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Idea: No Execution if Four Justices Object

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IDEA

NO EXECUTION IF FOUR JUSTICES OBJECT

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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.[1]

In 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)[2] 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.[3]

(2) The Court ameliorates this inevitable harshness through several mechanisms. When a litigant seeks review by certiorari a self-imposed Rule of Four dating from at least 1925 provides that four votes are

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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*, http://www.appellate.net/articles/certpractice.asp, at 5-6 (1999) (last visited December 13, 2014). There is a more formal, extended and current discussion in SHAPIRO, GELLER, 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 SUPREME COURT 221 (1991) (observing that in interviewing Justices, "It is remarkable how many of my informants used 'case' and 'issue' interchangeably. . . .[I]t is the issue, not the case[,] that is primary").

sufficient to grant the petition.[4] Four votes then suffice to defer action on pending petitions arguably raising the same question.[5] 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 99% of the time will be to rebuff the litigant)[6] is reached after the case has been given, or at minimum appears to have been given, as much attention as warranted.

In capital cases:

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

(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.[9] This is a problem the Court can and should

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[4]*See* SHAPIRO, GELLER, ET AL., *supra* note [2] , §5.4; 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 (1983).

[5]*See infra* note [42] . 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. The Court began publishing additional details when it revised its website on the first Monday of October 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 'potential 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, 167-68 (1996), *quoting* United States v. Johnson, 457 U.S. 537, 556 n.16 (1982).

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

[7]This has been clear since shortly after the resumption of capital punishment in the wake of Gregg v. Georgia, 428 U.S. 153 (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 (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 § 38.2[c][ii], at 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, 492 U.S. 302 (1989) (*Penry I*), that the Texas capital punishment system unconstitutionally restricted the presentation of mitigating evidence, *see also* Penry v. Johnson, 532 U.S. 782 (2001)(*Penry II*) (re-iterating this holding), and its ruling in Tennard v. Dretke, 542 U.S. 274 (2004*)* that the Fifth Circuit had erroneously "invoked its own restrictive gloss on *Penry I*," one which "had no foundation in the decisions of this Court," and was inconsistent with the principles underlying *Penry I,* id. at 284-85, an estimated forty prisoners who presented that claim were executed. *See* Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Capital Cases Try Supreme Court's Patience*, N.Y. Times, Dec. 5, 2004, at A1.

[8]"Little," however, does not mean "nothing." For example, at one time the Court followed an internal if unpublicized practice of discussing every capital case at Conference. *See* PERRY, *supra* note [3], at 92-97. If it still does, the leading treatise on the Court fails to record the fact. *See infra* note [50].

[9]Both the appearance and the substance of an orderly deliberative process erode. *See, e.g.,* Woodard v. Hutchins, 464 U.S. 377 (U.S. 1984). Many other examples are recounted in 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 pressure of an impending execution knocks the normal deliberative process askew: "Although the Court's staff

solve. Capital cases under warrant differ from all its other cases.[10] They require institutional treatment reflecting that simple truth. 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 publically and privately, sometimes in forceful language, for decades—as have litigants and commentators.[11] But the Court has been unwilling to address the situation even as recent legal developments have made the problem worse.[12]

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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*, http://www.scotusblog.com/wp/2007/10/ (Posted Oct. 19, 2007); *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*, Natl.L.J., Oct. 27, 2014, at 1.

[10]For purposes of the following discussion, then, the relevant 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.

Of course every execution is preceded by the setting of a date. And of course in ordinary course one expects to see litigation seeking to stay the execution. But there were only 35 executions in 2014, *see* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf, although there were approximately 3,035 inmates on Death Row, *see* http://www.deathpenaltyinfo.org/death-row-usa Many of them will eventually attain judicial relief or be otherwise removed from the system by a means other than execution. During 2013, for example, 115 inmates left Death Row but only 39 did so by execution, *see* US. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Capital Punishment, 2013 – Statistical Table*s, at 13 (revised December 19, 2014). Depending on the date-setting practice followed by the sentencing jurisdictions an inmate may well enter and exit Death Row without ever having litigated under warrant. Indeed, as noted *infra* note [42] (describing Powell Commission recommendation for automatic stay), there is substantial professional agreement that this is the desirable course of events. For our purposes, those cases do not differ from any other sort of litigation.

Capital litigation taking place under warrant, however, poses a heightened risk of the Supreme Court taking actions that are less fully considered than they should be. *See supra* note [9]. The purpose of providing a special rule for those case is to reduce that risk.

[11]I summarize this history in Part II below.

[12]As discussed in Parts II & III below, in the past the issue has generally 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, *supra* note *, Commentary to Guidelines 1.1, 10.8, 31 HOFSTRA L.REV., at 923-24, 1030-31 (giving examples), or in the Supreme Court, *see infra* note [66] (discussing original writs of habeas corpus), and they have done so with increasing frequency in the past fifteen years or so.

Lawsuits under 42 U.S.C. § 1983 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 a capital prisoner is properly brought under Section 1983 rather than as habeas corpus petition), *cert. denied*, 538 U.S. 999 (2003). In an area that has been the source of a number of recent episodes relevant to this Idea, *see* SHAPIRO, GELLER, ET AL, *supra* note [2 , at 61-62, 934-36; infra TAN [1419. 34-39,59-60], 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* Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331 (2014); Adam Liptak, *Moratorium May be Over, but Hardly the Challenges*, 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 (2011) (decided on merits after grant of stay pending cert. at 559 US. 1033 (2010)); Dist. Attorney's Office for Third

Adhering to the concise spirit of the Idea format and eschewing any pretense to an exhaustive presentation,[13] the following Parts:

(II) Summarize the recent and prior history of the problem.

(III) Propose 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.

(IV) Urge the Court in addition to adopting 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 recent actions in the case of the late Leon Taylor.

Taylor, a Death Row inmate, was one of a number of plaintiffs in a Section 1983 challenge to Missouri's lethal injection protocol which, as this is written in January of 2015, has been pending undecided in the Eighth Circuit for eight months. During that period the State has sought to execute several of the plaintiffs, a divided Court of Appeals has denied

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Judicial Dist. v. Osborne, 557 U.S. 52, 70, 73-75 (2009), and capital inmates use it for that purpose as well, *see, e.g.*, Barbour v. Haley, 471 F.3d 1222 (11th Cir.) (rejecting 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."), *cert. denied*, 551 U.S. 113 (2007).

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 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." 28 U.S.C. § 2261(b) (2000). *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 n.1 (2003) (citing cases). 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 whether states qualified would be made by the Attorney General of the United States. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109-177, section 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). *See also* Habeas Corpus Resource Center v. Department of Justice, 2014 U.S. Dist. LEXIS 109532 (N.D. CA. August 14, 2014) (granting injunction under Administrative Procedure Act against rules 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(b) .

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

stays of execution pending its disposition of the appeal,[14] and the inmates have been denied Supreme Court stays in summary 5-4 orders.[15]

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," 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."[16] 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.[17] That relief was denied about an hour later.[18] Taylor was executed that night.[19]

This suboptimal judicial performance was not an isolated case. The problems highlighted by *Taylor* are not new ones.[20] As indicated above,[21] and as counsel tried to call to the Court's attention in her rejected motion, they have bedeviled the Court for 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

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[14]*See* Zink v. Lombardi, No. 14-2220, 2014 U.S. App. LEXIS 23163 (8th Cir., December 4, 2014) (en banc) (Bye, J., joined by Murphy and Kelly, JJ., dissenting from denial of stay of execution of Paul Goodwin) (listing prior cases).

[15]In addition to Taylor's own case, Taylor v. Lombardi, No. 14A533 (U.S. November 18, 2014), see Goodwin v. Lombardi, 14A595 (U.S. December 9, 2014), Ringo v. Lombardi, 14A266 (U.S. September 9, 2014), Worthington v. Lombardi, No. 14A141 (U.S. August 5, 2014), discussed *infra* TAN 81-85, all of which have resulted in the execution of the petitioners. *See* http://www.deathpenaltyinfo.org/execution-list-2014 (last visited December 13, 2014).

[16]Motion for Reconsideration of Order Denying Stay of Execution, at 1-3, 6, Taylor v. Lombardi, No. 14A532 (U.S. November 19, 2014). This document is annexed to the one cited *infra* note [17].

[17]*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, No. 14A532 (U.S. November 19, 2014) (observing that the relevant Court rules, Rule 22 (regarding stay applications) and Rule 44 (regarding motions for reconsideration) contain no language supporting Clerk's position).

[18] *See* Taylor v. Lombardi, No. 14M63 (November 19, 2014) (reading in its entirety: "The motion to direct the Clerk to file a petition for rehearing of the order denying the application (14A532) for stay of execution of sentence of death is denied.")

[19]*See* Brett Barrouquere, *Missouri Executes Leon Taylor For 1994 Slaying of Gas Station Attendant*, Huffington Post, November 19, 2014, http://www.huffingtonpost.com/2014/11/19/missouri-executes-leon-taylor_n_6183144.html (last visited December 14, 2014).

[20]In fact, they even arose some ten years ago in the particular context of a challenge to Missouri's lethal injection protocol. *See* Brown v. Crawford, 544 U.S. 1046 (2005) (denying stay of execution on 5-4 vote).

[21]*See supra* TAN [11].

federal writ of habeas corpus.[22] During the day on September 3 (the Tuesday after Labor Day), four Justices voted to grant the stay.[23]

> 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. … At one minute to midnight on September 3, Powell yielded and provided a fifth vote to grant the stay.[24]

The practice followed in *Darden* did not last long,[25] 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[26] and he was executed without Court

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[22]The Darden episode is recounted in LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 165-74 (2005) and 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 [41, 43,52, and 55] are to be found there. Copies are available from the reference desk of the Hofstra Law Library.

The Eleventh Circuit denied a motion for 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 [Michael W. Mosman] to Mr. Justice Powell, August 29, 1985, at 2 (annexed to Memorandum to the Conference from Justice Powell re Darden v. Wainwright, August 29, 1985). Justice Powell supplemented this report in a Memorandum to the Conference dated September 3, 1985. 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. 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., at 1.

[23]GREENHOUSE, *supra* note [22], at 167.

[24]*Id. See* Darden v. Wainwright, 473 U.S. 928 (1985). *See also* Straight v. Wainwright, 476 U.S. 1132, 1133 n. 2 (1986) (denying stay of execution despite four votes to hold case pending resolution of *Darden*, while noting "[T]he court has ordinarily stayed executions where four Members have voted to grant certiorari"); *see infra* [note 42] (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 [22] , 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 Process*, 1996 S.CT. REV. 163, 172-76, 178-79.

[25]*See* SHAPIRO GELLER, 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.")

[26]*See* Hamilton v. Texas, 497 U.S. 1016, 1016-17 (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

review of the merits of his claim.[27] In *Herrera v. Collins*, just as in *Darden*, when petitioner found that his stay motion had received four but not five votes[28] he promptly sought to have the papers treated as a certiorari petition; but the motion was denied over four dissents,[29] 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."[30] At the last moment, however, the Court was rescued from its own fecklessness when the Texas Court of Criminal Appeals entered a stay[31] until the Supreme Court could decide the merits, as it eventually did.[32] "This was a lucky last-minute escape for Mr. Herrera, but it is no way to run a judicial system."[33] Nor was it an isolated instance.

In June of 2007 Christopher Scott Emmett, who was denied a stay by a 5-4 vote[34] 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."[35] As a result, he was alive when in October the Court granted him a stay of execution until the Court of Appeals decided his challenge to Virginia's lethal injection protocols.[36] He fared better than Clarence Edward Hill. Hill sought to

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").

[27]*See* Hamilton v. Texas, 498 U.S. 908 (1990).

[28]*See* Herrera v. Collins, 502 U.S. 1085 (1992).

[29]*See* Herrera v. Collins, 502 U.S. 1085 (1992).

[30]Herrera v. Collins, 502 U.S. 1085 (1992).

[31]The action is noted at Ex parte Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992). This case arose because a lower Texas court entered another execution date for Herrera while his case was still before the Supreme Court. 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.*

[32]*See* Herrera v. Collins, 506 U.S. 390 (1993).

[33]Eric M. Freedman, *Can Justice Be Served by Appeals of the Dead?*, Natl. 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, 17-19 (2002) (discussing cases and describing results as "unprincipled" and leading to "striking injustice").

[34]Emmett v. Kelly, 551 U.S. 1128 (2007)

[35]Emmett v. Kelly, 552 U.S. 942 (2007) (statement of Stevens and Ginsburg, JJ. respecting denial of certiorari). 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 (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, *see* Lovitt v. True, 546 U.S. 929 (2005), thereby dissolving the stay.

True's execution was then re-set for November 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*, N.Y. Times, Nov. 30, 2005, at A19.

[36]Emmett v. Johnson, 552 U.S. 987 (2007). *See* Robert Barnes & Jerry Markon, *Supreme Court Halts Va. Inmate's Execution, Ruling Could Lead to National Hiatus in Lethal Injections*, Wash.

challenge Florida's lethal injection protocols, but on September 20, 2006 he was denied a stay of execution by a 5-4 vote[37] and was executed.[38] He was dead when the Court, without recorded dissent, denied his certiorari petition on October 16, 2006.[39]

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.[40] 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.[41] Executions in capital cases that are "held" by as

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Post, Oct. 18, 2007, at A1. 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, at 1.

[37]*See* Hill v. McDonough, 548 U.S. 940 (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 Section 1983 action. The Circuit Court did not reach the merits of his challenge but instead ruled that Hill's dilatory litigation conduct disqualified him from equitable relief. *See* Hill v. McDonough, 464 F.3d 1256 (11th Cir. 2006). I accordingly suggest, *infra* note [67] , that the Court may have considered itself to be reviewing an interlocutory injunction, *see infra* note [79]. However, SHAPIRO, GELLER, ET AL. *supra* note [2], at 929 states that the ruling came on an "application for a stay of execution pending certiorari," which is equally consistent with the sparse published order.

[38]*See* Ron Word, *Killer Who Argued Lethal Injection Cruelty is Executed; Supreme Court Votes 5-4 Against Another Stay*, Houston Chronicle, Sept. 21, 2006, at A4.

[39]Hill v. McDonough, 549 U.S. 987 (2006).

[40]As a corollary, analogous to current practice with respect to the dismissal of certiorari as improvidently granted, *see* SHAPIRO, GELLER, ET AL., *supra* note [2], at 326-28, the vote of at least one of those four Justices would be required to modify such a stay. 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 that would have been the outcome of a reasoned review of the issues rather than of a chaotic middle-of-the night scramble.

[41]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, *see infra* [Part III(a)(1)] and to proceedings other than federal habeas corpus, *see supr*a note [12].

On the other hand, in contrast to proposals for an automatic stay without individualized judicial action throughout the pendency of federal habeas corpus proceedings, like the one made by in 1989 by a committee chaired by retired Justice Powell. *see* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, *reprinted in* 45 CRIM. L. REP. 3239 (1989); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 10-11 (1990) (reprinting American Bar Association policy in favor of proposal); Association of the Bar of the City of New York, *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASSOC. BAR CITY N.Y. 848, 855 (1989) (supporting 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.");

many votes are required under the Court's internal practice are stayed automatically.[42]

(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,[43] a proposal that has garnered support from various commentators over the years.[44] The rationale is that the need of the capital

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Memorandum from Harry A. Blackmun to the Conference, Sept. 20, 1985 at 1 ("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 defendants first federal habeas"), my proposal requires four affirmative Supreme Court votes for a stay.

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] .

[42]There is a long discussion of the Court's "hold" practice in Revesz, & Karlan, *supra* note, [4] at 1112-31, 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, *see id*. at 1111. As Professor Tushnet learned from the Marshall Papers, the Court changed its practice in 1991 to require four votes. *See* Tushnet, *supra n*ote [24], at 181. As indicated, *supra* note [24] , 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, J., dissenting); Straight v. Wainwright, 476 U.S. 1132 (1986); Harich v. Wainwright, 475 U.S. 1074 (1986). *See also* Tushnet, *supra*, at 176-78.

Answering that question affirmatively, the present proposal is that whatever internal rule the Court adopts for "holds," capital petitioners under warrant should benefit from a mechanism designed to reduce inequities *see supra* note [5], on an equal basis with other litigants. 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. 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 (2008) (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).

For the reasons discussed infra Part III (b), 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. 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. On considering the problem at leisure, 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 benefitted from the hold, by modifying its order as provided *surpa* note [40] . *See infra* notes [62], [84] (explaining how proposal would have worked in recent sets of cases before Court). Of course in either situation the Court should favor all concerned with a few explanatory words, *see infra* [TAN 90-92], 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*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/archives/sum2011/entries/heraclitus, §5 (Edward N. Zalta ed., 2011).

[43]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. As indicated [supra note 41], Justice Blackmun at the time and others subsequently have gone farther and proposed an automatic stay of execution extending throughout first federal habeas corpus proceedings even if certiorari had not been granted.

[44]*See, e.g*, . Robbins, *supra* note [33], at 19-20; *see also* Edward A. Hartnett, *Ties in the Supreme Court*, 44 WM & MARY L. REV. 643, 673 (2002) (proposing an amendment to 28 USC 2101(f)

litigant under warrant to garner five votes for a stay although four Justices vote for certiorari effectively nullifies the Rule of Four.[45]

Thomas Goldstein asserts that this proposal in fact represents the current practice. Contrary to its behavior in the early 1990's,[46] 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.[47] There is no recent action of the Court flatly inconsistent with this hypothesis.[48] But there is no empirical evidence supporting it either; in the words of the leading treatise:

> [Mr. 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

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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") .

[45]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 S.Comm on the Judiciary, 109th Cong. 308-09 (2005).

[46]*See supra* text accompanying notes [23-30] (describing cases of that period)

[47]Tom Goldstein, *Supreme Court Stays*, http://www.scotusblog.com/wp/2007/10/ (Posted Oct. 13, 2007) (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) *cert. diss'd as moot* 552 U.S. 803 (Oct. 1, 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 (2007)).

[48]That is, although there are dozens of cases which deny stays over four dissents, they do not facially refute Mr. Goldstein's hypothesis because either (1) the procedural posture does not formally involve certiorari, *see infra* Part II(b) & note [65], or (2) as in *Goodwin*, *supra* note [15]; *Warner*, *infra* TAN [56-64]; *Williams*, *supra* note [47], Brown v. Crawford, 544 U.S. 1046 (2005) (discussed *supra* note [20]), and Hubbard v. Campbell, 542 U.S. 958 (2004), the dissenters have not formally stated that they would vote to grant certiorari. *See* SCHAPIRO, GELLER, ET. AL, *supra* note [2] , at 941, *citing*, *e.g.*, Taylor v. Texas, 131 S. Ct. 3017 (June 16, 2011) (stay of execution denied over four dissents), *cert. diss'd as moot* , 132 S. Ct. 377 (Oct. 3, 2011); Getsy v. Strickland,557 U.S. 958 (2009) (stay of execution denied over four dissents; certiorari denied without indication of any dissent); Goodwin v. Johnson, 531 U.S. 1120 (2001) (stay of execution denied over four dissents; certiorari denied without indication of any dissent); Flores v. Johnson, 531 U.S. 987 (2000) (stay of execution denied over four dissents; certiorari denied with three of the four indicating that they would grant certiorari, but the fourth (Justice Stevens) not formally stating a vote on certiorari).

> 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.[49]

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.

(1) *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 Mr. Goldstein exists it is unresponsive to most of the problem.[50] 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,[51] including discussions of the matter with their colleagues,[52] and there is no basis as a matter of either justice or sound

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[49]SHAPIRO, GELLER et al., *supra* note[2] , at 939. In the motion for reconsideration she was not permitted to file, Leon Taylor's counsel, after noting Mr. Goldstein's hypothesis and the lack of any public 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, *supra* note [16], at 3.

[50]*See* SHAPIRO, GELLER ET. AL, supra note [2] at 15 (observing that in ordinary course more than 85 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," the authors 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.*

[51]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. The most recent statistics show that capital prisoners' federal habeas corpus petitions succeed approximately 47% of the time, compared to 3.2% for non-capital ones." 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 27 n. 27 (6th ed. 2011). *See also* SHAPIRO, GELLER et al, *supra* note [2] , at 931-33.

[52]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 William H. Rehnquist to the Conference, September 9, 1985 at 2.

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

judicial administration why they should have to commit on an accelerated schedule to grant review of a particular case because that is the only way to prevent an possibly wrongful execution.[53] The Justices deserve time to think.[54] 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.[55]

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routinely call for views of Solicitor General in all environmental cases, thereby 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, see, e.g. supra note [42], and there is every reason to believe that the minority is well aware of this. *See* Tom Goldstein, *More Thoughts on Death Penalty Stay*s, *supra* note [9], (commenting "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.")

[53]Indeed, in a blog post subsequent to the one discussed supra note [47] , Mr. Goldstein recognized this problem, *see* Tom Goldstein, *More Thoughts on Death Penalty Stays*, *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."). *See also* Memorandum from Harry A. Blackmun to the Conference, *supra* note [41] , at 2 ("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 [24 , at 175. In Emmett v. Kelly, 552 U.S. 942 (2007) (described *supra* [TAN 34-36]) 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."

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 if they were not under warrant, see supra note [10]. At least four Justices—and not necessarily ones opposed to the death penalty—may well appreciate the 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 [40] .

[54]*See* Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100, 122-23 (1959). It may be worth recalling that the 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).

[55]Indeed, if the States were aware of the Justices' practices, *see supra* note [53] they might modify their sometimes-abusive behavior in date-setting. *See* ABA GUIDELINES, *supra* note *, Commentary to Guideline 10.15.1, 31 HOFSTRA L.REV., at 1081-82; Memorandum from Harry A. Blackmun, *supra* note [41], 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. id.* (observing that "the primary responsibility" for stays should lie with the lower courts, who should "not pass the buck us'). These are among the good reasons for the Justices to publicize their practices, *see* infra TAN [92]. 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. EXPERIM. PSYC. 168, 171 (1947)

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. Along with several 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, 2015 in a plenary opinion on the merits.[56] The next day, January 13, the four plaintiffs filed a petition for certiorari and an application for a stay of execution.[57] The government responded on the next day, January 14, to both the stay motion and the certiorari petition,[58] and plaintiffs filed replies in support of both on January 15,[59] the scheduled execution date. Later that day the Court summarily denied the stays on a 5-4 vote over a reasoned 8-page dissent by Justice Sotomayor laying out the substantive legal issues presented by the case and concluding, "I hope that our failure to act today does not portend our unwillingness to consider these questions."[60]

And perhaps it does not. The Court did not rule upon (and the four dissenters did not formally record a position respecting) certiorari.[61] The body still has before it the certiorari petition of the other three plaintiffs, which it will necessarily have to rule upon sooner or later.[62] On a further

("A few accidental connections between a ritual and favorable consequences suffice to set up and maintain the behavior in spite of many unreinforced instances.")

[56]Warner v. Cole, No. 14-6244, 2015 U.S. App. Lexis 551 (10th Cir. Jan. 12, 2015); *see id*. at *3 (setting forth plaintiffs' execution dates). 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* S.Ct. R. 13.1.

[57]The information about the date of these filings and those noted in the following sentence of text is to be found in the Court's online case docket for Warner v. Gross, No. 14-7955.

[58]In ordinary course, its answer to the certiorari petition would have been due on February 13 2015, thirty days after the petition was docketed. *See* S.Ct. R. 15.3.

[59]In ordinary course, plaintiffs would have had a minimum of fourteen days to file reply papers in support of the certiorari petition. *See* SHAPIRO, GELLER ET AL., *supra* note [2], at 317.

[60]Warner v. Gross, No. 14A761 (January 15, 2015) (dissenting statement of Sotomayor, J., joined by Ginsburg, Breyer, & Kagan, JJ.)

[61]A cold-eyed observer might speculate that they would not announce a position in favor of certiorari out of concern for a potential adverse outcome on the merits. *See* SHAPIRO, GELLER ET AL., *supra* note [2], at 333. That dynamic is a function of the Rule of Four itself. *See supra* note [52]. 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. 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, even assuming that Mr. 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.

[62]For the remaining *Warner* plaintiffs before the Court, whose executions are set for the succeeding weeks, *see supra* TAN [56], the timing of any such announcement could mean the difference between life and death. Assuming that the practice of the Court is as described by Mr. Goldstein, they will be executed one by one for so long as the Court does not release an order granting

reading of Justice Sotomayor's dissent, one or more of the other Justices might decide that there is merit to the petition, resulting in a vote to grant it—perhaps in whole or perhaps in part, perhaps as written or perhaps as re-written by the Court. A collegial body would be acting as it should.[63]

Whatever happens, though, it will be too late for Charles Warner. Solely because he had an execution date in place, he will not receive the benefits of the Justices' consideration of the still-undecided certiorari petition on which he was until recently a petitioner. He was executed as soon as the stay was denied.[64]

(b) *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, or even upon the filing of a certiorari petition, would not go far enough.

Much litigation involving stays of execution lacks any formal connection to a certiorari petition.[65] In those instances the traditional Rule

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certiorari but will receive a stay as soon as it does. In the event that it does so at any time before the last one dies all of the survivors will be granted stays. Otherwise the petition will be dismissed as moot.

In short, the more care the Court—commendably—takes in considering the petition the more plaintiffs die. *Cf.* John Elwood, *Relist Watch: What Does the Court's Relist Streak Mean?*, http://www.scotusblog.com/2014/04/relist-watch-what-does-the-courts-relist-streak-mean/ (posted April 23, 2014) (suggesting that Court has adopted practice of relisting cases at least once following initial Conference vote for certiorari in order to allow time for careful re-vetting before announcement of grant).

My proposal would end this self-inflicted institutional wound. Under it, Warner would have recived a stay on January 15, and the other petitioners would have benefitted from it automatically. *See also infra* note [84] (providing similar example of working of proposal).

[63]The Court's current topsy-turvy stay practice, however, discourages such behavior. If the Court ruled in this thoughtful way it would doubtless face the criticism that Warner should have benefitted from its decision. That likelihood reduces the chances that it will render such a decision. The late-night ruling on Warner's stay application thus increases the risk of a lower-quality ruling on the pending certiorari petition of his co-plaintiffs. Like the other effects of the Court's current injudicious handling of cases under warrant, *see, e.g. supra* notes [61-62], this dynamic is both unfair to the litigants and inimical to sound judicial decision-making. *See supra* TAN [10].

[64]*See* Erik Eckholm, *Oklahoma Executes First Inmate Since Slipshod Injection in April*, N.Y. Times, Jan. 16, 2015, at A16.

[65]For example, in Medellin v. Texas, 554 U.S. 759 (2008) (discussed supra note [42]) 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, *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 (2013) (vacating by 5-4 vote stay of execution entered by Court of Appeals); *see* SHAPIRO, GELLER ET AL *supra* note [2], at 936-38, but often it does not. The scenario is common in lethal injection litigation. *See* SHAPIRO, GELLER, ET AL *supra* note [2] , §18.6 ("Stays Based on Challenges to the Method of Execution"). Examples include Hill v. McDonough, 548 U.S. 940 (2006) (described surpra note [37]), Emmett v. Johnson, 552 U.S.987 (2007) (described *supra* TAN 33-35), Brewer v. Landrigan, 133 S.Ct. 445 (2010) (described *infra* TAN 69-71), as well as Ringo v. Lombardi, 14A266 (U.S. September 9, 2014) and Worthington v. Lombardi, No.

of Four does not apply[66] but its rationale—that the votes of four Justices should be sufficient to cause the Court to take a case seriously—does.[67]

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.[68] 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.[69]

14A141 (U.S. August 5, 2014), both of which are described *infra* TAN [84-85]. It also arises in various other capital contexts. Examples include Wainwright v. Adams, 466 U.S. 964 (1984) (discussed *infra* note [67]), and Mullin v. Hain, 538 U.S. 957 (2003) (discsussed *infra* TAN [72-78]).

[66]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* In re Davis, 557 U.S. 952 (2009) (invoking procedure successfully); Felker v. Turpin, 518 U.S. 651, 660-61 (1996); In re Hill, 715 F.3d 284, 301 n.20, 307 n.8 (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, and (b) will only grant stays in such cases on the vote of five Justices. *See* In re Wright, 529 U.S. 1001 (2000) (over four dissents, summarily denying petition for original writ and refusing stay); In re Tarver, 528 U.S. 1152 (2000) (same); Robbins, *supra* note [33] , at 1-6, 22, 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).

[67]*See* Wainwright v. Adams, 466 U.S. 964, 965-66 (1984) (Marshall, J., dissenting from Court's 5-4 vacatur of stay of execution entered by Court of Appeals) ("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 impetuousness 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.").

The *Hill* case described *supra* TAN [37-38] & note [37] raises similar issues. 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 (2006) (denying interlocutory injunction; *but see supra* note [37]), 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 (2006), but that in Hill v. McDonough, 549 U.S. 987 (2006) (denying certiorari), 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 Mr. 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 [48]. If the ruling was on an application for a stay pending certiorari, then it fell into group (2) of *id.*

[68]*See* Landrigan v. Brewer, 2010 U.S. Dist. LEXIS 113485 (D. AZ. 2010), *affirmed* 625 F.3d 1144, *rehearing en banc denied*, 625 F.3d 1132 (9th Cir. 2010).

[69]Brewer v. Landrigan, 131 S.Ct. 445 (2010); *see i*nfra note [71].

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[70] 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.[71]

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. A divided Tenth Circuit panel gave a negative answer but noted that the Circuits were split on the question.[72] It granted a stay of execution pending a petition for en banc review; the en banc Court of Appeals granted review and declined to vacate the stay.[73] On the government's last-minute motion, and over the dissent of four Justices, the Supreme Court vacated the stay in an unadorned order[74] and Hain was

[70]The District Court's opinion, headed "Order Granting Motion for Temporary Restraining Order," Landrigan v. Brewer, 2010 U.S. Dist. Lexis 113485, at *1 (D. AZ. October 25, 2010) 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 835-36. 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)), and the Ninth Circuit explicitly determined to "construe [the] order as one for a preliminary injunction," Landrigan v. Brewer, 625 F.3d 1144, 1145 n.1 (9th Cir. 2010), which is plausible enough. The order of the Supreme Court, however, reads, "Application to vacate the order by the district court granting a temporary restraining order … granted," Brewer v. Landrigan, 131 S.Ct. 445 (2010). 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 v. Proctor & Gamble, 515 U.S. 1309 (1995) (Stevens, J., in chambers).

[71] *See* John Schwartz, *Murderer Executed in Arizona*, N.Y. Times, Oct. 28, 2010, at 16 (reporting 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.") 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 v. Brewer, 2010 U.S. Dist. LEXIS 113485, at *30 n. 6 (D. AZ. October 25, 2010). *See generally*, *No Justification*, N.Y. Times, October 29, 2010, at 30 (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").

[72]*See* Hain v. Mullin, 343 F. 3d 1146, 1149 (10th Cir. 2003).

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

[74]Mullin v. Hain, 538 U.S. 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 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 *, Guideline 10.15.2, 31 HOFSTRA L.REV. at 1089 (describing duties of clemency counsel), must begin far in advance of the execution date.

executed that night.[75]

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.[76] 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.[77] In due course, the Supreme Court cited this opinion in its 7-2 ruling agreeing with that conclusion.[78]

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[79]—by forcing litigants to contort those situations into ones involving certiorari petitions simply in order to benefit from a four-votes-for-stay rule originating in a different context ninety years ago. There is no policy justification for a requirement that counsel for the inmate file a certiorari petition unless professional considerations warrant doing so.[80]

The current murky situation, however, encourages such behavior—further burdening the Court and opening new possibilities for arbitrariness. In *Taylor*,[81] 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[82] — would improve the chances of obtaining a stay in the event

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In any event, although an order accompanied by a rationale would have been better than the one actually issued, *see infra* TAN, [82] the right place for sorting out the competing legal arguments was in the courts before Hain's execution, *see infra* note [76], not in the law reviews afterwards.

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

[76]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, s*ee 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.

[77]*See* Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) (en banc).

[78]*See* Harbison v. Bell, 566 U.S. 180, 194 (2009).

[79]There is an extensive body of law on interlocutory stays and injunctions, *see* SHAPIRO, GELLER ET. AL, *supra* note,[2], Ch. 17, one whose rules are designed in general for situations remote from capital litigation. The soundness of those rules should be considered in connection with the situations they were designed to address, while the special concerns of capital cases under warrant should be dealt with through a rule addressed to that context.

[80]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* SCHAPIRO, GELLER ET AL. *supra* note ,[2] 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.

[81]*See supra* TAN [14-19] (describing case). The discussion in text also applies to the case of Paul Goodwin, whose filings a few weeks after Taylor's, *see* supra notes [14-15], included a certiorari petition.

[82]*See* SHAPIRO, GELLER ET AL., *supra* note [2], at 85, 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 current appeal, with the result that

that four again Justices favored one.[83] But there is no sound basis for a rule that would have granted a stay to Leon 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. with their appeal of the District Court's dismissal of the action pending undecided in the 8th Circuit), and were denied on a 5-4 votes in the Supreme Court.[84] 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.[85] 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. Having satisfied four Justices that the stay equities were in their favor all three deserved to have had their executions stayed. And under my proposal all 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 very

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plaintiffs were being progressively executed pending a Circuit Court ruling that was unlikely to provide the Supreme Court with any additional illumination. *See* Petition for Writ of Certiorari, at 30-31, Taylor v. Lombardi, No. 14-7157 (U.S. November 18, 2014).

[83]*See supra* TAN [15] & n. 5 (noting three prior stay applications arising from same litigation that had received four votes). If indeed that was counsel's strategy, it was 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 TAN [16]. As indicated above, *see supra* [TAN 66 & n.66] the Rule of Four only applies to cases coming to the court by certiorari. *Cf.* Rehnquist, *supra* note [21], at 3 (stating that Court had determined at time of Barefoot v. Estelle, 463 US. 880 (1983) (discussed *infra* note [93]) 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.

[84]*See* Ringo v. Lombardi, 14A266 (U.S. September 9, 2014); Worthington v. Lombardi, No. 14A141 (U.S. August 5, 2014). Both were executed in consequence, *see supra* note [15].

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 supra* note [42]. Or they might have concluded that Bucklew's situation was unique, *see infra* note [85] (describing case), and did not warrant such a "hold." In that event, Worthington's execution would have been stayed in consequence of the Court's 5-4 decision of August 5, *supra*, and each of the later-arriving cases listed supra note [15] (Ringo, Taylor, and Goodwin) would have benefitted from the automatic stay described *supra* note [42]. *See also supra* note [62] (providing similar example of working of proposal).

[85]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 v. Lombardi, 134 S.Ct. 2333 (2014) ("The application for stay of execution of sentence of death … is treated as an application for a stay pending appeal in the Eighth Circuit. The application is granted...").

least the information would probably not reach us for many decades.[86] 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 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.[87]

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

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[88] ignores the repeated efforts of stakeholders to have it formulate openly, or even state in a systematic way, a non-arbitrary solution to a life-or-death problem[89]—going so far, indeed, as to issue a written order that

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[86]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.

[87]Charles Rothfeld, *Should the Supreme Court Correct Its Mistakes*?, 128 HARV. L. REV. F. 56, 59 (2014). *See also* Robbins, *supra* note [33], at 23-25 .

[88]*See* http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-14-07 (inviting public comment on proposed rule changes).

[89]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 somehow, *see* infra TAN [94-96 & n.96](suggesting several possibilities), would not be misplaced.

lacks a single syllable of reasoning or authority denying a capital litigant permission to file a pleading asking it to review its practices.[90]

There is a difference between what the Court can do and what it should do. Entirely independently of whether it adopts my proposal about voting rules in stay of execution situations, there are some things the Court should do 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 *Landrigan*, 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.[91] In contrast, in *Hain* the majority impoverished public dialogue by leaving its action unexplained.[92] On the level of the individual Justice, a published explanation of the practices of that Member provides critical data to interested outsiders.[93] 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,[94] 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.[95] The question is not whether the Court's rulings are correct but whether they are being given judicious consideration.

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[90] *See supra* note [18] (reproducing order).

[91] *See supra* TAN [68-71]

[92] *See supra* note [74]

[93] 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.

[94] *See, e.g.*, Barefoot v. Estelle, 459 1169 (1983) (granting 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 (1983)) *Cf.* Brooks v. Estelle, 459 U.S. 1061 (1982) (denying over three dissents stay to consider identical issue); Eric M. Freedman, "*Capricious" Infliction of the Death Penalty*, N.Y. Times, Oct. 14, 1983, at 30 (asserting in letter to the editor that actions of Court in *Barefoot* and later cases raised "serious doubts as to the propriety of Mr. Brooks's execution").

[95] *See* Revesz & Karlan, *supra* note [4] , at 111 (calling for Court to invoke its rulemaking procedures rather than consider issue in litigated case).

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 publicize it.[96]

There are, in short, a number of constructive measures the Court could take towards "remedying an anomaly that does it no credit."[97] Pretending that no problem exists is not one of them.

[96]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.

[97]*See supra* TAN [16].