IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 17 1986
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PAUL B. JOHNSON,

Petitioner,

v.

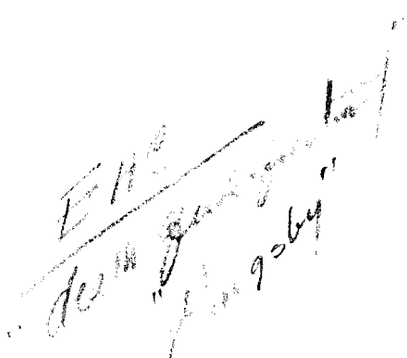
LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida,

Respondent.

Case No. 68319

CAPITAL CASE
Execution is Imminent,
Scheduled for Tuesday,
February 18, 1986,
7:00 A.M.

PETITION FOR EXTRAORDINARY RELIEF AND A
WRIT OF HABEAS CORPUS AND A STAY OF EXECUTION



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INTRODUCTION

This petition raises two claims. The first is that the process of capital jury death qualification, challenged by counsel at trial but not squarely raised on direct appeal, violates the sixth, eighth, and fourteenth amendments of the United States Constitution. This is a claim recently considered by this Court in Kennedy v. State, Case No. 68,264 (February 12, 1986), and which is presently pending before the United States Supreme Court in Lockhart v. McCree, Docket No. 84-1865. Because four jurors who could have fairly sat at the guilt/innocence phase were excluded from Mr. Johnson's jury, his case squarely presents the McCree issue.

The second claim is that Mr. Johnson received ineffective assistance of counsel on his direct appeal.

II. JURISDICTION

Claim I. This Court's jurisdiction derives from the Florida Constitution. Article V, Section 3(b)(1), (7), and (9) (1981), and Rule 9.030(a)(3), Fla. R. App. P. See also Rule 9.100, Fla. R. App. P. Relief under Fla. R. Cr. P. 3.850 is not available because the issue presented in this application was raised at trial and properly preserved but not fully raised on direct appeal of the judgment and sentence.

The writ of habeas corpus has been justly labelled "the Great Writ", because of its historic role as the guarantor of liberty. See generally Allison v. Baker, 152 Fla. 274, 11 So.2d 578 (1943); W. Duker, A Constitutional History of Habeas Corpus (1982). For this reason, both the State and federal constitutions explicitly provide for the writ. Fla. Const. Art. V, Section 3(b)(9); Art. I, Section 13; U.S. Const. Art. I, Section 9, clause 2. "Essentially, it is a writ of inquiry, and issued to test the reason or grounds of restraint or detention." Allison v. Baker, 11 So.2d at 579. Under our constitutional system, detention which violates the state or federal constitution is illegal, and reviewable by a writ of habeas corpus. The infringement of the sixth amendment guarantee of an

impartial jury is therefore properly cognizable in this court under Article V. We have applied for an original writ in this Court because Rule 3.850 appears to foreclose litigation of this claim in the trial court by a motion to vacate sentence and judgment. But the allocation of some habeas corpus jurisdiction to the trial court under Rule 3.850 hardly divests this Court of its constitutionally authorized jurisdiction, if the remedy under Rule 3.850 is unavailable. See United States v. Hayman, 342 U.S. 205 (1952) (interpreting 28 U.S.C. Section 2255, the model for Rule 3.850); Mitchell v. Wainwright, 155 So.2d 868, 870 (Fla. 1963) (enactment of Rule 3.850 does not suspend the writ of habeas corpus if it affords the same rights available under the writ).

Governor Graham signed Mr. Johnson's death warrant on January 16, 1986, three days after the United States Supreme Court heard oral argument on the constitutionality of the precise death qualification procedure used in Mr. Johnson's trial. If the United States Supreme Court affirms the Eighth Circuit, it will, in effect be pronouncing Mr. Johnson's conviction and sentence unconstitutional. This pronouncement, of course, will have little meaning unless Mr. Johnson's execution is stayed. We fully recognize that McCree is not yet "new law". A decision affirming the judgment of the Eighth Circuit, however, would clearly satisfy this court's definition of new law which may be invoked in a collateral challenge to a conviction. Witt v. State, 387 So.2d 922 (Fla. 1980).

It would be possible, of course, for Mr. Johnson simply to apply directly to the federal courts for habeas corpus relief. We believe that it would be proper for this Court to reconsider the question Mr. Johnson has presented because unique features of Florida's capital sentencing procedure are bound up in the application of McCree to this case and because we can present a new study confirming the effects of death qualification on juries in this State. The Florida provision for judicial override of the jury's sentencing verdict, the Florida requirement of a

majority recommendation, rather than a unanimous decision, and this Court's decisions concerning nonreliance on residual doubts of the defendant's guilt as a mitigating circumstance, alter the balance in Florida between the interests of the defendant in a fair jury and the state's interest in death qualification.

Claim II. This Court has jurisdiction over claims of ineffective counsel on appeal. Art. V, Section 3(b)(1), (9), Fla. Const. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

III. FACTUAL BASIS FOR RELIEF

Claim I. Trial counsel filed a pretrial motion objecting to the selection of a death qualified jury (R. 2312-15; Tr. 2115 ff.), which was denied. (Tr. 2125). Specifically, trial counsel noted that excluding jurors under Witherspoon created an unconstitutionally "biased" jury, not fairly drawn from a cross-section of the community. (Tr. 2314). Counsel also requested individual and sequestered voir dire (R. 2308-09; Tr. 2128 ff.), and renewed that motion at the start of jury empanelment. (Tr. 12). Both motions were denied. (Tr. 13).

Four prospective jurors were excluded because of their attitudes on capital punishment, despite their proven ability to be impartial at the guilt/innocence phase of trial. (Tr. 238-41, 249-51, 311-13, 314-15). At the conclusion of jury selection, trial counsel renewed his objection to the removal for cause of the four death scrupled jurors. (Tr. 411). Trial counsel's motion for new trial reiterated his objections to the death qualification of Mr. Johnson's jury. (R. 3443-45).

In his Initial Brief on direct appeal, Mr. Johnson's counsel challenged the exclusion of juror Patsy McWhorter for cause. (Issue 5 at 28), arguing that her disqualification violated Witherspoon. Counsel quoted extensively from the colloquy between trial counsel and the juror, which demonstrated that the juror would be a fair and impartial juror in the guilt or innocence phase of the trial, but would probably be unable to vote for a death sentence in the penalty phase. (Initial Brief

at 29, quoting Tr. 239-240.) In its Brief, the State identified and presented to this Court the very issue which trial counsel had argued, but which appellate counsel overlooked. The State asserted that Mr. Johnson had lost the right to contest Ms. McWhorter's exclusion on the grounds asserted on direct appeal, because at trial counsel's contemporaneous objection had been based upon a different theory entirely (Grigsby). (Answer Br. at 17). The State cited this Court's previous decisions in Riley v. State, ___ So.2d ___ (19), and Gafford v. State, ___ So.2d ___ (Fla.), as authority for the rule that jurors could, indeed, be excluded, even if they could be entirely fair in deciding guilt or innocence. (Answer Br. note 6 at 17). In essence, the State's argument was that the only basis upon which counsel could challenge the disqualification of the juror for cause on direct appeal was the precise objection stated at trial. The state quoted counsel:

> Mr. Sharer: OK, Do you think, mam, if you did not have to set at the penalty portion and have to recommend, if you were on the penalty, do you think if you were asked to sit at the trial part where guilt or innocence is determined, do you think you could?
>
> Mr. Sharer: You Honor, I would ask that Mrs. McWhorter not be excused for cause because she could sit as a fair juror possibly at the guilt or innocence portion. If she was, uh, did not if she sat, could not sit fairly at the penalty portion, a substitute juror could be sat to take her place.
>
> Mr. Sharer: Please the court, I would like to have my objection on the record to that challenge for cause and renew that motion I did make pretrial regarding that type of juror who only has a problem at the penalty phase and not the guilt phase.

Tr. 240-241.

Appellate counsel ignored this signal; although he considered it important to challenge the disqualification of Juror McWhorter, he made no mention of Riley in his Reply Brief.

This Court, in ruling on the direct appeal, found "After studying this prospective juror's responses to the questions asked on voir dire... that she unequivocally stated her opposition to imposing the death penalty. The trial court,

therefore, properly excused her." ____ So.2d at _____.

Claim II. Petitioner submits that there are at least three viable issues which were properly preserved below and which appellate counsel unreasonably failed to raise in the proceedings before this Court:

1. Appellate counsel unreasonably failed to argue that the trial court's refusal to sequester the jury, once deliberations on guilt/innocence had begun, was reversible error. Even if this Court finds such conduct was not ineffective, Petitioner contends this Court should address the issue as a denial of a fundamental constitutional right.

2. Appellate counsel unreasonably failed to clearly argue that the exclusion of four jurors during the death qualification voir dire violates Mr. Johnson's sixth, eighth and fourteenth amendment rights, and that therefore petitioner's judgments and sentences cannot stand. In the event the court finds such omission was not ineffective, Petitioner contends that this Grigsby error is fundamental error.

3. Appellate counsel unreasonably failed to argue that the admission of testimony of James Smith, to the effect that petitioner expressed an intent to commit future, violent crimes, constituted reversible error and was highly prejudicial at both the guilt-innocence and the penalty phases of petitioner's trial.

4. & 5. Appellate counsel failed to fully argue two clear instructional errors at penalty phase which unconstitutionally misled the jury.

IV. RELIEF SOUGHT

Claim I. Mr. Johnson seeks immediate relief, in the form of a stay of execution, in order to preserve this Court's jurisdiction over his constitutional claims. The issue raised in this application is currently before the United States Supreme Court. Lockhart v. McCree, Docket No. 84-1865. During argument, on January 13, 1986, the Supreme Court Justices specifically inquired into the implications of Lockhart for the State of

Florida, presumably because in Florida judges, not juries, have ultimate responsibility for sentencing decisions. In Kennedy v. Wainwright, this Court voted 4 - 3 to deny a stay in a case which was in the same jurisdictional posture as is Mr. Johnson. The United States Supreme Court subsequently unanimously stayed Mr. Kennedy's execution, based upon McCree. The United States Supreme Court has granted stays of execution in other cases raising the issue in Lockhart, including one case the procedural posture of which is similar to Mr. Johnson's. Celestine v. Blackburn, stay granted, 106 S.Ct. 31 (1985). Celestine raised a challenge to the death qualification of his trial jury on direct appeal. State v. Celestine, 443 So.2d 1091 (La. 1983). The United States Supreme Court denied certiorari. 105 S.Ct. 224 (1984). Mr. Celestine raised the issue in a petition for a writ of habeas corpus in the United States District Court. The Fifth Circuit denied relief. Celestine v. Blackburn, 750 F.2d 3531 (5th C. 1984). The Supreme Court granted the application for a stay. 106 S.Ct. 31 (September 25, 1985). Subsequently, relying on Celestine, the Fifth Circuit granted a stay of execution in a case presenting the same question. Rault v. Louisiana, ____ F.2d ____, Case No. 85-3281 (5th Cir. October 7, 1985).

The United States Supreme Court has also stayed execution in two cases presenting the Lockhart issue in successive petitions for a writ of habeas corpus. Bowden v. Kemp, 106 S.Ct. 213 (1985); Moore v. Blackburn, A-261 (October 4, 1985). This Court likewise has jurisdiction to stay Mr. Johnson's execution, Fla. Constitution, Art. V, Section 3(b)(7). The importance of the question, the probability of a landmark decision by the United States Supreme Court in the next few months, and Mr. Johnson's clear entitlement to relief should the Supreme Court affirm the Eighth Circuit in Lockhart, suggest that a stay is necessary and appropriate. Furthermore, since the issue presented in this application concerns the impartiality of the fact-finder, it calls into question the very reliability of the verdict and sentence of death.

Following sufficient opportunity to review the complex social science data at issue in Lockhart, this Court should reconsider whether death qualification is constitutional in Florida. Mr. Johnson requests an evidentiary hearing, at which he would present many of the studies which are in the Lockhart record. If this Court concludes that any evidentiary hearing is needed before it may decide the merits of Mr. Johnson's claim, it should remand this case to the trial court for such a hearing. It may well be, however, that the United States Supreme Court's decision will determine, as a matter of law, how much injury a criminal defendant suffers as a result of death qualification. It will only remain for this Court to decide how much weight to attach to the State's countervailing interest, which, as we show, is negligible because of the sentencing procedure used in Florida but not in Arkansas.

This Court, after full consideration of the record, should set aside Mr. Johnson's conviction, and order that he be given a new trial.

Claim II. A stay of execution is required so that this Court may give deliberate and careful consideration to Mr. Johnson's constitutional claims. Mr. Johnson's appellate counsel was ineffective, in violation of the sixth, eighth, and fourteenth amendments, and he is entitled to a new appeal.

V. BASIS FOR RELIEF

A. FIRST GROUND FOR RELIEF

On February 12, 1986, this Court, by a vote of 4 to 3, denied a stay of execution in the case of Edward Kennedy. Kennedy, whose jury was death qualified, argued that a stay should be granted because the United States Supreme Court will soon decide Lockhart v. McCree, 106 S. Ct. 59 (1985) (granting certiorari in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), which will resolve whether the process of Witherspoon death qualification violates the Constitution.

Following this Court's 4 - 3 denial of a stay, Kennedy applied for a stay pending certiorari in the United States

Supreme Court. The only issue raised in the application was the Grigsby claim. The Supreme Court unanimously granted the stay.

The stay in Kennedy is only the most recent example of the Supreme Court's determination that no death-sentenced inmates raising the Grigsby claim shall be executed while the Grigsby issue is unresolved. Only one week prior to the unanimous stay in Kennedy, the Court had unanimously stayed the execution of a North Carolina inmate. Rooks v. Woodard, ___ U.S. ___ (February 10, 1986), and in Bowden v. Kemp, 774 F.2d 1494 (11th Cir. 1985), the Eleventh Circuit had denied a stay, finding:

> BY THE COURT:
>
> The United States District Court for the Middle District of Georgia has dismissed petitioner's successive petition for the writ of habeas corpus and denied petitioner a certificate of probable cause to appeal. Presently pending is his petition for a certificate of probable cause and for his stay of execution pending appeal.
>
> The petition presents only one issue involved in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom Lockhart v. McCree, ____ U.S. ____, 106 S. Ct. ____, 87 L. Ed. 2d ____ (Oct. 7, 1985). In this Circuit, prior to and since Grigsby, we have rejected that contention. See Jenkins v. Wainwright, 763 F.2d 1390 (11th Cir. 1985), Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), and Smith v. Balkcom, 660 F.2d 573, 575-84 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148.
>
> Since granting certiorari in Grigsby, the Court has stayed executions in Celestine v. Blackburn, ____ U.S. ____, 106 S. Ct. 31, 87 L. Ed. 2d ____ (1985), and Moore v. Blackburn, 774 F.2d 97 (1985). It is asserted that these two stays by the High Court were granted because of the Grigsby issue involved in each of them; the orders granting those stays do not sufficiently advise us of the basis for them.
>
> Under the precedent binding us in this Circuit, the District Judge's dismissal of the successive petition is correct and the petitions for certificate of probable cause and stay of execution are without merit. Were we to grant CPC and reach the merits of the proposed appeal on consideration of the petition for stay of execution, See Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L.Ed.2d 1090 (1983), we should be bound to affirm the district court. The grant of the writ of certiorari in Grigsby is no authority

> to the contrary; any implications to be drawn therefrom may be discerned by application to the Supreme Court.
>
> The petition for certificate of probable cause is DENIED.
>
> The petition for stay of execution is DENIED.

Id. at 1494. The Supreme Court unanimously granted a stay. Bowden v. Kemp, 106 S. Ct. 213 (1985). The Court has granted stays in at least five additional cases raising the Grigsby issue in a variety of procedural postures. See Celestine v. Blackburn;, stay granted (October 4, 1985) (successive petition) (Grigsby claim raised on direct appeal, cert. denied); Kenley v. Missouri, Docket No. 85-5533, stay granted (October 8, 1985); Guzmon v. Texas, 697 S.W. 2d 404 ;(Tex. Cr. App. 1985), stay granted 54 U.S.L.W. 3391 (December 6, 1985); Gilmore v. Missouri, 697 S.W. 2d 172 (Mo. 1985) stay granted 54 U.S.L.W. 3423 (December 24, 1985). See also Rault v. Louisiana, _____ F.2d _____, Case No. 85-3281 slip op. (5th Cir. October 7, 1985) (denying rehearing but granting stay of execution in light of Moore and Celestine).

Mr. Johnson submits that the State courts should stay his execution, because the proceedings in state court should be seen as the "main event, so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing." Wainwright v. Sykes, 433 U.S. 77, 91 (1977). The United States Supreme Court has in recent years evinced a deep concern for preserving state autonomy within our federal structure and for enhancing the proceedings in State court as decisive and portentous events. See, e.g., Barefoot v. Estelle, 103 S. Ct. 3383 (1983); Marshall v. Lonberger, 103 S. Ct. 843 (1983); Stone v. Powell, 428 U.S. 465 (1976); Engle v. Isaac, 102 S. Ct. 1558 (1982); Rose v. Lundy, 102 S. Ct. 1198 (1982).

Mr. Johnson will not here repeat the social science studies and testimony at issue in Grigsby/McCree and detailed in Kennedy. The overwhelming evidence discussed in the Grigsby/McCree opinions and in the Kennedy pleadings demonstrate what many

experienced lawyers and judges have long believed: juries from which those who would not be able to vote for the death penalty have been removed are more likely to convict -- based on the same evidence -- than an ordinary criminal jury. The legal question posed in this application, and which is before the United States Supreme Court in Lockhart, is a narrow one. May the State exclude jurors who will be fair in the guilt phase of a bifurcated trial, simply because in the separate, sentencing phase, they would never vote to inflict the death penalty?

We do not contend that jurors whose opinions about capital punishment will influence their decisions about the defendant's guilt or innocence should serve on capital juries. This case involves only those jurors, sometimes described as "automatic life imprisonment" jurors, who are qualified to serve in the guilt phase of a capital trial, but who are excluded for the convenience of the State, so that additional alternate jurors are not required for the sentencing phase of the trial. We present our analysis of this issue in four parts: the defendant's unquestioned constitutional right to a trial by a fair and impartial jury; the defendant's right to a jury representing a fair cross section of the community; the state's interest in death qualification; and whether the state's interest is weighty enough to overcome the defendant's constitutional right.

a. Death Qualified Juries Are Not Impartial

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." In Duncan v. Louisiana, 391 U.S. 145 (1968), decided only two weeks before Witherspoon, the Supreme Court held that this provision was applicable to the States through the due process clause of the fourteenth amendment.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common sense judgment of a jury to the more tutored but

> perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges.

Id. at 156. Article I of the Florida Constitution, Section 22, provides: "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and number of jurors, not fewer than six, shall be fixed by law."

Because the right to trial by jury is inextricably linked to ideals of democracy and representation, "the proper functioning of the jury system, and indeed our democracy itself, requires that the jury be a 'body truly representative of the community and not the organ of any special group.'" Glasser v. United States, 315 U.S. 60, 86 (1942). "The constitutional standard of fairness requires that a defendant have 'a panel of impartial "indifferent" jurors.'" Murphy v. Florida, 421 U.S. 794, 799 (1975). Death qualification, like exposure to pretrial publicity, produces a jury which is predisposed to convict. See Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966); Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885 (1984). Unlike pretrial publicity, however, the predisposition resulting from death qualification is easily avoided, because it is entirely within the control of the court.

Because overwhelming evidence shows that death qualified juries are not impartial, death qualification necessarily violates the Constitution unless the State's interest in the procedure overcomes the defendant's constitutional right.

b. Death Qualification Violates the "Fair Cross Section" Requirement

In addition to the fundamental requirement that a trial jury be fair and impartial, it must also be representative of the community. "[T]he fair cross-section requirement [is] . . . fundamental to the jury trial guaranteed by the Sixth Amendment. . . ." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). In Duren v. Missouri, 439 U.S. 357, 364 (1979), the Court explained:

> In order to establish a prima facie violation of the fair-cross section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of this group in the jury selection process.

The Eighth Circuit applied this standard:

> There is no functional difference between excluding a particular group of eligible citizens from the 'jury wheels, pools of names, panels or venires from which juries are drawn' and systematically excluding them from sitting on a petit jury. Duren and Taylor forbid the former explicitly and can be read to forbid the latter implicitly. Duren, 439 U.S. at 363-67; Taylor, 419 U.S. at 526-31. The result is the same in either case: a distinct group of the citizenry is prevented from being considered for service on petit juries.

Grigsby v. Mabry, 758 F.2d note 7 at 230. The court found that the group of jurors who are excluded by death qualification is distinctive and sizeable; that the representation of such persons on venires is not fair and reasonable; and that they are systematically excluded by the death qualification process. Grigsby, 758 F.2d at 229.

The representation of a cross section of the community helps to make jury verdicts more reliable, since without such a cross section, the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." Peters v. Kiff, 407 U.S. 493, 503-4 (1972) (plurality opinion). Experimental data on death qualification confirms the relevance of this principle here. Cowan, Thompson and Ellsworth found that juries which included excludable jurors remembered the evidence more accurately than did members of juries which included only death qualified jurors. The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of deliberation, 8 L. & Hum. Behav. at 73. The authors concluded, "We expect that the superiority of mixed juries is also a function of the likelihood that errors of fact are more

likely to be corrected when there is a wide range of viewpoints and a higher level of controversy." Id. at 76. An unrepresentative jury cannot reflect "the common sense of the community." Ballew v. Georgia, 435 U.S. at 232. Death qualification impairs the ability of the jury to carry out this vital function and denies the defendant his constitutional right to a representative jury.

c. The State's Only Interest in Death Qualification is Fiscal and Administrative

The State's only interest in a criminal trial is in seeing justice done, not in obtaining a conviction or a particular sentence. Berger v. United States, 295 U.S. 78 (1935). For this reason, the State has no legitimate claim of entitlement to a death qualified jury because it is more favorable to the prosecution than ordinary criminal juries. Yet this is the reasoning which lies behind the contention voiced in the Petitioner's brief in Lockhart, and earlier in Spinkellink, that juries which are not death qualified may be "defendant prone." Discussing this position, the Eighth Circuit observed that this is "the wrong issue. The issue is not whether non-death-qualified jurors are acquittal prone or death-qualified jurors are conviction-prone. The real issue is whether a death qualified jury is more prone to convict than the juries used in noncapital criminal cases -- juries which include the full spectrum of attitudes and perspectives regarding capital punishment. The fact that the state charges a defendant with a capital crime should not cause it to obtain a jury more prone to convict than if it had charged the defendant with a noncapital offense." Grigsby v. Mabry, 758 F.2d at 2419 n. 31. The only meaningful standard of measurement of jury impartiality is an ordinary criminal trial jury; the evidence shows that compared to such a jury, death qualified juries are biased in favor of the prosecution. Since this kind of bias undermines the reliability of jury verdicts, and creates a risk of erroneous convictions, the State has no interest in obtaining a death qualified jury, unless the administrative advantages of having a single jury panel decide

both guilt and penalty is greater than the constitutional deficiencies arising from the demonstrated bias and unreliability of death qualified juries.

(1). The Florida Statutory Scheme Does Not Require Death Qualification.

The first, and perhaps the best, measure of the State's interest is the statutory scheme which governs jury selection in this State. Fla. Stat. Section 913.13 provides that "[a] juror who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." This section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will not vote to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death qualification procedure followed in this or any other case. The only other relevant statutory authority is Fla. Stat. Section 913.03(10), which authorizes the removal of jurors whose "state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality. . . ." But reliance on this provision to justify the exclusion of jurors who will be fair to both sides in the guilt phase but not in the penalty phase begs the question. The problem of impartiality in the penalty phase arises only if the same jury must decide both guilt or innocence and penalty. See Winick, Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. Rev. 825, 835-40 (1983).

Fla. Stat. Section 921.141(1) provides, in relevant part:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable.

> If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty.

This Court has remanded at least fourteen cases for resentencing before a new jury. Lee v. State, 294 So.2d 305 (1974); Lamadline v. State, 303 So.2d 17 (Fla. 1974); Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, 330 So.2d 137 (1974); Elledge v. State, 346 So.2d 998 (1977); Maggard v. State, 399 So. 2d 973 (Fla. 1981); Rose v. State, 425 So.2d 521 (Fla. 1982); Perri v. State, 441 So.2d 606 (Fla. 1983); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Simmons v. State, 419 So.2d 316 (Fla. 1982); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Patten v. State, 467 So.2d 975 (Fla. 1984); Hill v. State, 477 So.2d 553 (1985); Toole v. State, ____ So.2d ____, Case No. 65,378 (Fla. Nov. 25, 1985).

Nothing in Section 921.141(1) precludes a trial judge from, for example, seating alternate jurors who attended the guilt phase of the trial on the jury during the sentencing phase in place of jurors who would not consider imposing the death penalty. The substitution of a small number of alternates would be simple, efficient, and fair. The jury would thus be impartial in both the guilt and sentencing phases. Under current practice, the trial jury is not impartial in the critical determination of the defendant's guilt or innocence. Impartiality in the sentencing phase is bought too dearly when the cost is impartiality in the more important determination of guilt or innocence.

This is especially true in Florida for two reasons. First, the verdict in the sentencing phase need not be unanimous. Even if the sentencing jury were less than impartial, it might still reach the same result by a smaller majority. Second, the jury's sentencing verdict is only advisory. We discuss this point in greater detail below. In general, the determination of guilt or innocence is more important because the cost of an erroneous conviction is surely far higher than the social cost of an

erroneous sentence of life imprisonment. See 4 W. Blackstone, Commentaries on the Laws of England 358 (better that ten guilty men go free than one innocent person be convicted).

(2). The Trial Judge's Power to Override the Jury's Recommendation Makes Death Qualification Before Trial Unnecessary.

Florida law gives the trial judge the final decision on sentencing in a capital case. Fla. Stat. Section 921.141(3). The jury's recommendation receives "great weight" in the judge's final decision, Tedder v. State, 322 So.2d 908 (Fla. 1975), but judges retain, and not infrequently exercise, the power to override jury recommendations of life imprisonment or death. See Mello and Robson, Judge over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. Univ. L. Rev. 31 (1985).

> Because the trial judge decides sentence without being bound by a jury recommendation, he may impose capital punishment in an appropriate case even if 'automatic life imprisonment' jurors remain on the capital jury and vote, as inevitably they will, for life imprisonment. Indeed, whatever guidance the judge is provided by the jury's recommendation on the life or death question is still provided by a jury whose members include 'automatic life imprisonment' jurors. Since voir dire questioning will identify those jurors as being 'automatic life imprisonment' jurors, the judge will be aware of the number of such jurors sitting on the capital jury and will be able to give appropriate weight to the jury's advisory vote on sentence.

Winick, supra, 37 U. Miami L. Rev. at 852 (footnotes omitted).

In sum, Florida's statutory procedure already provides ample safeguards against "erroneous" failures to impose a death sentence. For this reason, the State's interest in an impartial jury in the sentencing phase is insubstantial by comparison to the defendant's constitutional right to have an impartial jury decide the question of guilt or innocence.

(3). This Court's decisions preclude reliance on residual doubts about guilt in mitigation of sentence.

The United States Court of Appeals for the Eleventh Circuit, in Smith v. Balkcom, supra, 660 F.2d at 580, concluded that -- regardless of the strength of the evidence that demonstrates that

death qualified juries were predisposed in favor of the prosecution -- death qualification was not constitutional error because "[t]here is a potential benefit to a defendant . . . which would be lost were the jury which found guilt discharged and a new jury empaneled to decide punishment. The members of the jury which heard the evidence in the guilt phase may believe that guilt has been proven to the exclusion of a reasonable doubt, "and yet, some genuine doubt exists. . . . The juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the . . . penalty of death. . . ." Id. This Court has repeatedly held that the sentencing judge should give no weight to jury recommendations based upon such lingering doubts about the defendant's guilt. In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court wrote:

> A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Id. at 953. Accord Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985); Sireci v. State, 399 So.2d 964, 972 (Fla. 1981). While we do not endorse this rule, the holding distinguishes Florida's capital sentencing scheme from the Georgia case discussed in Smith v. Balkcom. It is simply inconsistent to justify a system which impairs the defendant of a fair jury in the guilt phase of a trial on the basis of a "benefit" to which -- as a matter of state law -- a defendant in a Florida capital trial is not entitled.

Of course, it would not be necessary to empanel a new jury at all since in Florida the judge, not the jury, makes the final sentencing decision, and could give less weight to a jury recommendation influenced by jurors who would never vote to impose a death sentence. Nor would this be necessary if the court simply empaneled additional alternate jurors as substitutes for jurors who were not qualified to serve in the penalty phase. Since none of the reasons which ordinarily support death

qualification are applicable to Florida's sentencing process, a defendant's constitutional right to trial by an impartial jury surely must prevail in the balance.

The only other justification the state might offer is the administrative and fiscal burden of selecting additional jurors for the sentencing phase. Even if such fiscal considerations could play a proper role in this Court's constitutional analysis, they are insufficient to overcome the defendant's constitutional rights. These expenses are slight by comparison to those incurred by, for example, a change of venue. Furthermore, they would be partially, if not entirely, offset by a reduction in the length of voir dire before trial,and by the increased accuracy of jury verdicts, which would reduce the costs of appellate review of capital cases.

d. The Right to Trial by an Impartial Jury Outweighs the State's Interest in Death Qualification before Trial.

"It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" Witherspoon, 391 U.S. at 521. Yet this is precisely what happens when we entrust the determination of guilt or innocence to a death qualified jury. Death qualification undermines the fundamental premise of our jury system: that the fairest trial is one before a group fairly and randomly chosen from the entire community, which mirrors that community in its values and its diversity. Without compelling reasons, the state may not abridge this right. A similar compromise between the state's interest and the right to a trial by a jury representing a fair cross section of the community is presented in challenges to a prosecutor's racially motivated use of peremptory challenges. The Supreme Court has agreed to consider this issue this Term as well. Batson v. Kentucky, Docket No. 84-6263, cert. granted, 85 L.Ed 476 (1985). Florida's capital sentencing process makes death qualification before trial completely unnecessary.

B. SECOND GROUND FOR RELIEF

The appellate-level right to counsel rests on the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, ___ U.S. ___, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure . . ." Lucey, 105 S.Ct. 830, n. 6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf . . ." Douglas v. California, 372 U.S. 353, 358 (1965) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer . . ." Lucey, 105 S.Ct. at 835 (quoting Strickland v. Washington, 104 S.Ct. 2052 (1984). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae". Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657 , 664 (1984). Counsel is crucial, to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835, n.6. Unless counsel requires the "prosecution's case to survive the crucible of meaningful adversarial testing," Cronic, 80 L.Ed. at 666, this Court cannot easily perform its assigned function, as the leader of Florida's judiciary, to ensure "that the guilty be convicted and the innocent go free." Lucey, 105 S.Ct. 830, 835 (citations omitted). "'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" Cronic, 80 L.Ed. at 657 (citing the quote from Kaufman, Does the Judge Have a Right To Qualified Counsel, 61 ABAJ 569, 569 (1975)).

Effective counsel does not leave an appellate court with "the cold record which it must review without the help of an

advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S.Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also, Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

"The mere fact that [this Court is] obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically provided by counsel." Id., at 1302. In addition, the advocacy of counsel must be timely, not after oral arguments or on rehearing. "An appellate court conducts its most in-depth and complete review of a case during the direct appeal. A petition for rehearing typically receives a more summary consideration . . . Accordingly, the duties of an 'active advocate' mandate that appellate counsel assert his [or her] client's position at the most opportune time." Id.

This Court has long protected the right of indigents to effective appellate representation. In Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation of appeal fell below an acceptable standard." Subsequently, upon Mr. Barclay's new appellate record, briefing, and argument, this Court reversed Barclay's death sentence, and ordered that a life sentence be imposed. More recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome . . ." Harris v. Wainwright, ___ So.2d ___ (Fla. No. 66,523, June 13, 1985, slip

at 3).

Appellant neither can be denied appellate counsel as "a sacrifice of [an] unarmed prisoner[] to gladiators," Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied 423 U.S. 876 (1975), nor can he be provided an attorney whose ineffectiveness makes it "difficult to distinguish [the appellant's] . . . situation from that of someone who had no counsel at all." Lucey, 105 S.Ct. 830, 855, n.6. Nominal representation on an appeal as of right . . . does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Id. at 836. Counsel may not waive his client's defense, Id. at n. 6, and be considered effective.

While there is no federal constitutional right to an appeal generally, Jones v. Barnes, 103 S.Ct. 3308 (1983), the Eighth Amendment demands meaningful appellate review in capital cases. To ensure that death sentences are imposed in an evenhanded, rational, and consistent manner, as opposed to wantonly and freakishly, prompt and automatic appellate review is require. Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. 242 (1976). If effective assistance of appellate counsel is a constitutional imperative in cases in which the constitution does not even require an appeal, it follows a fortiori that enhanced effectiveness is required when the appeal is required by the Eighth Amendment.

Counsel on direct appeal rendered ineffective assistance of counsel in failing to raise three meritorious claims.

1. Permitting the jury to separate during deliberations.

The case of Paul Johnson was one in which there was a great deal of pre-trial publicity. The publicity was such that a defense Motion for Change of Venue [Tr. 2287-94] was granted in (Order transferring venue to Lake County, Florida [Tr. 2339] Amended Order [Tr. 2364]).

During the deliberation of the jury at guilt phase of this capital trial, the Court permitted the jury to separate and go home. [Tr. 1598-9]. Counsel objected to this procedure and the objection was overruled. (Tr. 1599-1600). When the jury returned after going home overnight, counsel again objected to the procedure, and moved for a mistrial. [Tr. 1603]. The jury returned with its verdict less than two hours later.

On September 21, 1981 at 3:58 P.M. the jurors, after having been instructed by the Court, retired to deliberate the guilt/innocence of Paul Johnson [Tr. 1596]. At 9:04 P.M. the jury returned to the courtroom and at 9:06 P.M. the Court excused the jury for the evening indicating they return at 9:00 A.M. the following day. [Tr. 1597-99]. A request for sequestration of the jury overnight was made by defense counsel before the Court instructed and dismissed the jury. [Tr. 1599]. The request was denied by the Court. [Tr. 1600].

On September 22, 1981 at 9:00 A.M., before the jury returned to the courtroom, defense counsel lodged a Motion for Mistrial on the ground that the jury had not been sequestered. The Motion was denied [Tr. 1603]. Defense counsel had previously moved at the onset of the trial for sequestration of the jury for the entire trial. [Tr. 9]. An additional Motion for sequestration during voir dire was made because of the massive amount of pre-trial publicity. [Tr. 2128-32].

The law in Florida is quite clear on the issue of jury sequestration during the deliberation phase of a capital trial. In Livingston v. State, 458 So.2d 235 (Fla. 1984) the Florida Supreme Court related:

> We therefore find that the trial court erred and that the error prejudiced appellant's right to a fair trial. We hold that in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so. A separation of the jurors after commencement of deliberations will generally be grounds for a mistrial, save for exceptional circumstances of emergency, accident, or other special necessity. Such a strict rule appears to be necessary in order

> to keep the attention of the jurors properly focused and concentrated on their deliberations.

In so ruling the Court relied on the decision and reasoning of Raines v. State, 65 So.2d 558 (Fla. 1953). In Raines, the prevailing law in Florida at the time of this trial in 1981, the court allowed the jurors to separate and go to their homes for the night after they had begun deliberations. The case had been fully submitted to the jury and the jury had deliberated for one and one-half hours prior to separation. The Raines court ruled that it was prejudicial error to let the jurors separate for the one night.

It is crucial to note that the Court in Raines was not concerned with whether counsel had objected nor with any requirement that actual prejudice be shown to obtain relief.

> There was no objection raised when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates. A fifteen hours absence under no restraint whatever leaves too much room to question the bona fides of everything that took place during that time . . . It imposes too great a burden on the defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal.

65 So.2d at 559-60.

Raines was based on an interpretation of Sections 919.01(1) and (2), Florida Statutes (1953) provisions which are now contained in Fla.R.Crim.Pro. 3.370 (1975). As analyzed by the Court in Livingston and Raines the statutes and rule do not contemplate that jurors should separate during deliberations. In addition, the Court noted that Section 918.06, Florida Statutes (1979) which provides the court with discretion to either sequester the jury or allow them to separate when they leave the jury box does not specifically allow for a sequestration during deliberations. The Court found "there is no specific authority

by statute or rule for the action of the trial court judge."

The Livingston Court highlighted the danger in allowing jurors to disperse after beginning deliberations by referring to the reasoning and language of the Raines Court.

> "...to allow the jurors to disperse for a weekend after they have begun their deliberations raises serious questions about their ability to reconvene and resume deliberations completely free from outside influences. Even in the trial of a noncapital felony, the separation of the jury prior to the rendering of the verdict has been recognized to be an irregularity which may call for the granting of a new trial. Smith v. State, 40 Fl.a 203, 23 So. 854 (1898). It should be noted that Smith, a noncapital case, was decided before the advent of electronic communications and entertainment in the home on a mass basis.
>
> In the instant case, the court gave admonitions to the jurors before the weekend recess and examined them prior to the resumption of deliberations on Monday. However, the issue in this case is whether the weekend recess in the midst of deliberations rendered the jurors so susceptible to the operation of improper influences as to have been reversible error even with admonitions before and voir dire after the recess. The Raines decision recognized that some situations carry such an inherent danger of improper influence that courts should remedy the error without requiring the accused to show that any such improper influences actually operated upon or affected the jury. More recent decisions have properly applied this principle and illustrate its continued validity. Armstrong v. State, 426 So.2d 1173 (Fla. 5th DCA 1983); McDermott v. State, 383 So.2d 712 (Fla. 3d DCA 1980); Kennick v. State, 107 So.2d 59 (Fla. 1st DCA 1958).

The Raines decision and the applicable Florida Statutes clearly defined the state of the law in Florida in 1981, when the trial in the instant case took place. In addition to Florida, several other jurisdictions had also, by 1981, established through statute, court rule and common law that a jury separation, "especially in capital cases and where the defendant objects, is prejudicial error. . . ." See e.g., Kimoktoak v. State, 578 P.2d 594 (Alaska 1978); Hughes v. State, 437 A.2d 559 (Del. 1981); Mason v. State, 239 Ga. 538, 238 S.E.2d 79 (1977); People v. Ritzert, 17 Ill.App.3d 791, 308 N.E.2d 636 (1974); Bales v. State, 418 N.E.2d 215 (Ind. 1981); Walker v. state, 410

N.E.2d 1190 (Ind. 1980); White v. Maxwell, 174 Ohio St. 186, 187 N.E.2d 878 (1963); Gibson v. State, 512 P.2d 1399 (Okla.Crim.App.1973); Gonzalez v. State, 593 S.W.2d 288 (tenn. 1980); O'Neil v. State, 642 S.W.2d 259 (Tex.Crim.App.1982); State v. Smalls, 99 Wash. 2d 755, 665 P.2d 384 (1983). Livingston, 458 So.2d at 238 (citing cases).

The Livingston Court, in addition to utilizing the language of Raines, also adopted the reasoning of the Supreme Court of Washington:

> "Jurors might be subjected to any number of prejudicial influences whenever the jury is allowed to separate. A juror allowed to return to his home overnight might be prejudiced by any of the myriad influences on his life. who can say how a juror might be influenced by contact with his family and friends, or exposure to the various news and entertainment media during an evening at home?
>
> In our opinion, jurors are especially sensitive to prejudicial influence during deliberations. While still hearing evidence, it is probably easier for jurors to keep an open mind. Moreover, the impact of potentially prejudicial influences will be dissipated by subsequent evidence, the arguments, and instructions. But when the jurors have heard all the evidence, and have been focused onto the issues before them by the arguments of the parties and instructions, the potential for prejudice increases substantially.
>
> ...A chance remark by a juror's spouse or a program watched on television during the juror's 12 hours at home would have more immediacy than the evidence. There is a very real possibility that the juror's recollection of the evidence or perception of it might be distorted by such influences received subsequent to the conclusion of the evidence.
>
> Of course, it is usually impossible to determine whether such influences actually prejudice a juror against the defendant in a particular case. The juror himself may well be unaware of the subtle influences which affect his decision. For this reason, admonition and instruction of the jury is probably ineffective in ameliorating the prejudicial effects of separation during the deliberations. For this reason also, the use of juror affidavits to prove a probability of prejudice is of dubious value; a juror cannot swear to being prejudiced by influences of which he is unaware.
>
> State v. Smalls, 99 Wash.2d at 765, 665 P.2d at 390-91.

Livingston, 458 So.2d at 238, 39.

There is no question but that the right of defendant to a

fair trial, a trial by an impartial jury, is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 16 of the Florida Constitution. Mr. Johnson was denied these rights during his trial. This was a highly publicized case with television cameras in the courtroom at all times. Defense counsel timely objected to the jury separation by requesting sequestration specifically on the advice of appellate counsel who was present at the time, although the Raines decision did not even require this. [See Aff., Ex.]. Notwithstanding motions for sequestration, the court ignored the danger of separation. The court cited no emergency, accident or other special necessity that would have, at least, given some justification for separation. The court's only reason for the separation was that it did not want to inconvenience the jurors. This is no justification for depriving Mr. Johnson of his right to a fair trial and impartial jury. Mr. Johnson was deprived of his rights under both the United States and Florida Constitutions and should be granted a new trial.

Appellate counsel's utter failure to address this properly preserved issue on direct appeal, especially in light of this Court's later decision in Livingston, demonstrates both his ineffectiveness as counsel and the highly prejudicial nature of this omission. The error is of such fundamental proportion that the Court should address the issue directly even if it finds appellate counsel was not ineffective for omitting it.

2. Death Qualification of Capital Jurors

Mr. Johnson's trial counsel challenged the death qualification of this jury by pretrial motion and specifically objected to the exclusion of jurors on the precise ground well before the Supreme Court in Lockhart v. McCree.

Appellate counsel's failure to discuss this issue on direct appeal, despite trial counsel's preservation of the record below, constitutes ineffective assistance of appellate counsel. This Court should stay Petitioner's execution pending the Supreme Court's ruling in Lockhart.

3. Admission of James Smith's testimony re: Petitioner's violent "intentions"

Appellate counsel was also ineffective in failing to raise on appeal the trial court's admission of certain testimony provided by witness James Smith during Petitioner Johnson's trial, although the issue of admissibility had been raised and properly preserved below.

Witness Smith was an inmate in the same institution as Mr. Johnson during January, February, and March, 1981. [Tr. 1108]. During that period of time, with the encouragement of agents of the state, [Tr. 1121 ff. passim], Smith engaged Mr. Johnson in several conversations concerning the homicides involved herein. [Tr. 1120]. After testifying to the substance of conversations the witness claimed to have had with Mr. Johnson directly concerning the three homicide victims, Smith was questioned as follows:

> Q. Did he mention going to the hospital or what he would do if he could go to the hospital?
> A. Yes.
> Q. What?

[Tr. 1117]. At that point, Defendant's trial counsel objected on the grounds of relevancy; the Court overruled the objection. [Tr. 1118].

The question was restated with the following response:

> Q. What did he say about going to the hospital?
> A. If they sent a little cop, he knew he could take his gun, if he took that big son-of-a-bitch's gun in Lakeland, and he would be home free then.
>
> . . . .
>
> Q. What did he say about the hospital?
> A. He said if they sent a little deputy with him to take him to the hospital, if he could take that big dude's gun in Lakeland, he could take that little one's and he'd be home free.

[Tr. 1118].

Defense counsel asked to make a motion outside the presence of the jury; the Court deferred argument until after cross-examination of Smith. [Tr. 1119]. At the conclusion of Smith's

testimony, defense counsel moved for a mistrial:

> MR. SHEARER: Yes, Your Honor, I'd like to make a Motion for Mistrial at this time on the ground that Mr. James Smith was permitted over objection to testify to alleged statements of the defendant Paul Beasley Johnson about some allegations as far as what he was going to do or would like to do regarding criminally violent offenses wholly unrelated to the charge in this case.
>
> To remind the Court, Mr. Smith was allowed to testify that Mr. Johnson supposedly said if he ever got to the hospital, he would take another deputy's gun away from him, try to escape, something of this nature. This is evidence or testimony allegedly that the Defendant made statements regarding another or subsequent offense regarding escape, assault on a police officer, resisting arrest, totally irrelevant to the case at bar and prejudicial to the defense and automatic grounds for a mistrial.

[Tr. 1132].

The Court denied the motion for mistrial. [Tr. 1132]. Despite trial counsel's preservation of this error below, appellate counsel failed to raise or argue the matter on direct appeal.

The admission of Smith's testimony as to Mr. Johnson's alleged intention to commit other, future violent crimes constitutes fundamental error. In the first place, the testimony in question, while highly prejudicial, is simply irrelevant. F.S. 90.401 defines relevant evidence as "evidence tending to prove or dispute a material fact." What Mr. Johnson said about his future intentions -- which in fact were never carried out nor criminally charged -- is simply irrelevant to the criminal prosecution in this cause. However, the introduction of such evidence was extremely prejudicial to Mr. Johnson in that it tended to show a general predilection for violence and for criminal behavior quite outside the scope of the indictment. In addition, such testimony could not fail to color the jury's deliberations during the penalty phase of Mr. Johnson's trial, because it tended to impugn Mr. Johnson's character in general terms, and because it suggested that any penalty short of a death sentence might result in an effort to escape.

Secondly, the testimony in question is directly analogous to

"Williams Rule" evidence, in that it involved allegations of "other criminal activity" introduced improperly in this case, solely for the purpose of showing Mr. Johnson's bad character, propensity for violent crime, and intention to escape.

In the usual case, if Williams Rule evidence is properly admissible as to collateral crimes because of a strong element of similarity between the crime charged and the collateral crime, a limiting instruction is sought and given to minimize the prejudicial effect of the collateral evidence. In this case, where the "crimes" discussed never happened, and were totally irrelevant in all respects, trial counsel did all he could to preserve the error, by moving for a mistrial. Had appellate counsel raised the issue and argued it, the conviction would have been reversed. Rivers v. State, 425 So.2d 101 (1st DCA 1982); Townsend v. State, 420 So.2d 615, (Fla. 9th DCA 1982); Dixon v. State, 426 So.2d 1358 (Fla. 2d DCA 1983).

Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981), held that, where the jury heard constant reference to the defendant's criminal past without any limiting instruction to apply such evidence only to a particular charge, such lack of instruction was prejudicial error, and

> rose to such a level as to make the petitioner's trial fundamentally unfair and in violation of the Fourteenth Amendment.65

Panzavecchia, 658 F.2d at 341 (emphasis added). This same passage was emphasized and quoted in United States v. Silva, 745 F.2d 840 (4th Cir. 1984). Both Panzavecchia and Silva deal with improper joinder of offenses, rising to the level of constitutional error. In Silva, the court further stated that the prejudicial effect of introduction of a defendant's prior conviction can be avoided through the proper use of a limiting instruction. In Silva, the trial judge repeatedly charged the jury to consider a particular conviction only for the purposes of one charge. No such instructions, which might have alleviated the prejudicial effect, were possible in this case.

Florida Statute 90.404(2)(b)(2) specifically states that "[a]fter the close of the evidence, the jury shall be instructed on the limited purpose for which the [Williams Rule] evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information."

To allow evidence of crimes not included in the indictment would permit the state to fail to meet the preliminary requirements of this statute. This rule was announced in order to prevent abuse in presenting testimony. See Fla. Stat. 90.404, Sponsor's Notes. In Mr. Johnson's case, permitting testimony concerning his alleged intentions to commit other, future violent crimes -- never charged in any indictment or information because they never occurred -- is an even more egregious error. Appellate counsel's failure to raise this potentially reversible issue on direct appeal therefore constitutes ineffectiveness and must be redressed by this Court.

CONCLUSION

Obviously, this court cannot search every record on appeal in every capital case for error. Where the points omitted would have, as we have demonstrated, resulted in reversal, appellate counsel's failure reaches the level of constitutionally ineffective assistance of counsel, and Petitioner's convictions and sentences must be vacated. Even if this Court finds no ineffectiveness as to Point 1, the fundamental nature of the error requires reversal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Mr. Robert J. Crauss, Assistant Attorney General, Office of the Attorney General, Suite 804, Park Trammell Building, 1313 Tampa Street, Tampa, FL 33602, this 18 day of February, 1986.

Attorney