themselves to be reviewing an interlocutory injunction. *See infra* note 76. However, Shapiro et al. state that the Court's ruling came on an "application for a stay of execution pending certiorari," which is equally consistent with the sparse published order. *See SHAPIRO ET AL.*, *supra* note 2, at 935.

40. *See* Ron Word, *Killer Who Argued Lethal Injection Cruelty Is Executed; Supreme Court Votes 5-4 Against Another Stay*, HOUS. CHRON. (Sept. 21, 2006), <http://www.chron.com/news/nation-world/article/Killer-who-argues-lethal-injection-cruelty-is-1515326.php>.

41. *See* Hill v. McDonough, 549 U.S. 987, 987 (2006).

42. As a corollary, analogous to current practice with respect to the dismissal of certiorari as impropvidently granted, the vote of at least one of those four Justices would be required to modify such a stay. *See SHAPIRO ET AL.*, *supra* note 2, at 326-2; *see generally infra* note 97. It is certainly possible that, had my proposal been in effect, some of the cases discussed below would have eventuated in a later order permitting the execution to go forward. But, as in *Lovitt* and *Bower* discussed *supra* note 37, that would have followed a considered review of the issues, rather than a chaotic eleventh-hour scramble.

43. This proposal, designed to best follow the contours of the current litigation landscape, is at once broader than some that have been made previously and less inmate-friendly than others.

On the one hand, it applies to cases other than those reaching the Court by certiorari, and to proceedings other than federal habeas corpus. *See supra* note 12; *infra* Part III.C. On the other hand, my proposal requires four affirmative Supreme Court votes for a stay, in contrast to proposals for an automatic stay without individualized judicial action throughout the pendency of federal habeas corpus proceedings, like the one made in 1989 by a committee chaired by retired Justice Powell. *See AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES* (1989), *reprinted in* 45 CRIM. L. REP. 3239, 3241 (1989); AM. BAR ASS'N, AMERICAN BAR ASSOCIATION POLICY RECOMMENDATIONS ON DEATH PENALTY HABEAS CORPUS (1990), *reprinted in* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 9-12 (1990) (supporting the proposal); Comm. on Civil Rights, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N B. CITY N.Y. 848, 855 (1989) (supporting the proposal); *see also* Emmett v. Kelly, 552 U.S. 942 (2007) (statement of Stevens, J., joined by Ginsburg J., respecting denial of certiorari):

"Both the interest in avoiding irreversible error in capital cases, and the interest in the efficient management of our docket, would be served by a routine practice of staying all executions scheduled in advance of the completion of our review of the denial of a capital defendant's first application for a federal writ of habeas corpus. Such a practice would be faithful to the distinction between first and successive habeas petitions recognized by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 and would accord death row inmates the same, rather than lesser, procedural safeguards as ordinary litigants. It is a practice that JUSTICE GINSBURG and I have followed in the past and one that I hope a majority of the Court will eventually endorse."

“held” by as many votes as required under the Court’s internal practice would be stayed automatically.<sup>44</sup>

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*Id.* at 943; Memorandum from Justice Harry A. Blackmun, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 1 (Sept. 10, 1985) (on file with the *Hofstra Law Review*) (“As all of you know, my position with respect to capital cases is that I shall vote to grant a stay pending the resolution here of the defendant’s first federal habeas.”); *infra* note 58 (discussing *Autry v. Estelle*, 464 U.S. 1 (1983)).

My trade-offs are, of course, debatable ones, and the justice system would benefit if they were debated openly and thoughtfully. *See infra* Part IV.

44. There is a long discussion of the Court’s “hold” practice in Revesz & Karlan, *supra* note 4, at 1109-31, which was written at a time when three votes were sufficient to delay the disposition of a case pending disposition of one already accepted for review. As Professor Tushnet learned from the Marshall Papers, the Court changed its practice in 1991 to require four votes. *See* Tushnet, *supra* note 26, at 181. As indicated, *supra* note 26, the Justices have long disputed whether, even assuming that a stay should issue when four of them have voted to grant certiorari, the rule should extend to cases being held for the first case. *See* *Watson v. Butler*, 483 U.S. 1037, 1038-39 (1987) (Brennan & Marshall, JJ., dissenting); *Straight v. Wainwright*, 476 U.S. 1132, 1133 n.2 (1986) (Powell, J., concurring); *Harich v. Wainwright*, 475 U.S. 1074, 1075-76 (1986) (Marshall, J., dissenting); *see also* Tushnet, *supra* note 26, at 176-80.

Answering that question affirmatively, the present proposal is that whatever internal rule the Court adopts for “holds,” capital petitioners under warrant should benefit on an equal basis with other litigants from a mechanism which is designed to reduce inequities. *See supra* note 5. This would cover situations such as that presented in *Streetman v. Lynaugh*, 484 U.S. 992 (1988), where there were four votes for a hold pending the decision that would eventually be rendered in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), but not five for a stay. The latter was denied on a 4-4 vote, and the petitioner was executed several hours later by “[b]affled prison officials.” *See When A Tie Vote Means Death*, N.Y. TIMES, January 18, 1988, <http://www.nytimes.com/1988/01/18/opinion/when-a-tie-vote-means-death.html> (editorially condemning an “anomaly in the Court’s rules” that denies the benefit of holds to prisoners under warrant). For another such example, *see Rook v. Rice*, 478 U.S. 1040, 1043 (1986) (Brennan, J., dissenting) (stay denied 5-4 despite four votes for hold). *See North Carolina Killer Executed After Appeal Fails*, N.Y. TIMES, Sept. 20, 1986, <http://www.nytimes.com/1986/09/20/us/north-carolina-killer-executed-after-appeal-fails.html>

One justification for a non-majority rule for holds in general is that it is difficult to tell in advance how the ruling in one case yet to be decided will bear on another. As *Streetman* and *Rook* show, that rationale applies fully in the capital context, where the cases are notoriously procedurally complex. Accordingly, my definition of “hold” extends to other internal Court practices that would ordinarily be available in a non-warrant situation on the vote of a minority of the Justices to assist the deliberative process. *See, e.g.,* *Medellin v. Texas*, 554 U.S. 759, 765-66 (2008) (per curiam) (Breyer, J., dissenting) (allowing execution on 5-4 vote notwithstanding the votes of a sufficient number of Justices (four) to call for the views of the Solicitor General).

The proposal also extends to situations that have not usually been considered as fitting under the “hold” rubric, because they do not involve certiorari petitions, e.g. when multiple litigants in the same underlying lethal injection controversy seek stays. *See infra* Part III.C. After a stay is granted in the first case, my proposal contemplates that the requisite number of Justices may vote to “hold” later such applications. After due consideration, the Court may decide that the salient problem is not the State’s use of Drug X in executions, but rather the use of Drug X without prior disclosure to the prisoner. The Court may then make that clear by denying stays in later-arriving cases raising the first issue, or, if a case raising the first but not the second has benefited from the hold, by modifying its order as discussed *supra* note 42. *See infra* notes 70, 94 (explaining how

A. *Cases Arriving by Certiorari Should Be Stayed if Four Justices Vote to Grant Review*

In reaction to *Darden*, at least two Justices proposed that four votes be sufficient for a stay in capital cases in which certiorari had been granted,<sup>45</sup> a proposal that has garnered support from various commentators over the years.<sup>46</sup> The rationale is that the need of the capital litigant under warrant to garner five votes for a stay, although four Justices vote for certiorari, effectively nullifies the Rule of Four.<sup>47</sup>

Thomas Goldstein asserts that this proposal actually represents the current practice. Contrary to its behavior in the 1990s,<sup>48</sup> he says, the Court will now issue a stay where four Justices are ready to grant certiorari, although not where they only wish time for further consideration.<sup>49</sup> There is no recent action of the Court flatly inconsistent

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proposal would have worked in recent sets of cases before the Court). Of course, in either situation, the Court should favor all concerned with a few explanatory words, lest it be rightly compared to the oracle at Delphi, who, in the words of Heraclitus of Ephesus, “neither reveals nor conceals, but gives a sign.” See Daniel W. Graham, *Heraclitus*, STAN. ENCYCLOPEDIA PHIL. (Mar. 29, 2011), <http://plato.stanford.edu/entries/heraclitus/>; see *infra* text accompanying notes 102-05.

45. Justice Brennan did so in a memorandum to his colleagues dated September 6, 1985, as did Justice Marshall in a memorandum dated September 10, 1985. See Memorandum from Justice Thurgood Marshall, Supreme Court of the U.S., on *Darden v. Wainwright* to the Conference 2-3 (Sept. 10, 1985); Memorandum from Justice Wm. J. Brennan, Jr., Supreme Court of the U.S., on *Darden v. Wainwright* to Colleagues 3-4 (Sept. 6, 1985). As indicated above, Justice Blackmun (like Justices Stevens and Ginsburg subsequently) went farther and proposed an automatic stay of execution extending throughout first federal habeas corpus proceedings, even if certiorari had not been granted. See *supra* note 43.

46. See, e.g., Robbins, *supra* note 35, at 18-20; see also Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 673-78 (2002) (proposing an amendment to 28 U.S.C. 2101(f) providing that “Notwithstanding any other provision of law, a sentence of death shall be stayed in the event the Supreme Court grants a petition for certiorari.”).

47. There is some evidence that Chief Justice Roberts sympathizes with this view. At his confirmation hearing, he was asked about the issue and responded:

It's an issue that I'm familiar with. I do know it arose. And I thought the common practice, the current practice was that if there are four votes to grant cert that the Court would grant the stay, even though that does require the fifth vote . . . I think that practice makes a lot of sense. I don't want to commit to pursue a particular practice in an area that I'll obviously have to look at in the future, but it obviously makes great sense that if you have four to grant and that's the rule that you will consider an issue if there are four to grant. You don't want to moot the case by not staying the sentence.

*Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Hearing Before the Comm. on the Judiciary U.S. S., 109th Cong. 308-09 (2005)*

48. See *supra* notes 28-35 and accompanying text (describing cases of that period). See also *Nguyen v. Gibson*, 525 U.S. 1050 (1998) (denying stay 5-4; denying motion to permit filing of certiorari petition).

49. Tom Goldstein, *Death Penalty Stays*, SCOTUSBLOG (Oct. 13, 2007, 12:06 PM),

with this hypothesis.<sup>50</sup> But there is no empirical evidence supporting it either. The data is equally consistent with the explanation that the perceived pattern results from ad hoc negotiations by the Justices on a case-by-case basis, and that the timing of the circulation of certiorari petitions is an element of those negotiations.<sup>51</sup>

In the words of the leading treatise:

[Goldstein's hypothesis] may well be true: there has not been a grant of certiorari coupled with a denial of a stay, nor an order denying a stay and reciting that four Justices would have granted certiorari. On the other hand, no statute or Supreme Court Rule requires such a practice, no judicial opinion states that this is the current internal voting procedure of the Court, votes on certiorari are generally kept confidential, and the experience of the 1980's reveals that such a practice can break down under pressure.<sup>52</sup>

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<http://www.scotusblog.com/wp/2007/10/more-thoughts-on-death-penalty-stays> (stating that the "practice in the later Rehnquist years" was for a Justice to grant "a courtesy fifth vote for a stay of execution when there [were] four votes to grant certiorari," and that this practice "remains fully in effect under Chief Justice Roberts").

This post was a response to Adam Liptak, *4 Votes Get a Man to Court. 4 Votes Let Him Die First*, N.Y. TIMES, Oct. 8, 2007, at A13 (discussing the Court's 5-4 stay denial of August 23, 2007 in *Williams v. Allen*, 551 U.S. 1183 (2007), a case which raised lethal injection challenges that the Court agreed on September 25, 2007 to review in *Baze v. Rees*, 551 U.S. 1192, 1192-93 (2007)).

50. That is, although there are dozens of cases in the relevant time period denying stays over four dissents, they do not facially refute Goldstein's hypothesis because either: (1) the procedural posture does not involve certiorari, *see infra* notes 74-90 and accompanying text, or (2) as in *Storey v. Lombardi*, 191 L.Ed. 2d 151 (2015), *Warner v. Gross*, 135 S. Ct. 824, 824 (2015), *Goodwin v. Lombardi*, 135 S. Ct. 780, 780 (2014), *Villegas v. Texas*, 134 S.Ct. 1870 (2014); *Garcia v. Texas*, 131 S.Ct. 2866 (2011); *Williams*, 551 U.S. at 1183, *Aguilar v. Dretke*, 547 U.S. 1161 (2006), *Brown v. Crawford*, 544 U.S. 1046, 1046 (2005), *Kunkle v. Dretke*, 543 U.S. 1132 (2005), *Hubbard v. Campbell*, 542 U.S. 958, 959 (2004), *Crawford v. Schofield*, 542 U.S. 954 (2004), *Robinson v. Crosby*, 540 U.S. 1171 (2004), *Roe v. Taft*, 540 U.S. 1171 (2004), *Vickers v. Johnson*, 540 U.S. 1170 (2004), *Zimmerman v. Johnson*, 540 U.S. 1159 (2004), *Bruce v. Johnson*, 540 U.S. 1146 (2004), and *Williams v. Taft*, 540 U.S. 1146 (2004), the dissenters have not explicitly stated that they would vote to grant certiorari. *See SHAPIRO ET AL.*, *supra* note 2, at 940 (citing *Taylor v. Texas*, 131 S. Ct. 3017, 3018-19 (2011) (denying a stay of execution over four dissents); *Getsy v. Strickland*, 557 U.S. 958, 958 (2009) (denying a stay of execution over four dissents and denying certiorari without indication of any dissent); *Goodwin v. Johnson*, 531 U.S. 1120, 1120 (2001) (denying a stay of execution over four dissents and denying certiorari without indication of any dissent); *Flores v. Johnson*, 531 U.S. 987, 987 (2000) (denying a stay of execution over four dissents and denying certiorari with three of the four indicating that they would grant certiorari, but the fourth (Justice Stevens) not formally stating a vote on certiorari)).

51. On the assumption that the Clerk of the Court acts at its direction, this explanation might account for the puzzling patterns discussed *infra* text accompanying notes 65-67 & note 67.

52. SHAPIRO ET AL., *supra* note 2, at 939. In the motion for reconsideration she was not permitted to file, Taylor's counsel, after noting Goldstein's hypothesis and the lack of any public

Simply put, the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be.

*B. Cases Arriving by Certiorari Should Be Stayed if Four Justices Want More Time to Think*

More importantly as a substantive matter, even if the rule extrapolated by Goldstein in fact exists, it is unresponsive to most of the problem.<sup>53</sup> The Justices (not to mention the parties and the public) are entitled to at least as thoughtful consideration of certiorari petitions in capital cases as in others,<sup>54</sup> including discussions of the matter with their colleagues.<sup>55</sup> There is no basis as a matter of either justice or sound

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information to verify it, argued: “If the Court has indeed adopted some new practice, the public interest would be served by an announcement of it – and a stay in this case should issue while that is formulated in a thoughtful manner.” Motion for Reconsideration of Order Denying Stay of Execution, *supra* note 17, at 3.

53. See SHAPIRO ET AL., *supra* note 2, at 15 (stating that in ordinary course more than eighty-five percent of the petitions listed for a particular conference “are automatically denied review without discussion or vote,” because they have not made the list previously circulated by the Chief Justice of those certiorari cases whose prima facie merit makes them “worthy enough to take the time of the Justices . . . for discussion and voting,” but “[a]dditional cases are placed on the list if any Justice so requests”). Defending this process as a sound method for the Court “to handle its heavy caseload,” Shapiro et al. explain that the cases that do not make the list “receive the attention of each member of the Court,” because it is prepared only “after the Justices or their law clerks have had a chance to canvass all the cases scheduled for a given conference.” *Id.*

54. As has been repeatedly documented in empirical studies and acknowledged in a number of published opinions of members of the Court, the claims presented on federal habeas corpus by capital prisoners are overwhelmingly more likely to be meritorious than those of non-capital prisoners. See 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 27-28 n.27 (6th ed. 2011); see also SHAPIRO ET AL., *supra* note 2, at 931-33. Recent statistics show that capital prisoners’ federal habeas corpus petitions succeed approximately 47% of the time, compared to 3.2% for non-capital ones. See HERTZ & LIEBMAN, *supra*; see also Baumgartner & Dietrich, *supra* note 10.

55. It has sometimes been objected that allowing four votes to suffice for a stay of execution would simply mean that “four Justices out of a total number of nine could frustrate the effectuation of the will of the majority,” by voting “to grant certiorari in every death [penalty] case.” Memorandum from Justice William H. Rehnquist, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 2 (Sept. 9, 1985).

Quite apart from its implicit disparagement of the Justices’ innate professionalism, this objection is unpersuasive. First, under the existing Rule of Four, the hypothetical obstructionists can already behave in this manner in all capital cases except for the relatively few under warrant. Second, the objection has nothing to do with capital punishment. The same tactic could be used by four Justices to force plenary consideration of every case in which a corporation had lost an antitrust case. But, there are many reasons—including collegiality, the likelihood of an adverse outcome on the merits, and the probability of negative public and Congressional comment—why the minority would be unlikely to behave in this fashion. Third, the same objection extends beyond the Rule of Four itself to all actions that the Court’s practices permit to be taken by a minority. Thus, for example, suppose four Members were resolutely opposed to enforcement of environmental laws. They might routinely call for views of Solicitor General in all environmental cases, thereby

judicial administration for requiring them to commit on an accelerated schedule to grant review of a particular case because that is the only way to prevent a possibly wrongful execution.<sup>56</sup> The Justices deserve time to

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blocking enforcement actions for a number of additional months. But the same considerations already listed make it unlikely that this would happen. Fourth, and most importantly, the majority retains ultimate control. Rules by which the Court grants powers to its minority exist only at the sufferance of its majority, and there is every reason to believe that the minority is well aware of this. See Goldstein, *supra* note 49 (“The four Justices who would grant the stay . . . would likely hesitate before adopting a regular practice of protectively granting cert. . . ., recognizing that the remaining five more conservative Justices might respond by stopping granting a ‘courtesy fifth’ vote for a stay in such cases.”).

Moreover, Justice Rehnquist’s concern was in fact rebutted by actual experience soon after he gave voice to it. On February 21, 1986, at a moment when Justice Powell was on the Court and presumably would again have acted as he had in *Darden*, see *supra* text accompanying note 26, the Court issued *Moore v. Texas*, 474 U.S. 1113 (1986), in which a stay was denied on a 5-4 vote with two of the dissenting Justices (Brennan and Marshall) stating that they would grant both the stay application and certiorari petition and the two others (Blackmun and Stevens) declining to vote for certiorari and merely stating that they would grant the application for a stay. A federal district judge stayed the execution shortly before it was to take place, see *Around the Nation; Judge Stays Execution of Texas Grocer’s Killer*, N.Y. Times, Feb. 26, 1986, <http://www.nytimes.com/1986/02/26/us/around-the-nation-judge-stays-execution-of-texas-grocer-s-killer.html>, and the prisoner eventually succeeded in invalidating his death sentence, see *Moore v. Johnson*, 194 F.3d 586 (5<sup>th</sup> Cir. 1999).

56. Indeed, in a blog post subsequent to the one discussed *supra* note 49, Goldstein recognized this problem. See Goldstein, *supra* note 9 (agreeing that under the practice he previously described, “[a] difficult dilemma arises when four Justices seek a stay in a late-presented case in order to consider the petition more fully and decide whether to grant review,” because “[Justices] need the opportunity to study and reflect in order to make a decision. When there are four such votes to stay the case, a courtesy fifth vote is not automatically provided, however. The execution can go forward.”).

In Memorandum from Justice Harry A. Blackmun, *supra* note 43, at 2, the Justice wrote: “I shall oppose—indeed, I resent—the necessity of our reviewing a petition for certiorari within 12 hours of its filing here, whether that time limit is occasioned by the state court or by this Court or by a Member of it. . . . In my view, capital cases should be treated with the same consideration, and on the same schedule, as other petitioners receive.”

When Justice Brennan subsequently presented a formal proposal that the Court adopt an internal rule that four votes be sufficient to stay a capital case arriving on certiorari, one of his rationales was that this would allow adequate time for the Justices to study, and perhaps ultimately deny, the petition. See Tushnet, *supra* note 26, at 175. In *Emmett v. Kelly*, 552 U.S. 942 (2007), Justice Stevens explained that his proposal for routine stays of execution to enable the Court’s review of capital habeas cases to be completed on the ordinary schedule was intended to facilitate “orderly review,” and added that, having had the opportunity due to the Governor’s stay to conduct such a review, “I do not dissent from the Court’s decision to deny certiorari.” *Id.* at 943. See *supra* text accompanying notes 36-38 (describing case).

I hope that the primary real-world effect of my proposal would be simply to grant capital cases under warrant the same judicious processing that they would receive if they were not under warrant. See *supra* note 10; see also *infra* note 70 (observing that Court seems to have recently adopted procedures for more careful vetting of cases before announcing certiorari grants). At least four Justices—and not necessarily ones opposed to the death penalty—may well appreciate the

think.<sup>57</sup> A statement by four of them that they want that time should suffice to postpone a potentially fatal deadline created for the occasion by a party to the litigation.<sup>58</sup>

Consider, for example, the fate of the late Charles Warner of Oklahoma. Warner was a plaintiff in a lethal injection litigation originating in Oklahoma. His execution date was January 15, 2015.<sup>59</sup> Along with three other plaintiffs (with execution dates of January 29, February 19, and March 5), he was denied a preliminary injunction by the District Court, a ruling that the 10th Circuit affirmed on January 12,

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benefits of a thorough record review. Such Justices might choose to adopt a blanket policy (e.g., voting for stays in all first capital habeas petitions) designed to achieve such benefits, particularly if they knew that their vote would then have added weight respecting any proposal to modify the stay. *See supra* note 42.

Once they became aware of the Justices' practices, the States might well modify their sometimes-abusive behavior in date-setting. *See* ABA GUIDELINES, *supra* note 12, at 1081-82; Memorandum from Justice Harry A. Blackmun, *supra* note 43, at 2 ("If we make clear to the States that this Court will insist upon having sufficient time adequately to review first federal habeas petitions, we shall eliminate the current incentive States possess to set execution dates that force hasty review of often problematic cases."). Moreover, if the message were sent, lower courts considering stay applications would read it. *Cf.* Memorandum from Justice Harry A. Blackmun, *supra*, at 2 (observing that "the primary responsibility" for stays should lie with the lower courts, who should "not pass the buck to us"). These are among the good reasons for the Justices to publicize their practices. *See infra* text accompanying note 105. As long as the outcome at the Supreme Court level is unpredictable, one can hardly blame counsel on both sides for trying their luck; in fact, that is exactly what one would expect. *See* B.F. Skinner, *Superstition' in the Pigeon*, 38 J. EXPERIMENTAL PSYCHOL. 168, 171 (1947) ("A few accidental connections between a ritual and favorable consequences suffice to set up and maintain the behavior in spite of many unreinforced instances.").

57. *See* Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword The Time Chart of the Justices*, 73 HARV. L. REV. 84, 85-94, 100 (1959). It may be worth recalling that much of the substance of this classic article was a critique of the Court's ruling in favor of the capital habeas corpus petitioner in *Irvin v. Dowd*, 359 U.S. 394 (1959).

58. In *Autry v. Estelle*, 464 U.S. 1, 2 (1983), the Court denied a stay pending the filing of a certiorari petition, stating that "[h]ad applicant convinced four members of the court that certiorari would be granted on any of his claims, a stay would issue," but rejecting the idea of "a rule calling for an automatic stay, regardless of the merits of the claims presented, where the applicant is seeking review of the denial of his first federal habeas corpus petition." Speaking through Justice Stevens, the four dissenters replied:

The practice adopted by the majority effectively confers upon state authorities the power to dictate the period in which these federal habeas petitioners may seek review in this Court by scheduling an execution prior to the expiration of the period for filing a certiorari petition. Shortening the period allowed for filing a petition on such an ad hoc basis injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error. Procedural shortcuts are always dangerous.. Greater—surely not lesser—care should be taken to avoid the risk of error when its consequences are irreversible.

*Id.* at 6 (footnote omitted).

59. *See* Warner v. Gross, 776 F.3d 721, 724 (10th Cir. 2015).

2015 in a plenary opinion on the merits.<sup>60</sup> The following day, January 13, the four plaintiffs filed a petition for certiorari and an application for a stay of execution.<sup>61</sup> The government responded on the next day, January 14, to both the stay motion and the certiorari petition,<sup>62</sup> and plaintiffs filed replies in support of both on January 15,<sup>63</sup> the scheduled execution date. Later that day, the Court summarily denied the stays on a 5-4 vote over a reasoned eight-page dissent by Justice Sotomayor that laid out the substantive legal issues presented by the case and concluded, “I hope that our failure to act today does not portend our unwillingness to consider these questions.”<sup>64</sup>

The Court did not rule upon (and the four dissenters did not explicitly record a position respecting) certiorari.<sup>65</sup> In fact, as subsequently became clear when the docket sheet was published, the Justices did not formally have the certiorari petition before them. Although it had been filed on January 13 along with the stay application, the petition was not distributed to the Court until January 20—five days after Warner’s execution<sup>66</sup>—for consideration at its conference of

60. *Id.* at 724, 727, 736. The Tenth Circuit’s ruling was a final judgment reviewable by certiorari, and, in ordinary course, the petition would have been due ninety days later. *See* SUP. CT. R. 13.1.

61. *See Search - Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14a761.htm> (last visited Mar. 3, 2015).

62. *Id.* In ordinary course, the State’s answer to the certiorari petition would have been due on February 13, 2015, thirty days after the petition was docketed. *See* SUP. CT. R. 15.3.

63. *See Search - Supreme Court of the United States*, *supra* note 61. In ordinary course, plaintiffs would have had a minimum of fourteen days to file reply papers in support of the certiorari petition. *See* SHAPIRO ET AL., *supra* note 2, at 317.

64. *Warner v. Gross*, 135 S. Ct. 824, 824, 828 (2015) (Sotomayor, J., dissenting).

65. *Id.* at 824-28. A cold-eyed observer might have speculated that they would not announce a position in favor of certiorari out of concern for a potential adverse outcome on the merits. *See* SHAPIRO ET AL., *supra* note 2, at 333. That dynamic is a function of the Rule of Four itself. *See supra* note 55. In all cases where there are only four Justices in favor of certiorari, they will ultimately need to decide whether to insist that the case be heard on the merits. *See, e.g.,* *Brown v. Texas*, 522 U.S. 940 (1997). But in all cases except capital ones under warrant the four will first have the benefit of internal communications among the full body. For example, they might learn from an interchange before or during conference that five or more Justices would be prepared to grant review to some other iteration of the question or to a case in some other procedural posture. In capital cases under warrant, assuming that Goldstein’s description of the Court’s stay practice is correct, the petitioner only lives if the four Justices are willing to demand plenary review in the absence of the information that would normally inform their decision. Leaving entirely aside the unfairness to the petitioner, it is very difficult to see how this state of affairs serves the institutional interests of the Court.

66. *See* Erik Eckholm, *Oklahoma Executes First Inmate Since Slipshod Injection in April*, N.Y. TIMES (Jan. 15, 2015), <http://www.nytimes.com/2015/01/16/us/oklahoma-execution-charles->

January 23.<sup>67</sup> On that day, the petition was granted on behalf of the remaining three plaintiffs.<sup>68</sup> The day before the next one was to be executed, the Court stayed the executions of all three.<sup>69</sup>

The Rule of Four was preserved; the Goldstein hypothesis remained unrefuted. Only fairness, good sense, and sound judicial administration were sacrificed. If a collegial body had been acting as it should, the four votes for a stay would have been sufficient to halt Warner's execution. The Court could then have considered the certiorari petition judiciously in light of the minority's views and responded to it

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warner-lethal-injection.html.

67. See *Search - Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-7955.htm> (last visited March 22, 2015).

The execution of Walter Storey, one of the plaintiffs in the Eighth Circuit lethal injection litigation described *supra* text accompanying notes 14-16 followed a similarly jarring sequence of events. On February 10, 2015, he filed a pre-judgment certiorari petition and an application for a stay of his execution scheduled for later that day. The stay application was denied on a 5-4 vote, see *Storey v. Lombardi*, 191 L.Ed. 2d 151 (2015), and he was executed in the early morning hours of February 11. See Jim Salter, *Walter Storey Executed for Killing Jill Frey*, [http://www.huffingtonpost.com/2015/02/10/walter-storey-execution\\_n\\_6658088.html](http://www.huffingtonpost.com/2015/02/10/walter-storey-execution_n_6658088.html). The certiorari petition was not distributed until February 12, for the conference of February 27, see *Search - Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-8362.htm> (last visited March 27, 2015). It was dismissed as moot by an order dated March 2, 2015. See *Storey v. Lombardi*, 2015 U.S. LEXIS 1586 (U.S. Mar. 2, 2015).

This pattern has been followed on at least one other occasion in the past year, in the case of Jeffrey Ferguson, another of the plaintiffs in the same litigation. On March 25, 2014, he filed a pre-judgment certiorari petition and a stay application. The latter was denied that day over four dissents, see *Ferguson v. Lombardi*, 134 S. Ct. 1582 (2014), and he was executed early the following morning, see *Missouri executes St. Louis-area man who killed teen girl*, ST. LOUIS POST-DISPATCH, March 26, 2014, at A2. His certiorari petition was not distributed until April 3, for the conference of April 18, see *Search - Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-9374.htm> (last visited March 26, 2015), and was denied by an order dated April 21, 2014. See *Ferguson v. Lombardi*, 134 S. Ct. 1927 (2014).

In contrast, the petitions for certiorari before judgment filed by two other of the plaintiffs were, as one would expect, distributed along with their stay applications and denied in a single order. For Paul Goodwin's case see *Goodwin v. Lombardi*, 135 S. Ct. 780, 780 (2014); *Search - Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-7406.htm> (last visited March 27, 2015), and for Leon Taylor's case see *Taylor v. Lombardi*, 135 S. Ct. 701 (2014); *Search - Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-7157.htm> (last visited March 25, 2015).

Until the Court vouchsafes—as it should, see *infra* Part IV—some reliable explanation for the seemingly disparate treatment of identically-situated litigants, prudent capital defense counsel representing an inmate under warrant should as a matter of practice file not just a stay application and a certiorari petition but also a motion to expedite consideration of the latter. See, e.g., *Martinez v. United States*, 557 U.S. 931 (2009). As a matter of policy, such a motion (which might itself be denied or deferred by five Justices) should not be necessary, and under my proposal it would not be.

68. See *Glossip v. Gross*, 190 L.Ed. 2d 929 (2015).

69. See *Glossip v. Gross*, 191 L.Ed. 2d 148 (2015).

in a thoughtful way.

Instead:

◆ Warner was executed. His identically-situated co-plaintiffs were not, and will receive merits review of their cases.

◆ The Court was under pressure to act before yet another plaintiff was executed.<sup>70</sup>

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70. Assuming that the practice is as described by Goldstein, the remaining plaintiffs would have been executed one by one as long as the Court did not release an order granting certiorari. In the event that it did so at any time before the last one died, all of the survivors would have been granted stays.

In short, the more care the Court—commendably—took in considering the petition, the more plaintiffs would have died. *Cf.* John Elwood, *Relist Watch What Does the Court's Relist Streak Mean?*, SCOTUSBLOG (Apr. 3, 2014, 11:50 AM), <http://www.scotusblog.com/2014/04/relist-watch-what-does-the-courts-relist-streak-mean> (suggesting that the Court has adopted the practice of relisting cases at least once following an initial conference vote for certiorari in order to allow time for careful re-vetting before announcement of the grant).

My proposal would end this self-inflicted institutional wound. Under it, Warner would have received a stay on January 15, and the other petitioners would have benefitted from it automatically. *See also infra* note 94 (providing similar example of the working of my proposal). A situation that is unavoidably bad, *see supra* note 7, would at least not be have been made avoidably worse.

In the same spirit of pragmatism, my proposal provides that four Justices could grant a stay in a capital case whenever they thought this was the sensible administrative course regardless of procedural subtleties. *See infra* Part III.C.

In *Romero v. Collins*, 504 U.S. 936 (1992), a stay was denied 5-4 on May 19, 1992. Speaking for three of the dissenters (himself and Justices Blackmun and Kennedy), Justice Stevens observed that certiorari petitions in *Graham v. Collins*, 950 F. 2d 1009 (5<sup>th</sup> Cir. 1992) (en banc) and two other cases raising the claim advanced by Romero (which had been rejected 7-6 by the Fifth Circuit) were scheduled to be discussed at the Court's conference of May 29, and continued, "In my opinion it is unseemly not to stay petitioner's execution until after that time so that his application and petition receive at least the same consideration as will be given to those whose petitions for certiorari are now pending on the Conference list." Justice O'Connor voted for a stay of execution but did not join this statement. Romero was executed on May 20, *see* <http://www.deathpenaltyinfo.org/jesus-romero> (last visited March 26, 2015). The Court soon afterwards granted the petition in *Graham*, *see* *Graham v. Collins*, 504 U.S. 972 (1992), and went on to decide the case on the merits, *see* *Graham v. Collins*, 506 U.S. 461 (1993). Under my proposal Romero would have been alive at the time. Similarly, my proposal would have led to the grant, rather than the 5-4 denial, of a stay in *Bundy v. Dugger*, 488 U.S. 1036 (1989), where the petitioner intended to raise on certiorari an issue which the Court had already agreed to review in another case.

Neither case would be covered by the separate portion of my proposal respecting "holds." *See supra* note 44 and accompanying text. In *Romero* only three, not four, Justices would have explicitly granted the stay on that basis, *see also* *Daugherty v. Florida*, 488 U.S. 936 (1988) (denying stay 5-4; three dissenters would hold petition pending decision in a granted case; one would grant stay for unstated reasons); *Jones v. Smith*, 475 U.S. 1076 (1986) (denying stay 5-4; two dissenters would hold petition pending decision in a granted case; two would grant stay for unstated reasons), and *Bundy* presented the obstacle that one cannot "hold" a petition that has not yet been

◆ The surviving plaintiffs had to overcome the psychological reluctance of the Court to rule in their favor notwithstanding its decision to let Warner go to his death.<sup>71</sup>

Although the Warner case got more publicity than most,<sup>72</sup> there was nothing unusual about it. The Court's dysfunctional handling of capital cases under warrant regularly produces similarly negative outcomes and will continue to do so for so long as the Court acquiesces in the subversion of its processes by the self-help tactics of certain States. In adopting my proposal to end the systemic problem and place all litigants on an equal footing, the Court would be benefitting not just itself but the public it serves.

### C. Cases Arriving by Any Procedural Route Should Be Stayed if Four Justices so Vote

A rule that four votes sufficed to stay an execution upon the grant of certiorari in a capital case under warrant, or upon the filing of a certiorari petition, or even upon the filing of a stay application seeking time for the filing of a certiorari petition<sup>73</sup> would not go far enough.

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filed.

71. The Justices might reasonably believe that they were acting, or would be criticized as having acted, inconsistently if they granted review to the remaining plaintiffs. The late-night ruling on Warner's stay application thus increased the risk of a lower-quality ruling on the uncirculated certiorari petition.

Similarly, there has as yet been no certiorari petition filed seeking review of the ruling in *Zink v. Lombardi*, 2015 U.S. App. LEXIS 3550 (8<sup>th</sup> Cir. Mar. 6, 2015), in which the Eighth Circuit rejected on the merits the current challenge to Missouri's lethal injection protocol. Any such certiorari petition will necessarily arrive under a cloud created by the executions of other plaintiffs in the same case over four dissents. See *supra* text accompanying notes 14-16 & note 16.

Like the other effects of the Court's current injudicious handling of cases under warrant, this dynamic is both unfair to the litigants and adverse to the best interests of the Court itself.

72. See, e.g., Adam Liptak, *Execution Case Highlights the Power of One Vote*, N.Y. TIMES, Jan. 6, 2015, at A13.

73. See, e.g., *Clayton v. Lombardi*, 2015 U.S. LEXIS 1837 (U.S. Mar. 17, 2015) (described *supra* note 16); *Derrick v. Collins*, 497 U.S. 1042 (1990) (denying such a stay by 5-4 vote); *Shaw v. Armontrout*, 495 U.S. 924 (1990) (same); *McCoy v. Lynaugh*, 490 U.S. 1086 (1989) (same); *Evans v. McCotter*, 479 U.S. 1001 (1986) (same); *Stewart v. Wainwright*, 478 U.S. 1050 (1986) (same); *Wicker v. McCotter*, 478 U.S. 1033 (1986) (same); *Knighton v. Maggio*, 468 U.S. 1229 (1984) (same). As described *supra* text accompanying notes 24-26, Darden's stay application in 1985 was initially made in this posture but the stay papers were subsequently transformed into a certiorari petition at his lawyer's request.

Of these prisoners, Shaw was not executed, see *Retarded Convict's Sentence Is Commuted*, N.Y. TIMES, June 4, 1993, <http://www.nytimes.com/1993/06/04/news/retarded-convict-s-sentence-is-commuted.html> (last visited March 26, 2015), and Stewart was not executed until eight years later, see <http://www.deathpenaltyinfo.org/roy-allen-stewart> (last visited March 27, 2015).

Examples of executions prior to decisions on already-filed certiorari petitions include the *Storey* and *Ferguson* cases cited *supra* note 67, *Bruce v. Johnson*, 540 U.S. 1206 (2004)

Much litigation involving stays of execution lacks any connection to a certiorari petition.<sup>74</sup> In those instances, the traditional Rule of Four does not apply,<sup>75</sup> but its rationale—that the votes of four Justices should be sufficient to cause the Court to take a case seriously—does.<sup>76</sup>

(denying certiorari petition on February 23, 2004 following 5-4 stay denial on January 14 in *Bruce v. Johnson*, 540 U.S. 1146 (2004) and consequent execution of petitioner that day, see <http://www.deathpenaltyinfo.org/kenneth-bruce> (last visited March 26, 2015), *Anderson v. Collins*, 496 U.S. 994 (1990) (dismissing certiorari petition on June 19, 1990 following 5-4 stay denial on May 16 in *Anderson v. Collins*, 495 U.S. 942 (1990) and consequent execution of petitioner that day, see <http://www.deathpenaltyinfo.org/johnny-anderson> (last visited March 26, 2015), and *Paster v. Lynaugh*, 493 U.S. 884 (1989) (dismissing certiorari petition on October 10, 1989 following 5-4 stay denial on September 13 in *Paster v. Lynaugh*, 492 U.S. 939 (1989) and consequent execution of petitioner on September 20, see <http://www.deathpenaltyinfo.org/james-paster>) (last visited March 26, 2015).

74. For example, in *Medellin v. Texas*, 554 U.S. 759, 759 (2008) (denying stay 5-4), the stay was sought in connection with motions to the Court to recall and stay its mandate in *Medellin v. Texas*, 552 U.S. 491 (2008) and for an original writ of habeas corpus. As indicated above, see *supra* note 12, there is every reason to believe that the number of such situations will increase in the coming years.

Capital inmates frequently find themselves in procedural situations in which the question at hand is the grant or vacatur of an interlocutory stay or injunction with no certiorari petition anywhere in sight. Sometimes the underlying capital litigation sounds in habeas corpus, e.g., *Roper v. Nicklasson*, 134 S. Ct. 822, 822 (2013) (vacating by 5-4 vote a stay of execution entered by Court of Appeals); see *SHAPIRO ET AL.*, *supra* note 2, at 936-38, but often it does not. The scenario is common in lethal injection litigation. See *SHAPIRO ET AL.*, *supra* note 2, at 934-36. For examples, see *Hill v. McDonough*, 548 U.S. 940, 941 (2006) (described *supra* note 39 and accompanying text); *Emmett v. Johnson*, 552 U.S. 987, 987 (2007) (described *supra* text accompanying notes 36-38 & note 38); *Brewer v. Landrigan*, 133 S. Ct. 445, 445 (2010) (described *infra* text accompanying notes 77-80), as well as *Ringo v. Lombardi*, 135 S. Ct. 40, 40 (2014) and *Worthington v. Lombardi*, 135 S. Ct. 22, 22 (2014), both of which are described *infra* text accompanying notes 94-96. It also arises in various other capital contexts. For examples, see *Wainwright v. Adams*, 466 U.S. 964, 964 (1984) (described *infra* note 76); *Mullin v. Hain*, 538 U.S. 957 (2003) (described *infra* text accompanying notes 81-85).

75. For example, under the 1996 habeas corpus statute, certain Court of Appeals' decisions may not be reviewed by certiorari; capital litigants must instead petition the Supreme Court for an original writ of habeas corpus. See 28 U.S.C. § 2244 (2012); *In re Davis*, 557 U.S. 952, 952-54 (2009) (invoking procedure successfully); *Felker v. Turpin*, 518 U.S. 651, 658-61 (1996); *In re Hill*, 715 F.3d 284, 301 n.20, (11th Cir. 2013) (noting that although 28 U.S.C. § 2244(b)(3)(E) meant petitioner could not seek certiorari from Circuit's adverse decision, he could seek Court review by original writ). But the Court: (a) does not follow the Rule of Four with respect to giving plenary consideration to original habeas petitions, see, e.g. *In re Stanford*, 537 U.S. 968 (2002) (summarily denying original writ in capital case on 5-4 vote), and (b) will only grant stays in such cases on the vote of five Justices. See *In re Graham*, 530 U.S. 1256 (2000) (summarily denying petition for original writ, and refusing stay over four dissents); *In re Wright*, 529 U.S. 1001, 1001 (2000) (same); *In re Tarver*, 528 U.S. 1152, 1152 (2000) (same); *In re Davis*, 521 U.S. 1142 (1997) (denying stay 5-4; denying original writ without indication of vote count); see also Robbins, *supra* note 35, at 2, 4-6, 22-24, 30 (criticizing Court for sending petitioner in *Tarver* on a "bizarre trip through" a "procedural maze" that relied on unpublished rules "cloaked in secrecy" to deny relief, and calling upon it to adopt openly a Rule of Four applicable to such cases).

76. See *Wainwright*, 466 U.S. at 964-66 (Marshall, J., dissenting). In his dissent from the

One example is the case of the late Jeffrey Landrigan. As plaintiff in a civil action challenging Arizona's lethal injection procedures, Landrigan had succeeded in the District Court, the Ninth Circuit, and the en banc Ninth Circuit in enjoining his execution until such time as the State provided certain information concerning the drugs it planned to use to execute him.<sup>77</sup> On the State's late-night application, the Supreme Court vacated the District Court's restraint by a 5-4 vote, and Landrigan was executed forthwith.<sup>78</sup>

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Court's 5-4 vacatur of the stay of execution entered by the court of appeals, Justice Marshall wrote: "After having had less than a day to consider the judgment of the Court of Appeals, this Court now vacates that judgment, thereby opening the way to Adams' execution. The haste and confusion surrounding this decision is degrading to our role as judges. We have simply not had sufficient time with which to consider responsibly the issues posed by this case. Indeed, the Court is in such a rush to put an end to this litigation that it has denied my motion to defer its action for 24 hours in order for me to write a more elaborate dissent . . . [C]aution has been thrown to the winds with an impetuosity and arrogance that is truly astonishing. What appears to have been forgotten here is that we are not dealing with mere legal semantics; we are dealing with a man's life. . . . [T]he Court has utterly failed to attend to this case with the careful deliberation that it deserves and has thus committed an error with respect to process as well as result."

*Id.* at 965-66.

The *Hill* case raises similar issues. *See supra* notes 39-41 and accompanying text. Leaving aside the question of mootness, the two rulings described could be made formally consistent with both each other and the Rule of Four by hypothesizing that in *Hill v. McDonough*, 548 U.S. 940, 941 (2006) (denying interlocutory injunction; *but cf. supra* note 39 (noting statement of Shapiro et al. that the *Hill* ruling came on "an application for a stay of execution pending certiorari")), four Justices questioned whether the Eleventh's Circuit's equitable holding was consistent with the Court's recent decision in *Hill's* favor in *Hill v. McDonough*, 547 U.S. 573, 578, 585 (2006), but that in *Hill v. McDonough*, 549 U.S. 987, 987 (2006) (denying certiorari after *Hill's* death), no Justice thought the ruling below was cert-worthy by traditional criteria. That would leave only the question of what difference any of this should make in deciding whether the Court acted prudently in denying a stay in a situation where four Justices believed that the Court of Appeals had given an unduly constricted reading to a prior mandate of the Court.

To answer a question that I hope many fewer readers are likely to ask, *Hill* does not contradict Goldstein's hypothesis regardless of its actual procedural posture. If the Justices' 5-4 stay denial did represent a ruling on a request for an interlocutory injunction, then it fell into group (1) described *supra* note 50. If the ruling was on an application for a stay pending certiorari, then it fell into group (2).

77. *See Landrigan v. Brewer*, No. CV-10-02246, 2010 WL 4269559, at \*1, \*12 (D. Ariz. 2010), *aff'd*, 625 F.3d 1144, 1145 (9th Cir. 2010), *reh'g en banc denied*, 625 F.3d 1132, 1132-33 (9th Cir. 2010).

78. *See Brewer*, 562 U.S. 996 (criticizing plaintiff for having made insufficient showing to justify District Court's order); John Schwartz, *Murderer Executed in Arizona*, N.Y. TIMES, Oct. 28, 2010, at A19.

The converse situation, which also would have resulted in a stay under my proposal, arose in *Ferguson v. Lombardi*, 134 S. Ct. 1582 (2014). There, the District Court had ordered the State to disclose certain information about its lethal injection protocol, the Eight Circuit vacated the order on a petition for mandamus, *see In re Lombardi*, 741 F.3d 888 (8th Cir. 2014), and the Supreme Court denied a supervisory stay on a 5-4 vote, *see Ferguson, supra*. As indicated *supra* note 67, Jeffrey

Under my proposal, the Court would, instead, have paused to consider the concerns of the four dissenting Justices. Although the Court's rapidly-issued order does not elucidate these, they were doubtless based on considerations appropriate to the procedural context, e.g., questions as to the basis on which the Court was exercising jurisdiction,<sup>79</sup> or as to whether the State had engaged in inequitable conduct by withholding information it had been ordered to provide below and then relying on the absence of that information to prevail in the Supreme Court.<sup>80</sup>

My proposal, similarly, would have resulted in a stay of the execution of Scott Allen Hain. The issue in controversy as his execution approached and his lawyers were seeking clemency from the Governor was whether the applicable federal statute authorized payment to counsel for their efforts.<sup>81</sup> A divided Tenth Circuit panel gave a negative answer, but noted that the Circuits were split on the question.<sup>82</sup> It granted a stay

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Ferguson was executed on March 26, 2014.

79. The District Court's opinion, headed "ORDER GRANTING MOTION FOR A TEMPORARY RESTRAINING ORDER," *Brewer*, 2010 WL 4269559, at \*1, concluded, "IT IS HEREBY ORDERED that Plaintiff's Motion for a Temporary Restraining Order or a Preliminary Injunction is granted . . . [and] Defendants are enjoined from carrying out Plaintiff's sentence of death until further order of the Court." *Id.* at \*12 (citation omitted). The State took an appeal from this order (which would have been proper in the case of a preliminary injunction, but not of a temporary restraining order, *see* 28 U.S.C. § 1292(a)(1) (2012)), and the Ninth Circuit explicitly determined to "construe [the] order as one for a preliminary injunction," *Landrigan*, 625 F.3d at 1145 n.1, which is plausible enough. The order of the Supreme Court, however, reads: "[A]pplication to vacate the order by the district court granting a temporary restraining order . . . is granted." *Brewer*, 562 U.S. at 996. If, indeed, the District Court's order were a temporary restraining order, the Court's jurisdiction to vacate it would have been "a matter which is doubtful at best." *See McGraw-Hill Cos. v. Proctor & Gamble Co.*, 515 U.S. 1309, 1309-11 (1995) (Stevens, Circuit Justice).

80. *See* John Schwartz, *Murderer Executed in Arizona*, N.Y. TIMES (Oct. 27, 2010), [http://www.nytimes.com/2010/10/28/us/28execute.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2010/10/28/us/28execute.html?_r=0&pagewanted=print). This article reported my comment:

"The state flatly stonewalled the lower courts by defying orders to produce information, and then was rewarded at the Supreme Court by winning its case on the basis that the defendant had not put forward enough evidence. That is an outcome which turns simple justice upside-down and a victory that the state should be ashamed to have obtained."

*Id.* The District Court had observed: "[A] party cannot refuse to provide discovery necessary to the opposing party's case and then claim that the opposing party's claims fail for lack of factual support." *Landrigan*, 2010 WL 269559, at \*10 n.6; *see also* Editorial, *No Justification*, N.Y. TIMES, Oct. 29, 2010, at A30 (commenting editorially that the Court "failed, shamefully" in allowing execution "to proceed based on [the] stark misrepresentation" that Landrigan had failed to produce evidence when, in fact, "the state defied four orders from a federal district court to produce it").

81. *See Hain v. Mullin*, 324 F. 3d 1146, 1147 (10th Cir. 2003).

82. *See id.* at 1147, 1149.

of execution pending a petition for en banc review; the en banc Court of Appeals granted review and declined to vacate the stay.<sup>83</sup> On the government's last-minute motion, and over the dissent of four Justices, the Supreme Court vacated the stay in an unadorned order,<sup>84</sup> and Hain was executed that night.<sup>85</sup>

Subsequent events suggest that the Court would have done well to take the time for full consideration of the views of its four Members, who were unpersuaded that it had acted prudently.<sup>86</sup> Hain's attorneys continued to pursue payment, and eventually the en banc Tenth Circuit concluded, in an 8-3 opinion written by the dissenting panel judge, that the federal statute entitled them to it.<sup>87</sup> In due course, the Supreme Court cited this opinion in its 7-2 ruling agreeing with that conclusion.<sup>88</sup>

The problem before the Court in these cases had to do with the wise exercise of its authority in ruling on the applications before it, not with the Rule of Four applicable to certiorari petitions. No constructive purpose would be served—and, indeed, collateral damage to the relevant law might be done<sup>89</sup>—by forcing capital litigants to contort those situations into ones involving certiorari petitions simply in order to benefit from a putative four-votes-for-stay rule originating in a different

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83. See *Hain v. Mullin*, 327 F.3d 1177, 1179 (10th Cir. 2003).

84. *Mullin v. Hain*, 538 U.S. 957, 957 (2003). Because the majority tendered no explanation, there is no actual rationale to discuss, only such hypothetical ones as a student may create. For example, perhaps the majority thought that, regardless of how the underlying issue of compensating the lawyers for clemency efforts was resolved, there would have been no impact on the inmate's situation because he did, in fact, have counsel at the time. If so, it might be worth pointing out that the extensive efforts needed for professionally competent clemency representation in a capital case, see ABA GUIDELINES, *supra* note 12, at 1088-90 (describing duties of clemency counsel), must begin far in advance of the execution date. In any event, although an order accompanied by a rationale would have been better than the one actually issued, see *infra* text accompanying note 104, the right place for sorting out the competing legal arguments was in the courts before Hain's execution, not in the law reviews afterwards.

85. See *Hain*, 327 F.3d at 1179.

86. Mindful that the timing of Supreme Court merits consideration of issues of general importance to capital litigation has already resulted in a steep body count among prisoners who were right too soon, see *supra* note 7, those Justices might well have thought that the Court was unnecessarily risking the creation of another such situation by stepping in to truncate orderly consideration below of an issue that was percolating through the Circuits.

87. See *Hain v. Mullin*, 436 F.3d 1168, 1171, 1175 (10th Cir. 2006) (en banc).

88. See *Harbison v. Bell*, 566 U.S. 180, 194 (2009).

89. There is an extensive body of law on interlocutory appellate stays and injunctions, one whose rules are designed in general for situations remote from capital litigation. See SHAPIRO ET AL., *supra* note 2, ch. 17. The soundness of those rules should be considered in connection with the situations they were designed to address, see, e.g., Jill Wieber Lens, *Stays Pending Appeal: Why the Merits Should Not Matter*, <http://ssrn.com/abstract=2571003> (last visited March 27, 2015) (forthcoming Florida State University Law Review), while the special concerns of capital cases under warrant should be dealt with through a rule addressed to that context.

context ninety years ago. There is no policy justification for a requirement that counsel for the inmate under warrant file a certiorari petition that would not otherwise be supported by professional considerations.<sup>90</sup>

The current murky situation, however, encourages such behavior—further burdening the Court and opening new possibilities for arbitrariness. In *Taylor*,<sup>91</sup> for example, the inmate’s Court filings included a petition for certiorari before judgment, no doubt because counsel hoped that filing such a petition—notwithstanding its modest probabilities of success<sup>92</sup>—would improve the chances of obtaining a stay in the event that four Justices favored one.<sup>93</sup>

But there is no sound basis for a rule that would have granted a stay to Taylor while denying one to his late co-plaintiffs, Michael Worthington and Earl Ringo. Both those inmates had sought stays a few months earlier in the same litigation under identical circumstances (i.e.,

90. In Landrigan’s case, for example, counsel would have had to file a moonshot certiorari petition in a situation where he had been the prevailing party below. *See id.* at 88-89, 426. This would be a bizarre requirement indeed to impose on a party opposing his adversary’s motion to vacate an interlocutory restraint entered below.

91. *See supra* text accompanying notes 14-21 (describing *Taylor*). The discussion in text also applies to the case of Goodwin, another plaintiff in the same litigation, whose filings a few weeks after Taylor’s included a certiorari petition. *See Goodwin v. Lombardi*, 135 S. Ct. 780, 780 (2014); *see supra* notes 15-16.

92. *See SHAPIRO ET AL.*, *supra* note 2, at 85-86, 287-88. Taylor’s theory in support of acceleration was that the Eighth Circuit, which had made its views on the merits known during prior litigation, had been irresponsibly dilatory in deciding the pending appeal, with the result that plaintiffs were being progressively executed in deference to an anticipated circuit court ruling that was unlikely to provide the Supreme Court with any additional illumination. *See* Petition for Writ of Certiorari for Defendant-Appellant at 30-31, *Taylor v. Lombardi*, 135 S. Ct. 701 (2014) (No. 14-7157).

93. *See supra* note 16 and accompanying text (noting prior stay applications arising from the same litigation that had received four votes). If, indeed, that was counsel’s strategy, she may have considered it successful to the extent that the presence of the certiorari petition put her in a position to argue for reconsideration on the basis that the Court’s action was inconsistent with the Rule of Four. *See supra* notes 20-21 and accompanying text. As indicated above, *see* text accompanying note 75, the Rule of Four only applies to cases coming to the Court by certiorari. *Cf.* Memorandum from Justice William H. Rehnquist, *supra* note 55, at 3 (stating that the Court had determined at the time of *Barefoot v. Estelle*, 463 US. 880 (1983) (discussed *infra* note 106) that five votes were required to grant certiorari before judgment, and that stay practice should correspond). Whether Justice Rehnquist’s memorandum accurately reports past or current practice, and whether any such considerations entered into the Court’s summary disposition of Taylor’s case, are, of course, questions that went unaddressed by that disposition. This is regrettable. As discussed *infra* Part IV, there is no good reason why public knowledge respecting basic matters of Court practice in capital cases depends upon the accuracy of speculative deductions based upon arcane data. Whatever the rules are, the Court should announce them.

with their appeal of the District Court's dismissal of the action pending undecided in the Eighth Circuit), and were denied on a 5-4 votes in the Supreme Court.<sup>94</sup> The substantial relief that all three litigants desired was for the Supreme Court to grant a stay of execution while the Circuit considered the appeal.<sup>95</sup> Distinguishing Taylor's case on the basis that counsel for Worthington and Ringo had, quite rationally, not inflicted a tangential piece of paper on the Court would represent formalism gone mad. The three prisoners were identically situated in every respect that mattered.<sup>96</sup> Having satisfied four Justices that the stay equities were in their favor, all three deserved to have had their executions stayed. Under my proposal, all three would have.

#### IV. MOVING FORWARD

The first needed step is for the Court to stop permitting executions when four Justices object. It should take that step.

If it did, though, the rest of us might never know it had. At the very least, the information would probably not reach us for many decades.<sup>97</sup> If the Court adopted my proposal in full tomorrow but made no other change to its existing way of doing business we earthlings would be

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94. See *Ringo v. Lombardi*, 135 S. Ct. 40, 40 (2014); *Worthington v. Lombardi*, 135 S. Ct. 22, 22 (2014). Both were executed in consequence. See *supra* note 16.

Under my proposal, four Justices could have determined in May, when the Court granted a stay to one of the plaintiffs in the underlying litigation, Russell Bucklew, that all subsequently-arriving plaintiffs from that case would be similarly treated. See *Bucklew v. Lombardi*, 134 S. Ct. 2333, 2333 (2014). Or they might have concluded that Bucklew's situation was unique, and did not warrant such a "hold." See *infra* note 95 (describing *Bucklew*). In that event, Worthington's execution would have been stayed in consequence of the Court's 5-4 decision of August 5, *Worthington*, 135 S. Ct. at 22, and each of the later-arriving cases listed *supra* note 16 would have benefitted from the automatic stay described *supra* note 44 and accompanying text; see also *supra* note 70 (providing a similar example of the working of my proposal).

95. The Court had, earlier in the year, granted exactly that relief in the case of another plaintiff in the same litigation, one who claimed that he had a particular medical condition making application of the State's lethal injection protocol to him particularly risky. See *Bucklew*, 134 S. Ct. at 2333 ("[The] [a]pplication for stay of execution of sentence of death . . . [is] treated as an application for stay pending appeal in the . . . Eighth Circuit. [The] [a]pplication [is] granted . . .").

96. See *supra* note 16 and accompanying text.

97. Depending on the arrangements today's Justices reached when they archived their papers, and depending on the contents of those papers, the data might become known eventually. At that time, of course, it would be describing practices long past. For example, in Memorandum from Justice William J. Brennan, Supreme Court of the U.S., to the Conference (June 25, 1984) (Blackmun Papers, Library of Congress, Box 409, Folder 3) the Justice reports the policies that he and Justice Rehnquist have concluded should be followed when five Justices wish to dismiss as improvidently granted a certiorari petition that had been granted with four votes, see *supra* note 42. The last sentence of the Memorandum reads: "Finally, we think our policy on this issue is a matter best left unpublished and should be treated as an internal rule." *Id.* at 2.

aware of nothing except the absence of stay denials over four dissents. We would be left to guess whether some change in practice had taken place, and precisely what the contours of the change might have been.

An experienced observer of the Court has recently commented that its:

internal procedures are largely unwritten, developing in common law fashion and documented, if at all, in internal memoranda that become public only when the papers of a retired or deceased Justice are released. The Court's published rules principally address the ordinary practice of lawyers appearing *before* the Court; even an internal matter as fundamental as the Rule of Four, specifying that it takes the votes of four Justices to grant certiorari, does not appear in a statute or formal rule of the Court. And the Court has never reduced to writing internal operating procedures, of the sort issued by most of the federal courts of appeals that describe how it handles cases internally or modifies decisions after the fact.<sup>98</sup>

A discussion of the extent to which these phenomena may be desirable, or even justifiable, as a general matter is well beyond the scope of this modest Idea.

But something is seriously amiss when a Court that is commendably willing to engage in public dialogue about changes to its procedural rules respecting such matters as the font to be used in briefs<sup>99</sup> ignores the repeated efforts of stakeholders to have it formulate openly, or even state clearly, its practice respecting a life-or-death problem<sup>100</sup>—going so far, indeed, as to issue a written order lacking a single syllable of reasoning or authority that denies a capital litigant permission to file a pleading asking it to do so.<sup>101</sup>

There is a difference between what the Court can do, and what it should do. In addition to adopting my proposal about voting rules in stay-of-execution situations, there are some things the Court should do

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98. Charles Rothfeld, *Should the Supreme Court Correct Its Mistakes?*, 128 HARV. L. REV. F. 56, 59 (2014); *see also* Robbins, *supra* note 35, at 23-25.

99. *See Proposed Revisions to the Supreme Court Rules*, SUP. CT. U.S., [http://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_05-14-07](http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-14-07) (last visited Mar. 9, 2015) (inviting public comment on proposed rule changes).

100. For that reason, although having Congress write specific rules of judicial procedure is generally a poor idea and is perhaps premature under present circumstances, Congressional pressure on the Court to respond to the issue in some public way would not be misplaced. *See infra* notes 102-08 and accompanying text (suggesting several possibilities).

101. *See supra* note 20 (quoting order in full).

about those cases.

To start with the simplest available improvement, the Justices should be mindful that every few words they vouchsafe regarding grants or denials of stays of execution are valuable. For example, in *Brewer v. Landrigan*,<sup>102</sup> whose substance I have not hesitated to criticize in strong language, full credit should be given to the majority for writing the four sentences of rationale which provided the opportunity for public input.<sup>103</sup> In contrast, the majority in *Hain* impoverished public dialogue by leaving its action unexplained.<sup>104</sup> On the level of the individual Justice, a published explanation of the practices of that Member provides critical data to interested outsiders.<sup>105</sup> These include, among many others: actual and potential individual and institutional litigants and their counsel; scholars; journalists; editorial writers; lower court judges; and support staff throughout the judicial system.

More broadly, the Court should address the problem in a reasoned and public way.

It might grant a stay in a pending case to consider its stay practices,<sup>106</sup> but, for many reasons, that would not be the ideal route to follow. Leaving aside the practical difficulties and the institutional impropriety of a court conducting internal rulemaking in the context of a private lawsuit, to go down that path would be to suggest an adversariality that should be absent from a discussion of how to process cases justly and efficiently.<sup>107</sup> The question is not whether the Court's rulings are correct but whether they are being given judicious consideration.

The Court should announce that it is reviewing that issue, and invite comment on what it ought to do. The responses could address both the substance of any rule, and the format by which the Court should

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102. 562 U.S. 996 (2010).

103. See *supra* note 78. Similarly, only a few words would be needed to clear up the issues raised *supra* notes 67, 93.

104. See *supra* note 84 and accompanying text.

105. The publication need not necessarily take place within the pages of the U.S. Reports. Justices may communicate with the public in many ways, including writing articles, giving interviews, and appearing on a variety of physical and virtual platforms.

106. See, e.g., *Barefoot v. Estelle*, 459 U.S. 1169 (1983) (granting a stay to consider "the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner," eventuating in *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)); cf. *Brooks v. Estelle*, 459 U.S. 1061, 1061-63 (1982) (denying over three dissents a stay to consider the identical issue).

107. See *Revesz & Karlan*, *supra* note 4, at 1111 (calling for the Court to invoke its rulemaking procedures, rather than consider the issue in the litigated case).

publicize it.<sup>108</sup>

There are, in short, a number of constructive measures the Court could take in the interests of “remedying an anomaly that does it no credit.”<sup>109</sup> Refusing to acknowledge that a problem exists is not one of them.

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108. Of course, one possibility would be an amendment to the Court’s rules. But there are many others. The Court could cause its views to be expressed in a Clerk’s comment to its rules, in a Clerk’s memorandum of guidance to counsel, or in a press release. Any of these routes would at least result in a statement by the Court of what its practice is—a necessary prelude to any future changes.

109. Motion for Reconsideration of Order Denying Stay of Execution, *supra* note 17, at 6.