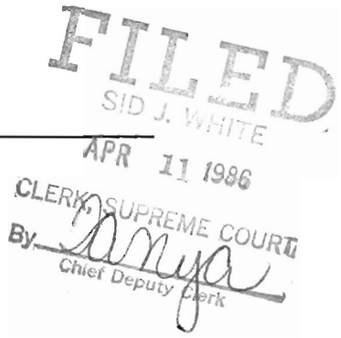
IN THE SUPREME COURT OF FLORIDA

NO. 68,412



DAVID FUNCHESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,
and R. L. DUGGER, Superintendent, Florida State Prison,

Respondents.

AMENDED PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

This case presents aspects of the claim presently under active consideration by the United States Supreme Court in Lockhart v. McCree, No. 84-1865. The venire underwent the death-qualification process. That process biased the jury in favor of guilt at the outset. The process focused on penalty before the trial began and conveyed the impression that Mr. Funchess was guilty. The process also resulted in the exclusion of veniremembers based on death penalty scruples. If granted an evidentiary hearing, Mr. Funchess would show that there was a systematic practice by the prosecutors in Florida's Fourth Judicial Circuit, where Mr. Funchess was tried, over a period of years, of exercising peremptory challenges against death-scrupled jurors who could not be excluded for cause.

Mr. Funchess recognizes that this Court has repeatedly denied stays in cases raising the Lockhart claim. We will not again burden the Court with the voluminous supporting documents to this claim. We rather incorporate by reference the appendices in Thomas v. Wainwright (Fla. April 7, 1986). The United States Supreme Court has stayed executions of inmates presenting different aspects of the Lockhart issue in different procedural postures, including in successive applications and cases in procedural default. See, e.g., James v. Wainwright, No. A-710 (U.S. March 18, 1986) (no Lockhart jurors excused for cause; four excused peremptorily; claim preserved at trial, not raised on direct appeal and presented to this Court in first habeas petition); Adams v. Wainwright, No. A-653 and 85-6545, 54 U.S.L.W. 3597, (U.S. March 6, 1986) (no Lockhart jurors exclused for cause and only one by peremptory challenge; claim not preserved at trial, direct appeal, first habeas petition or first post-conviction proceeding; presented for first time in successive habeas proceeding); Kennedy v. Wainwright, No. A-622, 54 U.S.L.W. 3558 (U.S. Feb. 14, 1986) (one Lockhart juror excluded for cause; claim preserved at trial and on direct appeal

and presented to this Court in first habeas petition); Moore v. Blackburn, No. 85-____, (U.S. Oct. 3, 1985), granting stay in Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985) (apparently no Lockhart jurors excluded for cause; claim not preserved at trial, on direct appeal or in first post-conviction litigation; stay granted in successive habeas proceeding); Celestine v. Blackburn, 106 S.Ct. 31 (1985) (one juror excluded for cause based on death penalty scruples, but unclear whether juror could have fairly decided guilt; claim raised in successive habeas petition); Bowden v. Kemp. 106 S.Ct. 213 (1985), granting stay in Bowden v. Kemp, 774 F.2d 1494 (11th Cir. 1985) (unclear whether jurors were excluded for cause; claim presented for first time in successive habeas petition).

In Harich v. Wainwright, No. A-711 and 85-6547 (U.S. March 18, 1986), the Court, 5 to 4, denied a stay based on Lockhart. But in so doing, the Court for the first time delineated the parameters of the questions presented in Lockhart and therefore the situations in which a stay is appropriate. The Harich case raised the outer limits of the Lockhart issue: No veniremember was excluded, either for cause or peremptorily based on death penalty scruples. Justice Marshall would have granted a stay in Harich because of the biasing effects of the death qualification process itself, and Justice Brennan would have granted the stay because of the inherent unconstitutionality of the death penalty. Justice Stevens and Justice Blackmun dissented from denial of the stay "because the Court has not yet acted on the petition for a writ of certiorari"; that petition raised only the Lockhart issue. Justice Powell, concurring in denial of the stay, wrote:

> The other capital case in which execution was scheduled for tomorrow is No. A-710, James v. Wainwright. I voted to grant a stay of execution in that case. Both James and Harich profess to present claims similar to that pending before the Court in Lockhart v. McCree, No. 1865.
>
> This case, however, presents an issue different from James and one without merit. In James, the Lockhart issue was at least arguably presented when persons on the venire who expressed reservations as to capital punishment were removed by peremptory

> challenges. In this case, petitioner "conced[ed] in this petition [before the Supreme Court of Florida] that at this trial 'no veniremen were excluded' during voir dire, either for cause or through peremptory challenge." Opinion of Supreme Court of Florida 2. Similarly, before this Court petitioner makes no allegation that persons on the venire were excluded during voir dire because of any objections to capital punishment.
>
> Accordingly, my vote is to deny the application for a stay of execution.

(emphasis added).

The apparent purpose of the separate opinions in Harich was to give the lower courts guidance in deciding whether to grant stays based on Lockhart. The opinions make clear that at least five Justices are convinced that a Lockhart stay is appropriate when veniremembers were excluded either for cause or peremptorily.

This is Mr. Funchess' second petition to this Court for a writ of habeas corpus. The first petition was filed in 1984 and raised one issue: whether Mr. Funchess received the effective assistance of counsel on his direct appeal to this Court. This Court denied Mr. Funchess' prior petition. That prior petition was filed by volunteer pro bono counsel, who agreed to represent this then pro se petitioner, under death warrant.

II. JURISDICTION

This Court's jurisdiction derives from the Florida Constitution, Article V, sec. 3(6)(a). See Adams, 11 F.L.W. at 79; see also secs. 3(b)(1), (7), (9); Fla. R. App. P. 9.030(a)(3), Fla. 9.100, Relief under Fla. R. Crim. P. 3.850 is not available because the issues presented in this application either were or could have been raised at trial and on direct appeal.

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 constitu-

tions explicitly provide for the writ. Fla. Const., Art. V, sec. 3(b)(9); Art. I, sec. 13; U.S. Const., Art. I, sec. 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 constitutional 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. sec. 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); Johnson, supra.

Governor Graham signed Mr. Funchess' death warrant two months after the United States Supreme Court heard oral argument on the constitutionality of the death-qualification procedure used in Mr. Funchess' trial and after several stays had been issued in cases presenting the Lockhart claim. If the United States Supreme Court affirms the Eighth Circuit, it will, in effect, be pronouncing Mr. Funchess' conviction and sentence unconstitutional. This pronouncement, of course, will have little meaning unless Mr. Funchess' execution is stayed. We fully recognize that Lockhart 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). See also Johnson, supra. As

discussed infra, stays of execution to await Lockhart reflect sound judicial policy.

It would be possible, of course, for Mr. Funchess 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. Funchess has presented because unique features of Florida's capital sentencing procedure are bound up in the application of Lockhart to this case and because we 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.

III. FACTUAL BASIS FOR RELIEF

The jury in this case underwent the death-qualification process. That process apparently resulted in veniremember Dennis being excluded peremptorily by the State:

> MR. AUSTIN: Do any of you others have -- I have received one answer when one gentleman raised his hand when I asked that question before and I am not going to repeat it but do any of you upon further reflection have any problem with the question I asked? You will be able to return a verdict of guilty if the State proves its case beyond and to the exclusion of every reasonable doubt as the Judge will instruct you that you have a duty to, even though it may subject this defendant to the death penalty? You would all be able to do that? Would you, ma'am?
>
> A PROSPECTIVE JUROR: Yes, sir.
>
> MR. AUSTIN: Your Honor, the State will respectfully excuse Miss Dennis.

(Tr. 111). The transcript does not conclusively demonstrate that the "prospective juror" was in fact Dennis, but the most reasonable inference is that the "ma'am" referred to by the prosecutor is indeed Ms. Dennis. This inference is confirmed by a published study documenting the practice of excluding such jurors

peremptorily. To the extent that there is ambiguity, an evidentiary hearing would set the record straight.

Further, veniremember Stevens was excluded for cause based on his scruples against the death penalty:

> MR. AUSTIN: Now, as I mentioned, these are harsh questions and I don't pretend they are otherwise. Some people have an honest and sincere conviction against the death penalty under any circumstances and the purpose of my asking you now these questions is not to ask you whether you are for or against the death penalty because that will not control whether you are allowed to sit as a juror; however, you must realize that if you do return a verdict of first degree murder in the case if you are convinced that the defendant is guilty beyond and to the exclusion of every reasonable doubt that there is a possibility of him going to the electric chair, of dying by electrocution and, knowing this, and not asking you whether you are for or against the death penalty but I am asking you that if the people of the State of Florida prove its case beyond and to the exclusion of every reasonable doubt and if Judge Duncan instructs you that if the State proves its case beyond and to the exclusion of every reasonable doubt, that you have a duty to convict would you be able to vote for a conviction, knowing that you are subjecting the defendant to the death penalty?
>
> A PERSPECTIVE JUROR: No.
>
> MR. AUSTIN: Are you telling me, sir, that under no circumstances could you vote to convict, no matter how strong the State convinced you of the defendant's guilt, you still could not vote for guilty if you knew he might be put to death by electrocution?
>
> A PERSPECTIVE JUROR: No, I could not vote for the death penalty. It is not within my promie to vote to take a man's life.
>
> MR. AUSTIN: So, you would vote against the death penalty if you knew he might get death by electrocution?
>
> A PERSPECTIVE JUROR: Yes, sir.
>
> MR. ROHAN: If I might inquire, Your Honor?
>
> THE COURT: Yes, sir.
>
> MR. ROHAN: Mr. Stevens, and correct me if I'm wrong, if the State were to convince you beyond every reasonable doubt that Mr. Funchess was guilty of first degree murder, you would either vote for second degree or not guilty or some other charge, other than first degree?
>
> MR. STEVENS: I would have to vote in order that there would be no possibility that I

would be a vehicle and bring a man to death.

* * *

THE COURT: All right. The court will excuse the juror for cause. You are Mr. Stevens; is that right?

MR. STEVENS: Yes, sir.

THE COURT: Step down, Mr. Stevens, and return to the bailiff and the juror is excused.

(Tr. 110-12).

GROUNDS FOR RELIEF

Mr. Funchess will demonstrate that (1) a stay must be granted, notwithstanding the successive nature of this petition and the fact that the Lockhart claim has not previously been presented, and (2) this case presents the Lockhart issue and entitles Mr. Funchess to relief.

A. THERE IS NO PROCEDURAL BAR TO CONSIDERATION OF THIS CLAIM; IN ANY EVENT, ANY PROCEDURAL OBSTACLE WOULD NOT DIMINISH THE NEED FOR A STAY

1. Procedural Bars Do Not Diminish The Need For A Stay

The United States Supreme Court's actions in granting stays in Lockhart cases have made clear that procedural barriers do not diminish the need for stays. The Court has granted stays in cases raising the Lockhart claim in postures of procedural default and successive petitions. The most recent example of this is the Adams case.

Aubrey Adams did not raise the Lockhart issue at trial. He did not raise the issue on direct appeal. He did not raise it in his first petition for writ of habeas corpus in this Court. He did not raise it in his first Rule 3.850 proceeding. He did not raise it in his first federal habeas corpus proceeding.

Adams raised the Lockhart claim as Mr. Thomas does here: in a second petition for writ of habeas corpus in this Court. This Court denied a stay 4 to 3, and the United States Supreme Court eventually stayed the execution 7 to 2.

It is critical to appreciate that the United States Supreme Court stayed the execution in Adams solely on the basis of the

challenge to death qualification. In his petition before this Court, Adams argued: (1) that the process of death qualification resulted in an unconstitutionally prosecution prone jury; and (2) that the prosecutor's peremptory exclusion of jurors violated Adams' right to a jury drawn from a fair cross section of the community. On February 26, 1986, this Court rejected Adams' claims based on Lockhart.

Adams immediately applied to the United States Supreme Court for a stay of execution pending filing of a petition for writ of certiorari. That application raised only the Lockhart issue.

The stay application was assigned order number A-653; the state's response to the stay application included the case number "A-653." The Court denied the stay 5 to 4, on February 28. A motion for reconsideration was denied. Adams then filed a petition for writ of certiorari based on Lockhart. The State responded to this petition, again noting that the case was designated "A-653."

Adams then initiated litigation unrelated to his Lockhart claim. Adams v. Wainwright, 11 F.L.W. 93 (Fla. March 3, 1986) (competency to be executed); Adams v. State, 11 F.L.W. 94 (Fla. March 3, 1986) (Rule 3.850 appeal, including challenge to prosecutorial closing argument). On March 3, 1986, Governor Graham temporarily stayed Adams' execution to permit a psychiatric commission to examine Adams' competency to be executed. On March 6, the commission found Adams competent and the Governor signed a new death warrant; execution was set for March 7. At that time, Adams had several independent certiorari petitions pending in the United States Supreme Court. Adams also argued that his execution should be stayed based on any one of three grounds: (1) the pendency of Lockhart; (2) the inadequacy of Florida's procedures for determining execution competency; and (3) dilution of the jury's sense of responsibility for sentencing in violation of Caldwell v. Mississippi.

Approximately 12 hours prior to Adams' scheduled execution, the Supreme Court granted a stay. The Court's stay order was in

case "A-653", the Lockhart certiorari petition and application for stay. The stay order noted: "The order of February 28, 1986, is vacated." Id. That February 28 order was the Court's 5-4 denial of the Lockhart stay in case number A-653; the Lockhart claim was the only matter before the Supreme Court on February 28. The Court's March 6 stay order leaves no doubt but that Lockhart was the sole basis of the stay in Adams.

The stay in Adams was only the most recent example of the Court's refusal to permit condemned inmates, whose cases present Lockhart issues, to be put to death until Lockhart is decided. Willie Celestine, a death row inmate in Louisiana, did not raise the Lockhart claim in his first petition for habeas corpus relief. When he attempted to bring the issue in a successive petition, the district court denied relief. Memorandum Ruling at 2-3, 5-6, Celestine v. Blackburn, ____ F. Supp. ____ (W.D. La. Sept. 19, 1985). The Fifth Circuit affirmed:

> The sole issue raised in the present petition is based upon the exclusion of potential jurors because of their expressed inability as a matter of conscience to consider imposition of the death penalty. Witherspoon v. Illinois, 88 S.Ct. 1770 (1968). The claim is that a jury from which are excluded those persons who are conscientiously opposed to the death penalty violates the right to an impartial jury at the guilt or innocence phase of the trial. The theory is that persons opposed to the death penalty are less likely to convict, and persons who are not opposed to the death penalty are more likely to convict. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), petition for cert. filed sub nom. Lockhart v. McCree, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (No. 84-1865).
>
> Petitioner explains the failure to raise this issue in his earlier petition for habeas corpus on the ground the Grigsby case had not yet been decided. Until the Grigsby decision and the Supreme Court's stay of execution pending decision on the petition for certiorari, the contention is that the law had been settled that a jury from which had been excluded those who have conscientious scruples against the death penalty was nevertheless competent to decide the issue of guilt or innocence.
>
> The immediate issue before the Court is whether a certificate of probable cause should be granted to allow the full consideration on appeal of petitioner's contention. This Court has just spoken definitively to

this issue in the case of Sterling Rault, Sr. v. State of Louisiana, No. 85-3281, decided September 13, 1985. Because this opinion has not yet been published, we quote in full the Court's disposition of the contention:

> [The] claim is that the exclusion of potential jurors who were excludable under Witherspoon v. Illinois, 88 S.Ct. 1770 (1968), because of their inability to consider imposition of the death penalty, denied him the right to a cross-sectional jury at the guilt stage of the trial and subjected him to a panel unfairly biased in favor of the prosecution, all as held in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), petition for cert. filed sub nom. Lockhart v. McCree, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (No. 84-1865).
>
> This theory has repeatedly been rejected by this Court and has been held not to justify our granting of a certificate of probable cause. Watson v. Blackburn, 769 F.2d 1055, 1056 (5th Cir. 1985); Knighton v. Maggio, 740 F.2d 1344, 1346, 1351 (5th Cir.), petition for stay of execution and petition for writ of certiorari denied, 105 S.Ct. 306 (1984).
>
> Accordingly this claim does not warrant our issuance of a certificate of probable cause. (Unrelated footnote omitted).
>
> The application for a certificate of probable cause to appeal the denial of habeas corpus relief under 28 U.S.C. [Section] 2254 and the motion for a stay of execution are denied. The appeal is dismissed.

Celestine v. Blackburn, ____ F.2d ____, No. 85-6445, slip op. at 4-5 (5th Cir. 1985). However, the United States Supreme Court granted a stay. Celestine v. Blackburn, 106 S. Ct. 31 (1985).

Similarly, in the Georgia case of Jerome Bowden, the Lockhart claim had been presented to the Eleventh Circuit on the first petition for writ of habeas corpus. See Bowden v. Francis, 733 F.2d 740, 745 (11th Cir. 1984), vacated and remanded for reconsideration on other grounds, 105 S. Ct. 1834 (1985), reinstated on remand, 767 F.2d 761 (11th Cir. 1985), cert. denied, 105 S. Ct. ____ (1985). An execution date was set and Bowden petitioned for a stay on the basis of Lockhart. The Eleventh Circuit denied the stay based on the successive nature of the petition:

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. However, the Supreme Court unanimously granted a stay. Bowden v. Kemp, 106 S. Ct. 213 (1985).

A Louisiana death-sentenced inmate named Alvin Moore failed to contemporaneously object to death qualification at trial. Memorandum Opinion at 1 & n.1, Moore v. Blackburn, ____ F. Supp.

____, 85-8264 (W.D. La. Oct. 2, 1985). Moore raised the Lockhart claim in his federal habeas corpus petition, and the issue was rejected without discussion of procedural default. Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984). The Supreme Court denied certiorari, and an execution date was set. Moore challenged death qualification in a successive habeas petition. The district court rejected the claim because "petitioner has already raised this issue unsuccessfully before the court. . . . The failure to object contemporaneously in itself could preclude petitioner from raising this issue here without a showing of just cause or actual prejudice. Wainwright v. Sykes, 97 S. Ct. 2497 (1977). However, the Court does not decide this issue, basing its holding on the merits." Memorandum Opinion at 2 and n.1, Moore v. Blackburn, ____ F. Supp. ____, No. 85-2864 (W.D. La. Oct. 2, 1985). The Fifth Circuit agreed:

> It is ORDERED that petitioner's application for a certificate of probable cause and his motion for a stay of execution are denied.
>
> The first issue raised in the petition concerns the exclusion from the jury of persons with scruples against the death penalty, resulting in a "death qualified jury." See Grigsby v. Mabry, 758 F.2d 129 (8th Cir. 1985) (en banc), petition for cert. filed sub nom., Lockhart v. McCree, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (no. 84-1865). This issue was squarely raised in petitioner's previous petition, and thus is is successive writ, disallowed under Rule 9(b), Rules Governing Section 2254 Cases. The issue was determined adversely to petitioner in the prior petition, the prior determination was on the merits, Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984), and the ends of justice would not be served by reaching the merits of this application. Sanders v. United States, 373 U.S. 1, 15 (1963); 28 U.S.C. [Section] 2244.

Moore v. Blackburn 774 F.2d 97 (5th Cir. 1985). The United States Supreme Court granted a stay in Moore.

The Lockhart claim was in procedural default by the time it reached federal court in the North Carolina case of John William Rook. The Fourth Circuit denied a stay, but the Supreme Court granted the stay despite the default.

Thus, procedural obstacles are no barrier to the grant of a

stay in cases raising the Lockhart claim. See also 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).

This is so because the Lockhart claim goes to the core of the truth-finding function of a trial by jury. The purpose of the Lockhart decision is to make jury verdicts more reliable, to purge them of partiality and make it less likely that the innocent will be convicted. This purpose goes to the heart of truth-finding. The substantive claim is too important to be foreclosed by procedural technicalities.

2. Mr. Funchess' Lockhart Claim Cannot Be Barred As Successive

Because the Lockhart issue was not raised in Mr. Funchess' initial habeas corpus petition to this Court, the claim may be entertained in this proceeding. The law at the time Mr. Funchess' first petition was filed was that "successive presentation of the same claim for relief in collateral proceedings is improper," Francois v. Wainwright, ____ So. 2d ____, No. 67,075, slip op. at 2 (Fla. May 24, 1985), but not the presentation of a new claim. "A second or successive motion for similar relief, as used in Rule 3.850, had been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983). In Francois v. Wainwright, ____ So. 2d ____, No. 67,051, (Fla. May 22, 1985), the Court cited McCrae for the proposition that successive habeas petitions on the same grounds may be summarily denied. Because the Francois decision was rendered subsequent to the 1985 amendments to Rule 3.850, which gave the trial court discretion to dismiss successive motions, the Court's citation to

McCrae indicates that successive habeas petitions raising entirely new claims may be entertained. Further, at the time Mr. Funchess' first habeas was filed, there was no bar to successive petitions raising new grounds; the intervening change to Rule 3.850 cannot be applied retroactively to bar this claim.

Application of the new successive bar rule to this case would constitute an unconstitutional ex post facto application of the successor rule, violating the ex post facto clause and the due process clause. Decisions by the United States Supreme Court "prescribe that two critical elements must be present for a criminal or penal law to be ex pose facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . A law need not impair a 'vested right' to violate the ex post facto prohibition." Weaver v. Graham, 450 U.S. 24, 30 (1981).

Both prongs of the Graham test are met here. The application of the successor bar clearly would be retrospective. Rule 3.850 was amended to include the bar on November 30, 1984 and December 28, 1984; the amendment did not become effective until January 1, 1985. Mr. Funchess' first habeas petition was filed in 1984. Further, the amendment would, if applied to this case, disadvantage Mr. Funchess. The prevailing law in 1982 was that presentation of a new claim in a successor was proper. "Successive presentation of the same claim for relief in collateral proceedings is improper," Francois v. Wainwright, ___ So. 2d ____, No. 67,075, slip op. at 2 (Fla. May 24, 1985), but not the presentation of a new claim. "A second or successive motion for similar relief, as used in Rule 3.850, has been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule." McCrae v. State 437 So. 2d 1388, 1390 (Fla. 1983). Under the pre-1985 amendment law, the Lockhart claim could not have been barred as successive. Because application of the 1985 amendments to this 1982 case would be a

retrospective application that would disadvantage Mr. Thomas, application of the 1985 successive bar would violate the ex post facto clause.

Some pre-Graham Supreme Court cases held that no ex post facto violation occurs if the "change effected is merely procedural." Graham, 450 U.S. at 30 n.12. "Alteration of a substantive right, however, is not merely procedural, even if the statute takes a seemingly procedural form." Id. The new successor bar is substantive rather than merely procedural, for the same reasons that criminal statutes of limitations are "considered as vesting a substantive right, rather than being a procedural matter." State ex rel. Mauncy v. Wadsworth, 243 So. 2d 345, 347 (Fla. 1974) (emphasis in original). See also Lane v. State, 337 So. 2d 976, 977 (Fla. 1976). Similarly, this Court has held that a statute pursuant to which a trial judge may retain jurisdiction to review any parole order "substantially alter appellant's situation to his disadvantage" and thus may not be applied retroactively. Prince v. State, 398 So. 2d 976, 976 (Fla. 1981).

This portion of Mr. Funchess' claim is controlled by Talavera v. Wainwright 468 F.2d 1013 (5th Cir. 1972). Talavera involved the standards that govern severance from joint trials with co-defendants. At trial, the standards governing severance were set out by Fla. Stat. Section 918.02. While the case was pending on appeal, that statute was repealed and replaced by the more stringent Fla. R. Crim. P. 1.190. This Court judged Talavera's severance claim based on the then-new Rule 1.190. The former Fifth Circuit held that application of the Rule violated the ex post facto prohibition:

> The Florida Supreme Court thus held petitioner to the standards of Rule 1.190, Fla.R.Crim.Proc. 33 F.S.A. But that rule was not operative at the time of petitioner's trial' rather, petitioner was tried in 1967, when Fla.Stat.Ann. [Section] 918.02 was still in effect. Petitioner thus could be held only to the standards of [section] 918.02, and that statute on its face demands less of the movant than does Rule 1.190.

* * *

> We think it sufficient to repeat without lengthy citation what is now an axiom of American jurisprudence: The Constitution prohibits a state from retrospectively applying a new or modified law in such a way that a person accused of a criminal offense suffers an significant prejudice in the presentation of his defense. See, e.g., Bouie v. City of Columbia, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894; Kring v. Missouri, 1883, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506. The two severance rules involved here differ markedly, and by applying the newer version retrospectively, the state has cut off petitioner's right to present the merits of his motion for severance. The new rule requires the movant to state the grounds on which it is based and further requires "a showing" of prejudice. But the statute in effect at the time petitioner stood trial only required "a motion." We interpret that statute, and the state has cited to us no cases to the contrary, as having allowed movants to elaborate the grounds supporting their motions after filing. Petitioner claims that he relied on that interpretation of the old statute when he filed his motion, and he alleges that he would have presented valid reasons why the motion should have been granted in the state had only given him an opportunity to do so.
>
> We do not purport to question the constitutionality of either statute; indeed, petitioner correctly admits that that question is not before us. We merely hold that a defendant is a state criminal prosecution is denied due process of law when any of his substantive rights are disposed of by the retroactive application of a statute or rule that was not in effect at the time he sought to exercise the right.

Id. at 1015-16 (emphasis added) (footnote omitted).

Further, application of the new successor rule does not foreclose review of the merits of Mr. Funchess' Lockhart claim. The Committee Note to the amendment states that the new rule is "similar to sub-rule 9(b) of Rule 35 of the Federal Rules of Criminal Procedure." Ironically, the definition of federal Rule 9(b) in capital cases is a matter presently under consideration by the en banc Eleventh Circuit. Moore v. Zant, 734 F.2d 585 (11th Cir. 1984), vacated pending rehearing en banc, id. But under prevailing Rule 9(b) law, the Lockhart claim should be cognizable as a change in law.

The standards that should guide a federal district court in

its treatment of claims asserted in a successive federal habeas corpus petition are set forth in federal statutes enacted by Congress. In its 1948 habeas amendments, Congress expressly provided that

> [when] after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, person in custody pursuant to the judgment of a State court has been denied by a court of the United States of a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. Section 2244(b) (emphasis added). The Supreme Court has consistently interpreted his provision according to equitable principles integral to the habeas remedy, observing that since "[t]he primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned," Price v. Johnston, 334 U.S. 266, 291 (1948),

> if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, if is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Id.

In Sanders v. United States, 373 U.S. 1 (1963), the Court emphasized that successive claims that had never been adjudicated on their merits by any federal court -- such as those petitioner asserted below -- could be dismissed as an abuse of writ only if the petitioner had deliberately withheld or abandoned them in his initial habeas petition, or if his "only purpose is to vex, harass, or delay." Sanders v. United States, supra, 373 U.S. at 18. In determining whether a petition has deliberately withheld a claim or been inexcusably neglectful, the Court pointed to the standards set forth in Fay v. Noia, 372 U.S. 391,

438-40 (1963), and Townsend v. Sain, 372 U.S. 293, 317 (1963), which require a showing that the petitioner himself, "after consultation with competent counsel," Fay v. Noia, supra, 372 U.S. at 439, has intentionally relinquished or abandoned a known right or privilege. Id.

Congress subsequently endorsed the Sanders interpretation of of 28 U.S.C. Section 2244(b) when it approved rule 9(b) of the Rules governing Section 2254 Cases. That Rule provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

As the Advisory Committee Note to Rule 9 emphasizes, "'full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ,'" quoting Sanders v. United States. In enacting Rule 9(b), Congress expressly rejected proposed language that would have permitted the dismissal of new claims if "not excusable," (rather than if an "abuse"), fearing that this "new and undefined term" gave judges too broad a discretion to dismiss a second or successive petition. H. Rep. No. 94-1471, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2478, 2480. The Advisory Committee explicitly states that "[s]ubdivision (b) has incorporated [the] principle [of Sanders] and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.... There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples."

The Eleventh Circuit has faithfully observed those Congressional provisions and Supreme Court precedents. See, e.g., Smith v. Kemp, 725 F.2d 1459, 1467-68 (11th Cir.), cert. denied, 78 L.Ed.2d 699 (1983); Potts v. Zant, 638 F.2d 727, 739 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981); Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980); Paprskar v. Estelle, 612 F.2d 1003 (5th

Cir.), cert. denied, 449 U.S. 885 (1980). The pendency of Moore in the en banc court may indicate a possible modification of abuse law, but none has happened yet.

If the Florida successor rule will in fact be patterned after the federal rule, then the Lockhart claim is cognizable in this proceeding. The frantic pace of the prior litigation belies any suggestion that failure to raise the claim then was a "deliberate" choice. Moreover, the claim at that time was, at best, inchoate. In 1984, no federal court of appeal had yet accepted the Lockhart argument. The Eleventh Circuit clearly had rejected the claim by 1984, as had this Court.

B. THIS CASE SQUARELY PRESENTS THE LOCKHART CLAIM AND ENTITLES MR. FUNCHESS TO RELIEF.

Over the past eighteen years, social scientists have responded to the Supreme Court's invitation in Witherspoon v. Illinois, 391 U.S. 510 (1968), to provide more than "tentative and fragmentary" data to support the widely shared intuition that juries from which persons who would never vote to impose the death penalty have been removed are unconstitutionally "prosecution prone", that is, more likely to favor the prosecution than would an ordinary jury in the determination of innocence in a criminal case. The United States Supreme Court, in Witherspoon, had available only the partial results of three studies. Since then, at least ten additional studies have been performed specifically to address the hypothesis that the process which excludes from juries that segment of the community which would vote against the death penalty in any case, although the penalty would not affect their ability to decide guilt or innocence impartially, unconstitutionally and unfairly "stacks the deck" in favor of the prosecution at guilt/innocence. These studies unanimously conclude that juries from which such persons (designated in the Lockhart opinion as "WE"s, for Witherspoon excludables) have been excluded are, in fact, a) more likely to

convict than ordinary criminal juries, b) less accepting of the basic principles that the defendant is presumed innocent and must be proven guilty beyond a reasonable doubt, and c) less likely to credit the testimony of the defendant. Brief Amicus Curiae of American Psychological Association, Lockhart v. McCree, at 3 ("without credible exception, the research studies show that death qualified juries are prosecution prone, unrepresentative of the community, and that death qualification impairs proper jury functioning"). In these, and other important ways, death qualified juries are less fair than the juries which try ordinary criminal cases.

It is ironic that despite the requirement of heightened reliability in the guilt as well as the sentencing phase of a capital trial, see Beck v. Alabama, 447 U.S. 625 (1980) capital jury verdicts are rendered less reliable than the verdicts in ordinary cases. The standard for reliable verdicts are those reached by an impartial jury after a fair trial. See Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 Note 184 at 54 (1982). In this section, we trace the reception of this scientific evidence in the courts, including this Court's decision in Riley v. State, 366 So.2d 19 (1979), culminating in the Lockhart decisions. We will show that at the time of Mr. Funchess' direct appeal, this Court did not have the benefit of the overwhelming record presented in Lockhart and that, for this reason, this Court should now consider the evidence, just as the United States Supreme Court has done by granting certiorari in Lockhart, and staying executions in Adams, James, Kennedy, Bowden, Celestine, Moore, Kenley, Guzmon, Gilmore, supra.

a. The Reception of Statistical Evidence

Courts regularly rely on statistical evidence in a wide variety of contexts. See, e.g., Hardwick v. State, 461 So. 2d 79 (Fla. 1984) (prevalence of blood type); Seaboard C.L.R. Co. v. Garrison, 336 So.2d 423 (Fla. 2d DCA 1986) (estimate of future inflation); Krohne v. Orlando Farming Corp., 102 So. 2d 399 (Fla.

2d DCA 1958) (value of crops); Rochelle v. State Road Dept., 196 So. 2d 477 (2d DCA 1967) (valuation of condemned property). Recognizing the limits of intuition, the courts have also often relied heavily upon social scientists to provide data concerning many other phenomena which are difficult to conclusively establish in a particular case, but which may be observed over a large number of cases. These include school discrimination, Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n. 17 (1977), discrimination in the selection of grand jurors, Casteneda v. Partida, 430 U.S. 483, 496 n.17 (1986); Vasquez v. Hillery, No. 84-836 (January 14, 1986) and the effect of jury size on deliberations, e.g., Ballew v. Georgia, 435 U.S. 223, 232-9 (1978). As the Supreme Court recognized by its invitation in Witherspoon, the behavior of death qualified juries is especially suited to such a statistical analysis for two reasons. First, the statistical evidence reveals a type of bias which is not easily demonstrated on voir dire. Rather, the predisposition of "death qualified" juries is subtle, but pervasive. Its most devastating impact is on the function of the jury as a whole. It is a problem characteristic of death qualified juries in the aggregate, rather than of an individual juror. For this reason, it is incorrect to state that the Eighth Circuit imputed bias to all death qualified jurors. See Brief of Petitioner, Lockhart v. McCree, Point II(A), pp. 22-30. The scientific evidence shows that the cumulative effect of death qualification is to produce juries which are more likely to convict, given the identical evidence, than an ordinary jury. Second, the ethical rules and judicial doctrines preventing jurors from impeaching their verdicts impede the demonstration of the effects of "prosecution-proneness" in a particular case. See Code of Professional Responsibility, Canon 7, EC 7-29; Brassell v. Brethauer, 305 So.2d 217 (4th DCA 1974); State v. Ramirez, 73 So.2d 218 (Fla. 1954). The only way to do this would be to conduct an extensive inquiry, after the fact, into the deliberations and behavior of the jury. It is for this very reason that the process of jury

selection is so critical and must fairly balance the interests of the prosecution and the defense. It is only because jury selection ideally controls what goes into the "black box" that we can be satisfied, without inquiry, with what comes out. The question posed in Witherspoon is whether the process of death qualification tips the balance in jury selection unfairly in favor of the prosecution. As the following sections illustrate, social scientists have found the question posed in Witherspoon is one which they can now reliably answer.

(1). Witherspoon: The Initial Question

William Witherspoon posed two questions to the Supreme Court in the appeal of his conviction in 1968: whether his trial jury had not been impartial in judging his guilt because all jurors with scruples about the imposition of capital punishment had been disqualified from service, and whether, for the same reason, his trial jury had not been impartial in deciding upon his sentence. The Court answered the second question in the affirmative, finding it "self-evident that, in its role as the arbiter of the punishment to be imposed, this jury fell woefully short of the impartiality to which [Mr. Witherspoon] was entitled under the Sixth and Fourteenth Amendments." 391 U.S. at 518. The Court explicitly reserved judgment on the first question because the petitioner had not presented sufficient evidence from which to make a determination of the merits of his claim.

> Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

Id. at 520. The evidence presented to the Court in Witherspoon included the partial results of studies by Hans Zeisel, subsequently more fully described in "Some Data on Juror Attitudes

towards Capital Punishment," Monograph, Center for Studies in Criminal Justice, University of Chicago Law School (1969); W. Cody Wilson, "Belief in Capital Punishment and Jury Performance," unpublished (1964); and Dr. Faye Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias and the Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. C.R.-C.L. L. Rev. (1970).

(2). Additional Research

Following Witherspoon, a number of social scientists began new investigations designed to determine, more conclusively than the earlier studies, whether death qualified jurors were more prosecution-prone than ordinary juries. This work included a study by Dr. George L. Jurow, New Data on the Effects of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971); a national survey conducted by the Louis Harris polling organization, Louis Harris & Associates, Inc., Study No. 2016 (1971); a study by Dr. Edward C. Bronson, On the Conviction Proneness and Representativeness of the Death Qualified Jury: An Empirical Study of the Colorado Veniremen, 42 Colo. L. Rev. 1 (1970); and a follow-up study Dr. Bronson conducted in California, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. Rev. 11 (1980).

(3). Riley v. State

This Court first grappled with the question reserved in Witherspoon in Riley v. State, 386 So.2d 19, 21 (1978). Riley's counsel relied exclusively on the contention that death qualified juries did not include a representative cross-section of the community. See Taylor v. Louisiana 419 U.S. 522 (1975); Duren v. Missouri 439 U.S. 359 (1979). He presented none of the empirical evidence demonstrating that death qualified juries were prosecution prone. Indeed, counsel failed to cite the studies proffered in Witherspoon. On this record, of course, this Court had no basis for resolving the question Witherspoon left open. In its subsequent opinions addressing the death qualification,

this Court has relied upon its decision in Riley.

(4). Hovey: More Questions.

In Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301 (1980), the California Supreme Court reviewed and discussed the Zeisel, Goldberg, Wilson, Jurow, Bronson, and Harris studies, as well as several at that time unpublished reports. Fitzgerald and Ellsworth, subsequently published as Due Process v. Crime Control: Death Qualification and Jury Attitudes, 8 L. & Hum. Behav. 31 (1984); Cowan, Thompson and Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 L. & Hum. Behav. 53 (1984); and Thompson, Cowan, Ellsworth and Harrington, Death Penalty Attitudes and Conviction-Proneness: The Translation of Attitudes into Verdicts, 8 L. & Hum. Behav. 95 (1984). None of these studies were available to this Court when it decided Riley. The California Supreme Court accepted the scientists' findings, but concluded that "until further research is done" to assess the effect of California's practice of excluding prospective jurors who would automatically vote for the death penalty in a capital case as well as those who would always vote for life imprisonment, it was not possible to conclude that California juries were unfairly biased in favor of the prosecution as a result of death qualification. The same would have been true in Florida, since "automatic death penalty" jurors are also excused from service in capital cases. Thomas v. State, 403 So. 2d 371 (Fla. 1981). The Court in Hovey did order, on the basis of an unpublished study by Craig Haney, subsequently published as On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 L. & Hum. Behav. 121 (1984), that, to minimize the impact of the death qualifying voir dire itself on the juror's perception of the defendant's guilt and punishment, in future cases death qualifying questions should be posed to jurors on an individual basis.

(5). Further Research.

Additional research answered the questions left open in

Hovey. Two studies, employing strikingly different methodologies, showed that the number of prospective jurors who would automatically vote for the death penalty and would therefore be excluded from juries in capital cases, was far too small to overcome the bias in favor of the prosecution resulting from the elimination of jurors who would automatically vote for life imprisonment. Young, "Arkansas Archival Study" (1981) (sampling Arkansas trial transcripts); Louis Harris & Associates, Inc., Study No. 814002 (1981) (poll of 1498 adults nationwide). See also Kadane, After Hovey: A note on Taking Account of the Automatic Death Penalty Jurors, 8 L. & Hum. Behav. 115 (1984).

(6). Answering the Questions: Grigsby.

The United States District Court for the Eastern District of Arkansas conducted a comprehensive hearing on the effects of death qualification on the impartiality of capital juries. The Court heard the live testimony of three expert witnesses in support of the petitioner and admitted the testimony of another expert at the evidentiary hearing held in the Hovey case. The State of Arkansas cross-examined these experts and presented testimony by three experts of its own. Two of these experts merely critiqued the methodology of the studies the petitioner's experts had testified about. The third, Dr. Gerald Shure, testified about a study which purported to show that the number of "automatic death penalty" jurors was much larger than the petitioner's evidence indicated. The District Court in Grigsby discounted this testimony because (1)Dr. Shure's past "interest and experience in the behavior is limited." 569 F.Supp. at 1307. His study, which asked a sample of 460 persons in West Los Angeles whether they could impose the death penalty in a given hypothetical case, did not identify "automatic death penalty" jurors, who would always vote for the death penalty, regardless of the facts. Id.

Based upon this extensive and complete record, the District Court found that, as prosecutors, defense attorneys, and judges have long suspected, See Grigsby 569 F.Supp. at 1306; Berry,

Death Qualification and the "Fireside Induction" 5 U. Ark. L. R. L. J. 1 (1982), death qualified juries are more favorable to the prosecution and more likely to convict than are the juries which ordinarily try criminal cases. The Court also found that death qualification makes juries unrepresentative, because it excludes a distinct group within the community. The Eighth Circuit, en banc, affirmed this decision. The only court to reach a different conclusion based upon a comparable record is the Fourth Circuit, which reversed a decision by the United States District Court for the Western District of North Carolina agreeing with Grigsby. Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). The United States Court of Appeals for the Eleventh Circuit rejected this claim, not based on the insufficiency of the evidence demonstrating bias, but on two arguments discussed at greater length below: (1) that the evidence showing that death qualified juries are more favorable to the prosecution than juries which have not been selected in this way does not establish which type of jury is truly impartial. See Spinkellink v. Wainwright, 578 F.2d 582, 594 (5th Cir. 1978),cert. denied, 440 U. S. 796 (1979); and (2) the use of any method of jury sentencing other than the judgment of guilt and penalty by the same, death qualified, jury would deprive the defendant in a capital case of the argument that capital punishment should not be imposed because of a lingering or residual doubt about guilt. Jenkins v. Wainwright, 763 F.2d 1390 (11th Cir. 1985), citing Smith v. Balkcom, 660 F.2d 573, 575-84 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (1981), cert. denied, 459 U.S. 882 (1982). The first ground is simply illogical. The second is inapplicable to Florida, because this Court has consistently ruled that residual or lingering doubts are not a mitigating circumstance which should influence capital sentencing.

b. The Grigsby Record.

The Eighth Circuit summarized the findings the studies presented to the District Court as follows:

> A. Attitudinal and Demographic Surveys
>
> 1. Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970). (Bronson-Colorado).
>
> The subjects of this study were 718 Colorado venirepersons. Interviews were done by trained students from the University of Colorado in 1968 and 1969. Each subject was asked whether they strongly favored, favored, opposed, or strongly opposed the death penalty. This was followed by five questions regarding attitudes on criminal justice issues. On each of the five questions the survey found the stronger the subjects' support for the death penalty, the stronger their support for positions most favorable to the prosecution.
>
> 2. Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980). (Bronson-California)
>
> Two studies similar to the Bronson-Colorado survey are grouped together in this article. Trained students interviewed 755 Butte County, California, venirepersons regarding their position on the death penalty. Seven attitudinal questions, much like those used in Bronson-Colorado, followed. Once again a direct and significant correlation between death penalty beliefs and criminal justice attitudes was found.
>
> The second survey involved interviews of 707 venirepersons from Los Angeles,
>
> Sacramento, and Stockton, California. The results were consistent with the prior studies: the more strongly the subjects favored the death penalty, the more likely they were to endorse pro-prosecution positions.
>
> 3. Louis Harris & Associates, Inc., Study No. 2016 (1971).
>
> Harris randomly polled 2,068 adults throughout the United States in 1971. The respondents were asked about their attitudes on the death penalty and other criminal justice issues. The results parallel those of the Bronson surveys. In addition, Harris found more blacks than whites, and more women than men, would be excluded from jury service by death qualification.

4. Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav 31 (1984). (Fitzgerald-1979).

The survey upon which this article is based was a sample of 811 jury eligible persons in Alameda County, California, in 1979. An independent professional polling organization, Field Research Corporation of San Francisco, drew the sample and interviewed the subjects. Respondents who could not be fair and impartial, i.e., nullifiers, were excluded. Of the remaining 717 subjects, over seventeen percent were found to be WEs. Questions regarding attitudes on criminal justice issues showed that death qualified respondents were more favorable to the prosecution than the WEs.

5. Precision Research, Inc., Survey No. 1286 (1981). (Precision Survey).

This survey was conducted by an Arkansas polling organization in 1981. A sample of 407 adults in the state of Arkansas were asked the same questions used in Fitzgerald-1979. The survey found that approximately eleven percent of those who could be fair and impartial in determining guilt-innocence were WEs.

B. Conviction-Proneness Surveys

1. H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (University of Chicago Monograph 1968) (Zeisel)

In 1954 and 1955 Zeisel questioned jurors who had served on felony juries in Brooklyn, New York, and Chicago, Illinois. The subjects were asked about the first ballot votes of their jury and whether they had scruples against the death penalty. The study controlled for the weight of evidence in each case and found jurors with conscientious scruples against the death penalty voted to acquit more often than jurors without such scruples.

2. W. Wilson, Belief in Capital Punishment and Jury Performance (1964) (unpublished). (Wilson).

This study presented 187 college students with written descriptions of five capital cases in 1964. Each student was asked whether he or she had scruples against the death penalty. They were then asked to assume that they were jurors in the five cases. The students without death penalty scruples voted for conviction more often than those with scruples.

3. Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data

to Raise Presumptions in the Law, 5 Harv. C.R.-C.L. L. Rev. 53 (1970).

A set of sixteen written descriptions were given to 100 white and 100 black college students in Georgia. Those without scruples voted to convict in seventy-five percent of cases, compared to sixty-nine percent for those with scruples.

4. Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971). (Jurow).

Audio recordings of two simulated murder trials were played for 211 employees of Sperry Rand Corporation in New York. The subjects filled out questionnaires which measured their attitudes toward the death penalty and various criminal justice issues. The subjects were then asked to listen to each "trial" and vote on guilt-innocence. Those persons who more strongly favored the death penalty were found to be more likely to convict.

5. Cowan, Thompson & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984). (Cowan-Deliberation).

This 1979 study began by identifying the WEs in its sample of jury eligible residents of San Mateo and Santa Clara Counties, California. Those WEs who could not be fair and impartial in determining guilt-innocence (nullifiers) were excluded from the sample. The remaining 288 subjects were shown a realistic two and one-half hour videotape of a murder trial. The subjects filled out questionnaires regarding their criminal justice attitudes and were assigned to panels of twelve in order to simulate jury deliberations. Some panels were death qualified, while others included WEs. Ballot forms were filled out by each subject before and after the panel deliberations as a means of examining the quality and importance of the deliberations.

The study found that death penalty attitudes were closely linked to conviction proneness -- subjects favoring the death penalty were more likely to convict. In addition, the study concluded that jury panels containing a mix of WEs and death-qualified subjects tended to view all witnesses more critically and remember the facts of the case more accurately than death-qualified jury panels.

C. Other Surveys

1. Thompson, Cowan, Ellsworth & Harrington, Death Penalty Attitudes and Conviction Proneness, 8 Law & Hum. Behav. 9 (1984). (Thompson-

Attitudes).

A videotape of two witnesses' conflicting testimony in a criminal trial was shown to twenty death-qualified subjects and sixteen WEs, all of whom had participated in the Cowan-Deliberation survey. The subjects then filled out a questionnaire regarding the testimony they had viewed. The death-qualified subjects gave answers more favorable to the prosecution than the WEs.

2. Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121 (1984).

This study investigated the process of death qualification on the jurors who undergo it. A sample of sixty-seven jury eligible residents of Santa Cruz County, California were selected after screening out those who could not be fair and impartial in determining guilt-innocence (nullifiers). The subjects were randomly divided into two groups and shown a realistic two hour videotape of a murder trial. One group, in addition, saw a half-hour of voir dire in which prospective jurors were death qualified. The study found that the members of the group which viewed the voir dire were more likely to believe the defendant was guilty than members of the other group.

3. A. Young, Arkansas Archival Study (1981) (unpublished). (Arkansas Study).

This study consisted of a review of forty-one transcripts of voir dires in capital cases from 1973 to 1981 which were on file at the Arkansas Supreme Court. The survey found that over fourteen percent of the venirepersons were WEs and one-half of one percent were ADP'S.

Based upon these studies, as well as the testimony of experts retained by both sides, the Court of Appeals affirmed the findings of the District Court that:

1. Death qualification excludes a substantial number of jurors who could be fair and impartial in determining guilt, even though they could not vote to impose the death penalty; this group comprises somewhere between 11 and 17% of the jurors who are impartial in the guilt phase. 569 F.Supp. at 1285; 758 F.2d at 231-2.

2. Death qualification excludes a small number of jurors who could be fair and impartial in the guilt phase of the trial,

but who would automatically vote for a death sentence. Because of its small size, about 1%, exclusion of this group does not offset the effect of excluding the much larger segment of the population which would automatically vote for life imprisonment.

3. Death qualification disproportionately excludes blacks and women. 569 F.Supp. at 1283, 1293-4.

4. Death qualified jurors differ from those who are excluded by death qualification in their appraisal of the criminal justice system and their approach to the evidence. Death qualified jurors are more likely to conclude that a defendant who does not testify in his own behalf is guilty. They are more distrustful of defense attorneys, more hostile to the insanity defense, and less concerned about the danger of erroneous convictions. 569 F.Supp. at 1283, 1293, 1304; 758 at 232-33.

5. The process of death qualification itself tends to make jurors believe the defendant is more likely to be guilty as charged. 569 F.Supp. at 1302-05; 758 F.2d at 234.

6. Death qualified juries are more likely to convict given the same evidence than juries which have not been death qualified.[1] 569 F.Supp. at 1294-1302; 758 F.2d at 233-36. Not only

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[1] Thompson, Cowan & Ellsworth, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts, 8 L. & Hum. Behav. 95 (1984) found that death qualified jurors were much more likely to resolve conflicts in credibility in favor of the prosecution than were jurors excludable under Witherspoon but able to decide guilt impartially. The subjects of the study watched a videotape of the conflicting testimony of two witnesses: a white police officer and a black defendant. Id. at 101. The videotape was judged highly realistic by practicing attorneys. The study asked each subject to evaluate the credibility of the witnesses on a scale of 1 to 6, with 6 being the most favorable to the prosecution.

This study corroborated earlier findings that death qualified jurors evaluated witness credibility differently from jurors who would be fair in the guilt phase but would not vote to impose death. After viewing a 2 1/2 hour videotape of a criminal trial, complete with jury instructions, the subjects retired to deliberate as 12 person juries. Death qualified jurors reported significantly different perceptions of the believability of witnesses than excludable jurors. These findings are in "Table 2. Death-Qualified and Excludable Jurors' Perceptions of the Believability and Helpfulness of Prosecution Witnesses," on page 40 of this pleading.

is this the unanimous conclusion of the studies of this question, it is a conclusion which is most strongly supported by the study which most accurately simulates the process of deliberation in an actual criminal trial. Cowan, Thompson and Ellsworth, The Effect of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 L. and Hum. Behav. 53 (1984). 569 F.Supp. at 1294-1302; 758 F.2d at 233-6.

c. Florida Research Data

An important recent study, the first such study conducted in the state of Florida, to be published next month in the Journal of Applied Psychology, demonstrates that death qualification leads to biased juries in Florida, as it does in other states. Moran and Comfort, Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment, 71 J. Applied. Psychol. ____ . Professors Moran and Comfort of Florida International University conducted two surveys of actual members of Florida petit jury panels in felony cases. The first study involved 319 jurors who had served on Miami felony juries between 1975 and 1976. The second sampled 346 members of felony juries -- including capital trials -- who served between October 1982 and August 1983.

This difference in perceived witness credibility may help to explain the difference in the verdicts which death qualified jurors would have reached, as compared to jurors excludable because they would never vote to impose capital punishment even though they could be fair in the guilt phase of the trial. Findings of these verdicts is at "Table 1. Verdict Choices of Death-Qualified and Excludable Jurors," at page 40 of this pleading.

These findings are especially significant for Mr. Thomas's case, because the videotape used for this study was especially chosen "to be representative of the procedures, setting, style and issues that commonly occur in actual homicide trials. The case was complex enough to afford several plausible interpretations and verdict preferences. It resembled most real murder trials in that the fact that the defendant had killed the victim was not in controversy; rather, the evidence centered on the precise sequence of events preceding the killing, and on the defendant's state of mind at the time." Cowan, Thompson and Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 L. & Hum. Behav. at 63.

Each former juror completed a questionnaire which sought demographic information, data concerning attitudes towards aspects of the criminal justice system which might make someone inclined either towards the prosecution or the defense, specific attitudes about the death penalty, and information about the juror's individual verdict after hearing the evidence but before deliberations. Moran and Comfort found a statistically significant[2] relationship between the pre-deliberation verdicts of jurors who sat on capital cases (App. L at 7), and their views on capital punishment. In cases in which the jury deliberated longer, and therefore, in which the evidence was likely to be more evenly balanced, the study also found a highly significant correlation between attitude toward the death penalty and pre-deliberation verdict. What this means is that jurors who are in favor of capital punishment are more likely to enter the jury room intending to convict than other jurors. A jury which includes only those jurors who would be willing to vote for capital punishment will include more conviction-prone jurors than a jury in an ordinary criminal case. Moreover, this effect is likely to be most striking in the very cases in which an impartial jury is most important: the close ones.

The authors concluded that "[t]he present findings regarding the conviction proneness of stronger advocates of capital punishment provide support from panels of modern impaneled felony jurors for the conclusions in prior studies (Cowan, et al, 1984; Jurow, 1971; Zeisel, 1968) all of which suggest that death qualifiable persons are more inclined to convict a defendant than

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[2]The usual standard of statistical significance is p .05, that is, the probability of an observed result happening through chance is less than 5%. In studying the possibility that attitudes toward the death penalty are related to conviction-proneness, a scientist assumes that they are not related, and rejects this assumption if the results of the study are inconsistent. See, Brief Amicus Curiae, American Psychological Association, Lockhart v. McCree, at 22-23.

are peers less inclined to capital sanctions. Such jurors are also quicker to reach a decision in jury deliberations. Furthermore, it bears noting that those death qualifiable jurors perceive themselves to have been more active and influential in their juries deliberations" The study also provides confirmation, based upon recent Florida data, that the death qualification process itself tends to bias jurors towards conviction. It continues the line of research which has discovered, without exception, that death qualified juries are different from ordinary juries in important ways which make them less fair to defendants and less representative of the community.

2. DEATH QUALIFICATION VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

The overwhelming evidence discussed in the preceding section demonstrates 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.

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), 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.

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, 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, applying this standard, 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.

The United States Supreme Court, in granting stays in James

and Adams and in the separate opinions in Harich, recognized that the peremptory challenges aspect of death qualification is an issue before the Court in Lockhart. The district court in Lockhart addressed the peremptory issue, basing its findings on a Florida study of the Fourth Circuit during the time that Mr. Funchess was tried:

> It is impossible to deal with the issues presented in this case without at least contemplating the effect thereon of the practice of permitting peremptory challenges, especially in felony and capital cases, where such a large number of such challenges are given to the parties.
>
> Clearly the use of peremptory challenges can completely destroy the "representativeness" of the jury actually chosen to try the case. Also, if voir dire as to the jurors' attitudes towards the death penalty be permitted in non-capital felony cases and in bifurcated capital cases (where the jurors have nothing to do with the assessment of the penalty), then peremptory challenges utilized on the basis of the results of such questioning could result in a conviction-prone or prosecution-prone jury even if no challenges for cause were permitted. In such circumstances the opposite also could occur: the exercise of peremptory challenges on the basis of the results of such voir dire questioning could result in an "acquittal prone" or "defense-prone" jury.
>
> In its first Grigsby opinion, this court suggested the separate opinions that appear to underlie and justify peremptory challenges. This Court reasoned that the granting of peremptory challenges has made the jury selection process fairer, or at least has made it appear to be fairer, than would be the case if such challenges were denied altogether. While still adhering to the view the Court recognizes that issues relating to use and number of peremptory challenges should be reexamined in the light of the empirical data that has been developed recently.
>
> In Peremptory Challenges in Capital Cases, supra, Professor Winick reviews the data from a Florida study which demonstrates that prosecutors in the region studied systematically excluded mildly scrupled jurors in capital cases by peremptory challenges after first removing Witherspoon Excludables by for-cause challenges. The effect is essentially to return us to the pre-Witherspoon situation in which all, or almost all, scrupled jurors (including the mildly scrupled ones) are removed from both the guilt and penalty phases of capital trials. If this is the general practice of prosecutor,s it will greatly reinforce both the guilt proneness effect and the under-

representativeness effect of the practices here challenged. Professor Winick's study provides a strong basis for arguing that, if state prosecutors are systematically using their peremptory challenges to get rid of non-Witherspoon Excludables who hold mild scruples against the death penalty; those prosecutors are violating Witherspoon itself for excluding scrupled jurors on a "broader basis" than their "inability to follow the law or abide by their oath." See Adams v. Texas, 448 U.S. 38, 48, 100 S.Ct. 2521, 2528, 65 L.Ed.2d 581 (1980). And this study also reinforces Dr. Berry's conclusion in his article, 'Fireside Induction', see infra, that the "gut" judgment of both prosecutors and defense attorneys is that scrupled jurors across the board (even if in differing degrees) are less likely to convict than those who favor or have no scruples against the death penalty. For why else would prosecutors systematically use their peremptory challenges to remove mildly scrupled jurors? Indeed, one of the experienced prosecutors who testified for the respondent in this case made it clear that if he could not remove a scrupled juror for cause on Witherspoon grounds, he would achieve the same result through the use of the state's peremptory challenges.

Although the use of peremptory challenges, properly or improperly, is not before the Court, the issues are so interrelated that the subject cannot be ignored. The question of appropriate limits upon voir dire are raised in both contexts. Professor Winick's article offers some interesting suggestions on restructuring voir dire to prevent the abusive use of peremptory challenges. Peremptory Challenges in Capital Cases, supra at 82-90. The issue is narrower here because we are only concerned with the problem of identifying potential "nullifiers" without introducing the biasing effects of the usual death-qualification voir dire process. See Haney study, supra.

Since this Court has concluded that, if the State wishes to "death qualify" penalty juries, bifurcated trials will be required, see infra, the appropriate limits on voir dire appear obvious.

Witherspoon, Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973, and the first opinion of the Court in Grigsby, recognize that if prospective jurors hold attitudes toward the death penalty which would prevent them from making an impartial decision as to the defendant's guilt, such jurors may be challenged for cause. As noted elsewhere this simply reflects the more general rule that no one should be permitted to sit on the jury who is unable to try the case in accordance with the law and the evidence in keeping with the juror's oath. So, how are these potential nullifiers to be identified?

In a bifurcated case in which the jurors who

sit during the guilt-innocence determination phase have nothing to do with the assessment of the penalty, the question arises whether inquiries into the jurors' attitudes towards the death penalty should be permitted at all since they will have nothing to do with the assessment of the penalty. It may be argued that the Lockett case decided sub silencio that such inquiries are permissible in order to identify and remove the "nullifiers" described above. But this question has never been explicitly ruled upon by the Supreme Court. So the question remains: should death-qualification inquiries be permitted in the bifurcated trial situation and, if so, should those inquiries be permitted in the bifurcated trial situation and, if so, should those inquiries be limited to capital cases? The latter question is raised because some of the testimony in this case indicates, and at least one experiment suggested, that the conviction proneness of jurors who have strong feelings in favor of the death penalty appears to operate with respect to other than capital crimes, -- at least with respect to other crime of violence such as assault and rape. An argument could be made that such voir dire should be permitted in these non-capital cases so that the state and the defense counsel would know how best to utilize their peremptory challenges. This Court strongly believes that such questioning should not be permitted in non-capital cases and doubts that it should be permitted in bifurcated capital cases (where the jurors will have nothing to do with the assessment of the penalty) absent some strong suggestion that the "nullifier" problem exists. In other words, if the court clearly explains to the jurors the alleged facts underlying the capital charge, and points out that the jury chosen will be called upon only to determine the guilt or innocence of the defendant -- and not the penalty -- and then inquiries of the panel if there be any reason why any of them could not fairly and impartially try the issue of the defendant's guilt in accordance with the evidence presented at the trial and the court's instructions as to the law, and none of the jurors respond, then, the Court suggests, further inquiries about the jurors' attitudes towards the death penalty would be inappropriate. This is manifest if one accepts the evidence that such inquiries themselves will prejudice the jury even if no challenges for cause be permitted. Of course, if a juror indicates that there might be some reason that he or she could not fairly and impartially try the issue of the defendant's guilt, then that juror could be isolated from the other jurors and further inquiry made as to his or her reasons. If scruples against the death penalty were suggested as the reason, then further "death-qualification" questioning could be permitted and the juror excused for cause if it is established that he or she is in fact a "nullifier."

The suggested procedure would also tend to

> prevent the improper use of death-qualification information by the prosecution or the defense in deciding upon the use of peremptory challenges. See Peremptory Challenges in Capital Cases, supra.
>
> It cannot be repeated too often: petitioners are simply asking that their guilt or innocence be determined by a jury which is chosen and composed in essentially the same way that juries are selected in over 99 percent of all criminal cases, i.e., in all non-capital cases. They accept that if such a jury were to convict them, and the state should continue to seek the death penalty, then the state will be entitled to have the penalty assessed by another jury which is properly death-qualified under Witherspoon, i.e., by a jury from which persons adamantly opposed to, and adamantly in favor of, the death penalty are removed for cause.
>
> Although the evidence before the court shows that attitudes toward the death penalty are usually coupled with "law and order" concerns on the one hand and "due process" concerns on the other, and thereby are good indicators of conviction-proneness or acquittal proneness, no one has yet argued that either those strongly in favor of the death penalty or those strongly opposed to it should be excluded in cases where the death penalty would never be an issue, e.g., in a simple robbery case. Indeed it is assumed that no inquiry into such attitudes would even be permitted in such non-capital cases, and this is as it should be because basic to the concept of a "jury" in a democratic society should be presumption of inclusion, i.e., the presumption that all citizens are qualified to serve. Those urging excluding should, and do, carry the burden of demonstrating good cause therefore. The right to serve on juries should presumptively be considered part and parcel of the status of adult citizenship.

Grigsby, 569 F. Supp. at 1309-11.

The study relied upon by the district court in Grigsby analyzed data drawn from Florida's Fourth Judicial Circuit, where Mr. Funchess was tried in 1975, and covered the period between January, 1974, and December, 1978. Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982). The voir dire of 1,103 jurors were examined. Of those 1,103, 516 were excused for cause for health reasons, because of specific biases against the defendant or the state, or because they were sufficiently unequivocal and immovable in their opposition to capital punishment that they were excludable under the

Witherspoon standard. Of the remaining 587 persons, 51 were classified as "scrupled" because they had expressed some opposition or difficulty with the death penalty. The State exercised 154 peremptory challenges against the the 536 nonscrupled jurors, or 28.7% of the jurors. A significant difference is seen in the state's use of its strikes against scrupled jurors: 38 of the 51 scrupled jurors, or 74.5% were challenged peremptorily by the state. The result was that only 13 death-scrupled jurors were left to serve out of 395 jurors, a total of 3.29%. Professor Winick concluded:

> The question under investigation is whether prosecutors in the Fourth Judicial Circuit systematically used their peremptory challenges to eliminate from capital juries those potential jurors expressing opposition to the death penalty. Table 2 shows that for scrupled jurors subject to prosecutorial peremptory challenge, 40 out of 52 (76.9%) were challenged. Given that prosecutors used peremptory challenges for 28.2% of nonscrupled potential jurors, one would expect that 15 of the 52 scrupled juors would have been challenged. The chance of 40 or more scrupled potential jurors being removed by prosecutorial peremptory challenge at random is approximately eleven in one hundred billion (.000,000,000,11), or the equivalent of 7.6 standard deviations. This presents an astronomical degree of statistical significance;; the result could be pure chance to approximately the same extent that flipping 33 heads in a row could be a chance result using an unbiased coin.
>
> Moreover, the data demonstrate that, despite even more one-sided (in the opposite direction) use of defense peremptories, the pattern in the use of peremptories by the prosecutors produced a substantial underrepresentation of scrupled jurors on the jury panels selected. Table 1 reveals that 147 out of 1116 (13.2%) venirepersons examined as potential jurors expressed opposition to the death penalty, and that 969 (86.8%) did not. After those excused for cause and by defense peremptory challenge were eliminated, 629 venirepersons remained. Of these, 52 (8.3%) were scrupled and 577 (91.7%) were nonscrupled. Table 2 reveals that 426 jurors and alternates were actually selected. Of these, one would expect that 35 (8.3%) would have been scrupled. In fact, as Table reveals, only 12 scrupled venirepersons were selected, the remaining 40 having been removed by prosecutorial peremptory challenge. The chance of 12 or fewer scrupled jurors being selected at random is calculated at approximately 32 32 out of one million (.000,032), or the equivalent of 4.0 standard deviations. This presents a high

> degree of statistical significance; the probability of such a result occurring by chance as approximately equal to that of flipping 14 heads in a row with an unbiased coin.

Id. at 35-36.

Mr. Funchess submits that the Winick study meets the stringent test of Swain v. Alabama, 380 U.S. 202 (1965). We recognize that this Court held otherwise in Dobbert v. State, 409 So. 2d 1053 (Fla. 1982), but we ask the Court to reconsider.

This Court rejected the claim in Dobbert on the basis of Swain. But in Batson v. Kentucky, 85 L. Ed. 476 (1985), the Court will decide whether to modify the stringent Swain test.

Mr. Funchess contends that this group of prospective jurors share distinctive attitudes, not merely towards the death penalty, but toward a range of criminal justice issues, and that since this jury was deprived of these perspectives, the jury was more prone to favor the prosecution than would an ordinary jury and therefore more likely to convict. Mr. Funchess contends that, because of these effects, the death-qualification procedure violated his sixth and fourteenth amendment rights to a fair and impartial jury, and to a tribunal selected from a representative cross-section of the community.

Logically, if the jury would have been constitutionally defective if chosen by virtue of the prosecution's challenges for cause, the same jury must be defective if chosen through peremptory challenges. Regardless of whether a constitutionally defective jury is created by the state through its challenges for cause or through its peremptory challenges, the result is identical. Clearly, there is more than one way to "stack a deck" and when the State accomplishes indirectly, through the use of peremptory challenges, the precise result condemned in Witherspoon and Grigsby for use of the challenge for cause, the constitutional consequences must be the same. In both cases, the resulting jury is not neutral on the question of innocence, but is biased in favor of guilt.

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. Florida Statutes 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." In order to minimize the demonstrated prejudicial effects of death qualification on the jury's perception of the defendant's guilt or innocence, the trial court should identify jurors who must be disqualified under this section in an individual voir dire. See Hovey. This statutory 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. Sec. 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).

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 this statute 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. Alternate jurors would also replace any juror who stated that he or she would only consider the death penalty. The substitution of a small number of alternates would be simple, efficient, and fair. We do not suggest that this is the only way to avoid the prejudicial effect of death qualification. This is simply one method which presents advantages of efficiency and economy. 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 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.[3] 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). This 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

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[3]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.

"benefit" to which -- as a matter of state law -- a defendant in a Florida capital trial is not entitled. 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.

CONCLUSION

Thus, Petitioner respectfully requests that this Court enter a stay of his execution scheduled 7:00 a.m., April 22, 1986, and grant the writ so that a new direct appeal may follow. In the alternative, Petitioner requests that his conviction and sentence of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Repectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Department of Legal Affairs, The Elliot Building, 401 North Monroe Street, Tallahassee, FL 32301, and Federal Expressed to Richard Doran, Assistant Attorney General, Department of Legal Affairs, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, 401 Northwest Second Avenue, Suite 820, Miami, FL 33128, this 11th day of April, 1986.