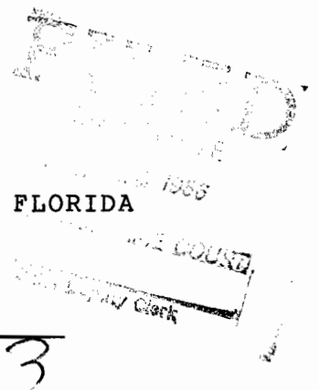

IN THE SUPREME COURT OF FLORIDA

NO. 68,453

DAVIDSON J. JAMES,

Petitioner,

v.

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

Respondents.

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

Steven H. Malone
Senior Assistant

Mark A. Evans,
Assistant

Office of Capital Collateral
Representative
Univ. of So. Fla. - Bayboro
140 7th Ave. So., RM COQ-216
St. Petersburg, FL 33701
(813) 893-9186
COUNSEL FOR PETITIONER

QUR
Death qualification
/SEN/

INTRODUCTION

This Petition raises three claims. The first is that the process of capital jury death qualification, challenged by counsel at trial but not raised on direct appeal, violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This is a claim upon which this Court granted a stay weeks ago in Johnson v. State, Case No. _____ (February 14, 1986), and which has also been considered in Adams v. State, Case No. 68,351, (March 6, 1986), and in Kennedy v. State, Case No. 68,264 (February 17, 1986). Stays of execution were granted by the United States Supreme Court in both cases. As this Court has acknowledged, this claim is presently pending before the United States Supreme Court in Lockhart v. McCree, Docket No. 84-1865. Because the jury in this case underwent the constitutionally questionable death qualification process, this case presents the McCree issue, and the equities require a stay.

In the second claim Mr. James requests this Court to revisit the legality of the death sentence in light of the holding of the United States Supreme Court in Cabana v. Bullock, 54 U.S.L.W. 4105 (U.S. Jan. 22 1986), and to stay the execution of petitioner pending the disposition of Tison v. Arizona, 690 P. 28 755 (Arz. 1985). cert. granted, 54 U.S.L.W. 3591 (Feb. 24, 1986). In Tison, the Supreme Court will determine the legality of a death sentence under Enmund which was imposed under the facts nearly identical to that presented here. In the Tison cases, the Arizona Supreme Court found death was appropriate for inmates who intended lethal force be used, and who played an active part in the events leading to killings, but did not themselves kill. The question presented is whether death is appropriate in the circumstances under Enmund. Id. 54 U.S.L.W. at 3591. We do not pretend to know how the Supreme Court will ultimately rule in the cases, but urge this Court to stay the execution of petitioner pending resolution of this difficult issue.

Cabana represents a fundamental shift in the analysis of

Enmund claims. While such a change in the law normally renders a claim cognizable in 3.850 proceedings, petitioner believes it is appropriately presented here because this court has already passed on the issue and made findings, albeit under pre-Cabana law.

The third claim presents this Court with what we believe to have been a critical error in the factual finding on the Brady claim presented on direct appeal involving the photo pak identification. While this Court resolved the issue by determining defense counsel should have moved for an order unsealing records, the undisputed fact is that trial counsel was never told the name of the juvenile initially identified as the perpetrator, even after a specific request. The other two issues presented Enmund and Brady, were ruled upon by this Court on direct appeal, but, as petitioner will demonstrate, the conclusions reached by this Court are premised on critically inaccurate factual findings. This is Mr. James' first petition to this Court for a writ of habeas corpus.

II. JURISDICTION

This Court's jurisdiction derives from the Florida Constitution. Article V, Section 3(b)(1), (7), and (9) (1981), and Rule 9.030(a)(3), Fla. R. App. P. See also Rule 9.100, Fla. R. App. P. Relief under Fla. R. Cr. P. 3.850 is not available because the issues presented in this application were raised at trial and property preserved, but were either not raised on direct appeal of the judgment or sentence, or resulted in errors at the appellate level.

The writ of habeas corpus has been justly labeled "the Great Writ", because of its historic role as the guarantor of liberty. See generally Allison v. Baker, 152 Fla. 274, 11 So.2d 578 (1943); W. Duker, A Constitutional History of Habeas Corpus (1982). For this reason, both the state and federal constitutions explicitly provide for the writ. Fla. Const. Art. V, Section 3(b)(9); Art. I, Section 13; U.S. Const. Art. I, Section 9, clause 2. "Essentially, it is a writ of inquiry, and issued

to test the reason or grounds of restraint or detention." Allison v. Baker, 11 So.2d at 579. Under our constitutional system, detention which violates the state or federal constitution is illegal, and reviewable by a writ of habeas corpus. The infringement of the 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. Section 2255, the model for Rule 3.850); Mitchell v. Wainwright, 155 So.2d 868, 870 (Fla. 1963) (enactment of Rule 3.850 does not suspend the writ of habeas corpus if it affords the same rights available under the writ), Johnson, supra.

Governor Graham signed Mr. James' death warrant approximately two months after the United States Supreme Court heard oral argument on the constitutionality of the death-qualification procedure used in Mr. James' trial. If the United States Supreme Court affirms the Eighth Circuit, it will, in effect, be pronouncing Mr. James' conviction and sentence unconstitutional. This pronouncement, of course, will have little meaning unless Mr. James' execution is stayed. We fully recognize that McCree is not yet "new law". A decision affirming the judgment of the Eighth Circuit, however, would clearly satisfy this court's definition of new law which may be invoked in a collateral challenge to a conviction. Witt v. State, 387 So.2d 922 (Fla. 1980). See also Johnson, supra. As discussed infra, and as enforced by this Court in Johnson, stays of execution to await Lockhart reflect sound judicial policy.

It would be possible, of course, for Mr. James 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. James has presented because unique features of Florida's capital sentencing procedure are bound up in the application of McCree to this case, and because we can present a new study confirming the effects of death qualification on juries in this State. The Florida provision for judicial override of the jury's sentencing verdict, the Florida requirement of a majority recommendation, rather than a unanimous decision, and this Court's decisions concerning nonreliance on residual doubts of the defendant's guilt as a mitigating circumstance, alter the balance in Florida between the interests of the defendant in a fair jury and the state's interest in death qualification.

The pendency of the Enmund claim before the United States Supreme Court in the Tison cases likewise counsels this Court to grant a stay of execution.

III. FACTUAL BASIS FOR RELIEF

Claim I. Trial counsel filed a pretrial motion objecting to the process of death-qualification of Mr. James' jury and in the alternative, seeking to have jurors who could sit impartially in the guilt-innocence phase protected from Witherspoon challenges for cause (R 785-7). The motion was denied (R 659). Specifically, trial counsel argued that death-qualification and exclusion of death-scrupled jurors resulted in a jury, 1) both unconstitutionally biased on the question of guilt and, 2) not fairly drawn from a cross-section of the community.

The voir dire and selection of Mr. James' jury, all of which took place in open court, focused heavily on the willingness of prospective jurors to impose the death penalty. Almost at the outset of his voir dire, after briefly questioning only one juror, the prosecutor told the venire that the state would be seeking the death penalty, and he advised the potential jurors to "think about that, and put that in the back of your mind, so there is no question about what we are going to be talking about later when we get to it". (R 12, emphasis added).

Thereafter, counsel for both the state and the defense inquired into the individual panel members' attitudes toward the death penalty; all death-scrupled jurors were peremptorily stricken by the state (R 12, Juror Meadors, stricken R 67; R 40, Juror Harrell, stricken R 68; R 41, Juror Holscheider, stricken R 95; R 42, Juror Phoenix, stricken R 68).

During the course of the voir dire, references to the penalty phase overwhelmed references to the guilt-innocence phase - especially towards the later stages of the voir dire during which attitudes towards the penalty became almost the exclusive focus of the examination:

> R 12: prosecutor explains bifurcated proceeding and that the state is seeking the death penalty in this case.
>
> R 12: Juror Meadors (later stricken), states her opposition to capital punishment.
>
> R 35-6: prosecutor reiterates "...this is a capital case, and the state will ask for a death penalty, so, really, upon a conviction for first-degree murder, you will have another function...If you find that Mr. James is guilty of murder in the first degree, then you will be called upon again to make an advisory recommendation to the judge as to whether or not Mr. James should be sentenced to death ... (emphasis added).
>
> R 37: Prosecutor explains Florida law as to aggravating and mitigating circumstances.
>
> R 38: Prosecutor explains that although unanimity is required in the first phase, only a majority is necessary to make a recommendation in the second phase.
>
> R 39-40: Prosecutor poses a "hypothetical" as to the prospective jurors: Assuming there are only aggravating and no mitigating circumstances, can they recommend death. One juror (Harrell, later stricken) says no.
>
> R 40-41: Prosecutor then quizzes each juror on the same question; Juror Holscheider (later stricken) says she has a problem with that.
>
> R 42: Prosecutor reiterates the question as follows: "At the end of the first phase, we are now in the second phase. You have made a finding of guilty of the crime of First Degree Murder. If there are all aggravating circumstances and no mitigating, what would your vote be in that situation?" Juror Phoenix (later stricken) states she does not believe in capital punishment.

R 47: Prosecutor states that the state's case is either premeditated murder or felony murder, but the punishment for either can be death.

[Note: After a luncheon recess, the defense commenced its voir dire, R 53-67, whereupon some jurors were stricken. State began questioning new panel members at R 70].

Despite the fact that voir dire was conducted in open court, and that the state asks <u>each</u> new potential juror whether there is <u>anything</u> to prevent him/her from being fair and impartial (R 71, R 72, R 76, R 77, R 78, R 79), the prosecutor nonetheless singled out the death penalty and juror attitudes for special attention:

R 81: Prosecutor <u>repeats</u> (for the third time) that the state is seeking the death penalty, and mentions aggravating and mitigating circumstances again. Each juror is individually quizzed. R 81-2.

[Defense counsel took over voir dire at R 83 and focused on the punishment phase of trial. R 89-95].

R 99 & R 101: Newly seated jurors state they would be fair and impartial.

R 102: Despite above, prosecutor <u>again</u> asks new jurors if they could recommend a death sentence.

[Defense counsel took over at R 103 through 109. A new juror was seated, after strikes].

R 111: State asks juror whether he can vote to impose a death sentence.

R 115: State asks another juror (newly seated after a strike) whether he can vote to impose a death sentence.

R 123: State asks two new jurors whether they could recommend death.

R 129: State asks two new jurors whether they could recommend death.

R 134-5: State asks two new jurors whether they could recommend death.

As can be seen by the recitation above, death qualification - especially towards the later part of jury selection - became the focus of questioning. There can be no doubt that the process itself attitudinized the jury and created an impermissible psychological atmosphere in which conviction rather than

acquittal became more likely. The statistical evidence presented in the Lockhart case itself demonstrates the validity of the subjective impression which can be gained from reading the voir dire transcript in Mr. James' case. The procedures inevitably had the effect of causing the jury to assume, right from the beginning, that they would find Mr. James guilty of first degree murder, and that they would therefore in fact be called upon to sit in a second phase from which would arise their life-death verdict recommendation.

IV. RELIEF SOUGHT

Claim I. Mr. James seeks immediate relief, in the form of a stay of execution, in order to preserve this Court's jurisdiction over his constitutional claims. The issue raised in this application is currently before the United States Supreme Court. Lockhart v. McCree, Docket No. 84-1865. During argument, on January 13, 1986, the Supreme Court Justices specifically inquired into the implications of Lockhart for the State of Florida, presumably because in Florida judges, not juries, have ultimate responsibility for sentencing decisions. In Adams v. Wainwright, which raised the Lockhart issue, this Court voted 4-3 to deny a stay. The United States Supreme Court subsequently stayed Mr. Adams' execution by a vote of 7-2 [App. Ex.]. In Kennedy v. Wainwright, which also raised the Lockhart issue, this Court voted 4-3 to deny a stay. The United States Supreme Court subsequently unanimously stayed Mr. Kennedy's execution, based upon Lockhart. This Court, following suit, next unanimously stayed the execution of Paul Johnson, whose habeas petition raised the Lockhart issue. The United States Supreme Court has stayed execution in several other cases presenting the Lockhart issue. Bowden v. Kemp, 106 S. Ct. 213 (1985); Moore v. Blackburn, A-261 (October 4, 1985). This Court clearly has jurisdiction to stay Mr. James' execution, Fla. Const., Art. V, sec. 3(b)(7).

In the event this Court denies a stay and rules against the Petitioner on the merits, Mrs. James requests the Court

nonetheless enter a stay of execution pending the filing of a timely petition for a writ of certiorari to the United States Supreme Court.

The importance of the question, the probability of a landmark decision by the United States Supreme Court this term coming, and Mr. James' clear entitlement to relief should the Supreme Court affirm the Eighth Circuit in Lockhart, suggest that a stay is necessary and appropriate. Furthermore, since the issue presented in this application concerns the impartiality of the fact-finder, it calls into question the very reliability of the verdict and sentence of death.

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

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

Claim II. This Court should stay petitioner's execution until the Supreme Court has resolved the identical issue pending before it, or find the sentence of death is precluded by Enmund, and vacate that sentence.

Claim III. This Court should reconsider the Brady claim, vacate the convictions and sentence of death, and remand for a

new trial.

V. BASES FOR RELIEF

A. FIRST GROUND FOR RELIEF

MR. JAMES'S EXECUTION MUST BE STAYED PENDING DECISION IN LOCKHART V. MCCREE.

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

Following this Court's 4-3 denial of a stay, Kennedy applied for a stay pending certiorari in the United States Supreme Court. The only issue raised in the application was the Lockhart claim. The Supreme Court unanimously granted the stay.

Three days after the stay was issued in Kennedy, this Court unanimously stayed the execution of Paul Johnson. Johnson v. Wainwright, No. _____ (Fla. Feb. 17, 1986). The Johnson case raised the Lockhart claim.

On February 26, 1986, this Court, by a vote of 4 to 3, denied a stay of execution in the case of Aubrey D. Adams. Adams also raised the Lockhart issue, but in the context of preemptory rather than for cause challenges to death-scrupled jurors. Following this Court's denial of a stay, Adams applied for a stay pending certiorari in the United State Supreme Court. The only issue raised in the application was the Lockhart claim. The Supreme Court granted a stay by a vote of 7 to 2. [App. Ex. ___].

It should be noted that, unlike the situation in Kennedy and Johnson the biasing effects of death qualification in Mr. James' case did not result in the actual exclusion for cause of prospective jurors who could have been fair as to guilt even

though they possessed scruples against the death penalty; such jurors were excused peremptorily, rather than for cause. The Adams case, however, also involved peremptory rather than "for cause" challenges.

The process of death qualification itself -- the searching voir dire inquiries of prospective jurors' attitudes toward the death penalty -- biases jurors on the question of guilt. "The process has its own effects . . . . By focusing on the penalty before the trial actually begins, the key participants, the judge, the prosecution and the defense counsel convey the impression that they all believe the defendant is guilty, the 'real' issue is the appropriate penalty, and that the defendant really deserves the death penalty." Grigsby, 569 F. Supp. at 1303-04. The California Supreme Court has recognized that "current [death qualification] procedures create in the minds of jurors certain expectations unfavorable to the accused and predispose the jurors to receive and interpret evidence in ways favorable to the prosecution." Hovey v. Superior Court, 616 P.2d 1301, 1347 (Cal. 1980) (mandating individual, sequestered voir dire in capital cases; based on supervisory power). Bias which takes the form of a strong inference of a defendant's guilt like bias resulting from the exclusion of prospective jurors, deprives a defendant on trial for his life of his right to a fair and reliable determination of his guilt and sentence by an impartial jury.

The elaborate questioning of jurors about their death penalty views suggests strongly to the prospective jurors that the case they are about to consider is to be a death case and that the defendant is guilty as charged. See Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 L. & Human Behavior 121 (1984). See Appendix G. The Haney study is discussed in Grigsby, 569 F. Supp. at 1302-05; 758 F.2d at 234; Keeten v. Garrison, 578 F. Supp. at 1175-76; Hovey, 616 P.2d at 1350-53. Death qualification harms the defendant in three related ways: (1) it

enables the prosecution to strike scrupled jurors and deny the defendant of a jury containing a fair cross section of the community; (2) it biases the jury in favor of a guilty verdict; and (3) it biases the jury in favor of a death sentence. The half-way measure of sequestration during jury selection may help (the Hovey court mandated individually sequestered voir dire on the issues which involve death qualifying the jury in order to "minimize the potentially prejudicial effects identified by the Haney study," 616 P.2d at 1354), but there is no evidence to show that the prosecution prone bias is significantly dissipated. In any event, the death qualification in this case was precisely the sort of procedure shown to indoctrinate the jury to believe the defendant is guilty and deserves a death sentence.

The ultimate question before the Supreme court in Grigsby is whether death qualification as a process results in a jury unnaturally (and therefore unconstitutionally) prone to convict. The substantive portion of the Respondent's Brief in Grigsby begins in this way:

> "Death qualification," as Arkansas uses it, is an extraordinary procedure. At the outset of a capital trial, before they have heard any evidence on guilt or innocence, jurors are questioned, often at length, about their willingness to sentence the defendant to death, and those who might not be able to impose capital punishment are excluded from the decision on guilt as well as the decision on penalty. This practice highlights punishment before guilt is proven, and it alters the composition of the jury so as to narrow the range of viewpoints reflected on it. The practice is invoked solely by the prosecutor's discretionary decision to ask for the death penalty; nothing similar happens in non-capital trials.
>
> The constitutional principles advocated by McCree call for a simpler process -- contrary statements by Arkansas and its amici notwithstanding. Voir dire at the guilt phase of capital cases should be restricted to the issues presented at that stage: prospective jurors should neither be questioned about nor excused for attitudes that are relevant only to a decision on penalty that may never be necessary. This will simplify and shorten the voir dire at the guilt phase of all capital cases; it will bring jury selection in capital trials more into line with practice in other criminal cases. It may require some additional

> sifting at the penalty phase -- the phase at which attitudes on punishment become relevant -- for the fraction of cases which reach that stage. Or it may not. In the past some states have eliminated death qualification entirely, and administered capital punishment statutes with no particular problems. But if a state wishes to exclude from capital sentencing decisions all jurors whom it is constitutionally permitted to exclude, it will be able to do so with little or no difficulty. The end result will be a capital guilt-determining jury similar to the juries that determine guilt in all non-capital cases, from misdemeanors to murders.

Brief of McCree at 22-24 (footnotes omitted).

The general constitutional attack in Grigsby is that death qualification as a process predisposes the jury to a belief that the defendant is guilty. This happens in two ways, only one of which is directly relevant to Mr. James' case. First, a death-qualified jury is unduly conviction prone -- "less than neutral" with respect to guilt, in the language of Witherspoon -- in violation of a capital defendant's sixth and fourteenth amendment rights to a fair and impartial jury. Second, the exclusion of individuals who could be fair as to guilt results in a jury that is unrepresentative of the community from which it is drawn. This latter violation occurred in Mr. James' case indirectly, through the prosecutor's use of peremptories, rather than directly through challenges for cause. The end result was the same: A juror who could be fair in deciding guilt was excused. But regardless of the cross-sectional implications of actually excusing such jurors, the Grigsby record makes clear that the biasing effect of the death-qualification process taints the jury with unconstitutional bias, even when exclusion of prospective jurors for cause does not result.

This Court's recent opinion in Kennedy implicitly recognizes the distinctness of the bias issue on the one hand and the cross section issue on the other hand. The Kennedy opinion spoke of "juror bias and group distinctiveness" and of the "procedure" under attack. Kennedy, slip op. at 4 (emphasis added). While the Kennedy opinion involved the actual exclusion of one juror, id. at 1-2, 3, the exclusion of a lone juror cannot in and of

itself bias a jury. The exclusion of that jury is one effect of the biasing process of death qualification, but it is the process itself that is the culprit under scrutiny in Lockhart.

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 to an unbiased and representative jury.

(1) Death-Qualified Juries Are Not Impartial

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

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges.

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

Because the right to trial by jury is inextricably linked to ideals of democracy and representation, "the proper functioning of the jury system, and indeed our democracy itself, requires that the jury be a 'body truly representative of the community

and not the organ of any special group.'" Glasser v. United States, 315 U.S. 60, 86 (1942). "The constitutional standard of fairness requires that a defendant have 'a panel of impartial "indifferent" jurors.'" Murphy v. Florida, 421 U.S. 794, 799 (1975). Death qualification, like exposure to pretrial publicity, produces a jury which is predisposed to convict. See Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966); Patton v. Yount, 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.

The district court's opinion in Grigsby explicitly states that the biasing effect of the death-qualification process is a matter "independent[] of the compositional effects of voir dire . . . the likelihood that the jury which ultimately sits will be more likely to convict than the same jury absent its exposure to that process." Grigsby v. Mabry, 569 F. Supp. 1273, 1304 (E.D. Ark. 1983). The district court explained:

> In 1979 Dr. Haney conducted a study of the effects of the death qualification voir dire process on jurors who survive that process and thereby go on to serve on capital juries.
>
> Dr. Haney's work adds an entirely new and different dimension to the problem. Since the results of his study appear to confirm the "gut" opinions of those who daily operate in the courtroom environment it is important to review it even though no one contends that social science research on that problem is other than in its infancy.
>
> The subjects of Dr. Haney's study were 67 jury-eligible adult men and women from Santa Cruz, California. He screened all prospective subjects and excluded those who (1) were not jury-eligible, (2) could not be fair on the issue of guilt (nullifiers) in capital cases, and (3) those who stated they could not impose the death penalty under any circumstances (WEs). He then used two videotapes as his stimuli. Half of the subjects viewed one tape; half viewed the other. The first portrayed a two-hour voir dire of prospective jurors, one-half of which was devoted to the death-qualification process. The second videotape was identical to the first except that the death qualification part was eliminated. Both tapes are in evidence.

Subjects were assigned to the two groups on a random basis. Both groups were told to assume that they were jurors participating in a real voir dire. They were then asked certain questions.

The results of the Haney 1979 study showed that jurors exposed to the process of death qualification during voir dire, simply by virtue of that exposure, as compared to subjects not exposed to that process, are (1) more predisposed to convict the defendant, (2) more likely to assume before the trial begins that the defendant will be convicted and will be sentenced to death, and (3) more likely to assume that the law disapproves of persons who oppose the death penalty and (4) more likely to assume that the judge, the prosecutor and the defense attorney all believe the defendant to be guilty and that he will be sentenced to die and (5) are themselves far more likely to believe that the defendant deserves the death penalty. Such findings were convincingly explained by recognized psychological principles.

One of the principal objectives lawyers have in wanting to voir dire the jury is to open up channels of communication, to start the process of persuading the jurors before they have even been selected and before any evidence has been introduced. If lawyers perform their adversarial and partisan roles on behalf of their clients their highest priority will be to obtain a jury which is partial to their client. An "impartial jury" might be their second choice, but, if they are performing their duty to their clients, they will, under accepted professional standards, by seeking to prevent the empaneling of jurors they believe will be partial to their adversary and at the same time they will be seeking the empanelment of persons who they believe will be favorable to their clients. Only one person in the courtroom is charged with the direct responsibility of insuring the selection of a truly fair and impartial jury, and that is the judge. The controversy rages over the appropriate roles of the judge and the lawyers in the conduct of the process of voir dire. But one thing is clear: The process has its own effects. The process communicates attitudes and ideas to the prospective jurors. The process is a means of communicating and informing. The communications inherent in the process can be very positive or very negative on jury performance. Properly utilized, voir dire will reveal the information needed by the court, the lawyers and their clients to determine the existence of the predicate for any proper challenge for cause. It can also serve to enhance and inform the sense of duty and responsibility which each juror will feel and to emphasize that the objective of the process is, indeed, a fair and impartial jury.

The death-qualification process traps the

participants into the necessity of communicating false cues to the jury. It is natural for prospective jurors to look to the participants, and particularly to the judge, for information about the case and what their duties and responsibilities will be.

By focusing on the penalty before the trial actually begins the key participants, the trial judge, the prosecutor and the defense counsel convey the impression that they all believe the defendant is guilty, that the "real" issue is the appropriate penalty, and that the defendant really deserves the death penalty. The process desensitizes jurors to the gravity of their pre-penalty phase duties. The experts have testified that a person's imagining of an event and publicly affirming one's commitment to it ("I could impose the death penalty") increases the likelihood that that person will allow that event to occur.

One each of the 16 questions posed by Dr. Haney to his two groups of subjects, the group that viewed the death qualification voir dire process gave more prosecution-prone answers and less defense-prone answers than did the group which did not see the death qualification voir dire process.

So, independently of the compositional effects of voir dire, and in addition thereto, the process itself increases the likelihood that the jury which ultimately sits will be more likely to convict than the same jury absent its exposure to that process. The process itself predisposes the "surviving" jurors to convict. The sequestration of prospective jurors is no solution according to Dr. Haney, because sequestration would only enhance such process effects in the juror's mind by allowing more time and attention to be spent focusing on the death penalty. And it is well known that even without sequestration, death-qualification voir dire may take days or weeks in a capital case.

So, the predisposition of a death-qualified jury results from the compositional consequence of the process and also from the process itself. To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence, and particularly the attitudinal surveys discussed by Drs. Bronson and Hastie, clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed in favor of the prosecution and are uncommonly predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the

> death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."
>
> As pointed out the Haney study provides strong empirical support for what trial lawyers and judges already know, and that is, that regardless of the preconceptions which a juror might have before entering the courtroom, the questions and the answers and the dialogue pursued in the death qualification process have a clear tendency to suggest that the defendant is guilty. Death qualification, then, is comparable to saturating the jury pool with prejudicial pretrial publicity, which, as we know, is unconstitutional. See Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); and Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). But the death qualification process is worse because the biasing information is transmitted to the prospective jurors inside the courtroom and is imparted, albeit unconsciously, not only by the attorneys but also by the judge. The reading of the voir dire transcripts in these cases makes this abundantly clear -- so clear that the Court suggests that even without the strong empirical support of the Haney study, the court could conclude on its own that a reasonable limitations on such voir dire procedures would be appropriate. Judges of our trial and appellate courts are qualified and able to assess the prejudicial effect of a questioning process employed during voir dire. They should, by training and experience, be considered to possess some expertise on the effects of courtroom procedures, such as voir dire, which they observe almost daily either directly or through review of transcripts from state and federal courts. Of course, it is reassuring to have the support of empirical data from qualified social scientists. But the determination of just what is fair procedure, falls within the ken of the judiciary.

Id. at 1302-05. The court noted in a footnote that

> The prejudicial effect of certain types of voir dire questioning has long been recognized by the courts without the aid of social scientific data. For instance, no one would argue with the notion that asking potential jurors detailed questions about their views on liability insurance and insurance companies would prejudice the rights of the defendant in the standard personal injury lawsuit. One prejudicial effect is obvious. The jury's attention is diverted from the primary threshold question

> of liability to the secondary question of who will satisfy the judgment. So the courts have traditionally placed limits on voir dire to prevent obvious prejudice. And, of course, while fair practice should be required in every case, civil and criminal, no proceeding should be more carefully monitored than capital trials. For suggestions on appropriate limits on voir dire, see section on "The Peremptory Challenge Problem and Proper Limits on Voir Dire," below.

Id. at 1305 n.9.

The Eighth Circuit explicitly discussed the evidence of the biasing effects of death-qualifying voir dire, Grigsby v. Mabry, 758 F.2d 226, 234 (8th cir. 1985) (en banc), and the testimony of the witnesses who presented it, id. at 235, in support of its finding that death-qualification biases juries against capital defendants at guilt. The Eighth Circuit did decline to assess the impact of the process of death-qualifying voir dire on the remedy for the constitutional problem it had identified. Id. at 243.

The parties in the United States Supreme Court disagree somewhat on the analytical separateness of the prosecution-proneness process issue and the fair cross-section issue. The State argued that the Eighth circuit "specifically declined to pass on the issue of the psychological nature of the voir dire procedure itself." Brief of Petitioner at 18. But the State elsewhere argues that the two concepts were "merged" by the Eighth Circuit, id. at 8, a point argued by the dissenters in the Eighth Circuit. More importantly, as discussed above, the process question was a part of the Eighth Circuit's decision.

The inmate's brief in Grigsby squarely has raised the process issue. That brief identifies four "questions presented":

> 1. Is there substantial support in the record for the findings of the two lower federal courts that death qualification produces juries that are uncommonly predisposed to favor the prosecution, and uncommonly prone to convict?
>
> 2. Does death qualification violate a capital defendant's right to a trial on guilt or innocence by an impartial jury because of the proven fact that death-qualified juries are "less than neutral on the issue of guilt," i.e., because it allows the State to enhance

its chances of obtaining a conviction by asking that the defendant be punished by death?

3. Is there substantial support in the record for the findings of the two lower federal courts that the jurors who are excluded by death qualification are a sizeable and distinctive group in the community, and that they share a distinctive constellation of attitudes on important criminal justice issues?

4. Does death qualification violate a capital defendant's rights to a trial on guilt or innocence by a jury that reflects a fair cross section of the community, because it excludes from the pool of prospective jurors who are eligible to serve at the guilt phase of capital cases a group that is distinctive both in its attitudes and predispositions, and in its behavior on juries?

The inmate's brief argues that

> The process of death qualification jurors believe that the defendant is guilty before they have heard evidence in court. Cf. Parker v. Gladden, 385 U.S. 363 (1966). It thus entails "dilution of the principle that guilt is to be established by provocative evidence and beyond a reasonable doubt," Estelle v. Williams, 425 U.S. 501, 503 (1976). The problem here bears some resemblance to the problem of an inclination to convict arising from jurors exposure to pretrial publicity. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966); Patton v. Yount, 104 S. Ct. 2885 (1984). But unlike the latter problem, this one arises entirely from communications to the jurors which are within the court's control; here, there are no "conflicts between the right to an unbiased jury and the guarantee of freedom of the press," Nebraska Press Ass'n v. Stuart, 427 U.s. 539, 547 (1976); hence, there is no need to tolerate "some possibility of an injustice unredressed," id. at 555. The possibility can be curbed, if death qualification is.

In an appendix, inmate's brief notes:

> The process of death-qualification. The major study on the effects of the process of death-qualifying voir dire is the Haney study. Dr. Haney showed a videotape of voir dire in a capital case to two randomly assigned groups of death-qualified jury-eligible subjects. One group saw a tape of voir dire with death qualification; the other saw the same tape without the death-qualification segment. Subject jurors who viewed the death-qualifying voir dire were substantially and statistically significantly more likely to believe, without hearing any evidence, that the defendant was guilty, that he would be convicted, and that the judge and

> the defense attorney also believed that he was guilty.

(footnote omitted).

Similarly, the American Psychological Association, as amicus curiae, argues that the first question presented by the Grigsby data is whether "the process of death qualification produces juries that are less than neutral with respect to guilt." Brief of American Psychological Association at 5. The brief goes on:

> In many jurisdictions voir dire occurs in the presence of other prospective jurors and can also be highly repetitive. Haney has studied the effects of voir dire on conviction proneness.
>
> After WEs were excluded from the sample, Haney randomly assigned 67 jury-eligible adults to one of two experimental conditions. They watched either a two-hour videotape of a standard criminal voir dire including death qualification or an identical tape from which the death-qualification portion had been deleted. At the conclusion of the tapes, all subjects responded to a series of items designed to measure their attitudes and beliefs about the case whose voir dire they had just observed.
>
> Those exposed to the death-qualification voir dire were significantly more conviction prone and were more likely to believe that the judge, the prosecution, and even the defense attorneys through the defendant was guilty. Haney also found disturbing evidence of the effects of the death-qualifying voir dire on jurors' attitudes toward the appropriate sentence. Of the 32 jurors who heard an ordinary voir dire, only seven said that if the defendant were convicted of a capital crime, death was the appropriate penalty. Of the 35 jurors exposed to the death-qualifying voir dire, 20 said that death would be the appropriate penalty.
>
> In a parallel examination of actual capital voir dire, Haney found that judges and attorneys frequently lapsed into language even more prejudicial than that used in his experiment. They used phrases that made the verdict seem a foregone conclusion, such as, by the court: "When I instruct the jury at the end of this trial, I will outline in detail the factors to be weighed in deciding whether to impose a death penalty," id. at 138; and "There are two parts to this case," id. at 137; and by the prosecutor: "You know all [sic] that you are going to have to go through with the second phase," id. at 138.

Id. at 14-15.

(2) Death Qualification Violates the "Fair Cross Section" Requirement

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

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

The Eighth Circuit applied this standard:

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

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

The representation of a cross section of the community helps to make jury verdicts more reliable, since without such a cross section, the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." Peters v. Kiff, 407 U.S. 493, 503-4 (1972) (plurality opinion). Experimental data on death qualification confirms the relevance of this principle here. Cowan, Thompson and Ellsworth found that juries which included excludable jurors remembered the evidence more accurately than did members of juries which

included only death qualified jurors. The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 L. & Hum. Behav. at 73. The authors concluded, "We expect that the superiority of mixed juries is also a function of the likelihood that errors of fact are more likely to be corrected when there is a wide range of viewpoints and a higher level of controversy." Id. at 76. An unrepresentative jury cannot reflect "the common sense of the community." Ballew v. Georgia, 435 U.S. at 232. Death qualification impairs the ability of the jury to carry out this vital function and denies the defendant his constitutional right to a representative jury.

The prosecutor in this case chose not to excuse, for cause, potential jurors who could follow the law and serve fairly to determine guilt or innocence in a capital case, yet who had moral or religious objections to the imposition of the death sentence in the subsequent penalty proceeding, if any. But the prosecutor was able to achieve the same result, albeit indirectly, by the use of the peremptory challenge.

The district court in Grigsby addressed this issue, basing its findings on a Florida study:

> 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.

Mr. James contends that this group of prospective jurors share distinctive attitudes, not merely toward 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. James 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.

This Court has subjected peremptory challenges to careful judicial scrutiny. In State v. Neil, 457 So. 2d 481 (Fla. 1984), this Court held that the State may not systematically exclude blacks from the jury. The Court reasoned that the systematic exclusion of a particular race from the jury could not result in a cross-sectional jury. Accordingly, the Court determined that, since the Constitution guarantees that a defendant be tried by a jury representative of a cross-section of the community, the systematic exclusion of blacks must violate the defendant's constitutional rights. While this Court roundly rejected the peremptory aspect of Grigsby in Adams, the United States Supreme Court nevertheless granted a stay of execution on the same theory. The United States Supreme Court will decide the peremptory issue later this term in Batson v. Kentucky, cert. granted 85 L.Ed.2d 476 (1985).

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.

(3) 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 State's brief in McCree, 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.

a. The Florida statutory scheme does not require death qualification.

The first, and perhaps the best, measure of the State's interest is the statutory scheme which governs jury selection in this State. Fla. Stat. sec. 913.13 provides that "[a] juror who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." This section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will not vote to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death-qualification procedure followed in this or any other case. The only other relevant statutory authority is Fla. Stat. 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).

Fla. Stat. sec. 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 14 cases for resentencing before a new jury. Lee v. State, 294 So. 2d 305 (1974); Lamadline v. State, 303 So. 2d 17 (Fla. 1974); Miller v. State, 332 So. 2d 65 (Fla. 1976); Messer v. State, 330 So. 2d 137 (1974); Elledge v. State, 346 So. 2d 998 (1977); Maggard v. State, 399 So. 2d 973 (Fla. 1981); Rose v. State, 425 So. 2d 521 (Fla. 1982); Perri v. State, 441 So. 2d 606 (Fla. 1983); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Simmons v. State, 419 So. 2d 316 (Fla. 1982); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983); Patten v. State, 467 So. 2d 975 (Fla. 1984); Hill v. State, 477 So. 2d 553 (1985); Toole v. State, ____ So. 2d ____, Case No. 65,378 (Fla. Nov. 25, 1985).

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

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

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

b. 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. sec. 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.

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

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

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

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

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

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

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

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

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

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

B. SECOND GROUND FOR RELIEF

THE SENTENCE OF DEATH WAS OBTAINED WITHOUT A SUFFICIENT FINDING OF INTENT TO KILL ON THE PART OF THE DEFENDANT AND WITHOUT ADEQUATELY GUIDED CONSIDERATION OF THE CO-DEFENDANT'S EXCLUSIVE ROLE OF THE KILLING OF THE VICTIM IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

On direct appeal, this Court addressed Mr. James' Enmund claim in a manner only recently found to be insufficient to comply with the eighth amendment, in Cabana v. Bullock, 54 U.S.L.W. 4105 (U.S. Jan. 22, 1986). Cabana teaches that jury and judge findings resting on imputed liability, like those in this case, are an insufficient basis for a death sentence. The Supreme Court now requires that some factfinder review the record independent of such theories to determine the sufficiency of the evidence of intent to kill. Because this approach compels an analysis of factual matters quite different than that used on direct appeal, and because some facts, petitioner believes, were not found accurately, Mr. James requests this Court revisit the issue of his intent under Enmund.

Mr. James recognizes he is not entitled to a "second appeal", and does not wish to "quarrel" with this Court's findings, but he believes Cabana counsels a fresh review of the case, and that after doing so, this Court will agree his attenuated participation in the crime precludes the imposition of a death sentence.

Cabana adopted the premise of the Fifth Circuit decision under review that a jury finding based in part on instructions permitting imputed liability is insufficient to establish the intent necessary under Enmund. The instructions in that case were similar to the "aiding and abetting" and felony murder instructions given here. The Court held:

> The Court of Appeals was correct in concluding that neither the jury's verdict of guilt nor its imposition of the death sentence necessarily reflects a finding that Bullock killed, attempted to kill, or intennded to kill. The jury instructions at the guilt phase were, to say the least,

> confusing, and they do not lend themselves easily to any particular interpretation. A fair-minded juror, however, could have understood them to mean that the jury could find Bullock guilty of capital murder without regard to his intent and solely by virtue of his having aided his accomplice at some point in the assault that led to the killing. This interpretation of the instructions is buttressed, as Judge Garwood pointed out in his concurring opinion below, by the fact that "the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felonyy murder conviction or for the sentennce of death, to find that Bullock had either the intent to kill or any personal participation in the killing." 743 F.2c, at 248. Thus, the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill; or it may have reached its decision without ever coming to any conclusion whatever on those questions.

Cabana, 54 USLW at 4107. The principle that jury findings under such circumstances cannot be relied upon for an Enmund finding was apparently accepted by this Court in Tafero v. State, 459 So. 2d 1054 (Fla. 1984).

While the jury here was asked to make an intent finding, it was explicitly told that their finding must be based on instructions, evidence and principles of law it had already heard in the case. [R 628]. Since the jury had been repeatedly instructed it could base an intent finding on imputed liability, and that theory was urged upon the jury often and strongly during the guilt phase of the trial, its "Enmund" finding is meaningless and should not have been relied upon by this Court.

The theory on which this case was tried at both guilt and penalty phase, and urged over and over again by the prosecutor, was that the defendant could be found guilty and sentenced to death based on the acts of the co-defendant. The numerous references to the theory during jury selection and argument make it manifestly clear that the theme of the case was the basic principle that the defendant was accountable for the acts of the co-defendant.

The theme was consistently coupled with the felony murder theory of first degree murder, which was explicitly charged in the indictment and emphatically and repeatedly argued to the jury.

At the close of the guilt phase, the court instructed the jury that the defendant could be found guilty of first degree murder based on the acts of the co-defendant, even if he was not present at the time of the offense. Further, there were instructions to the jury on the felony murder rule. The instructions read as follows:

> I now instruct you on the circumstances which must be proved before the defendant can be found guilty of the offense of murder in the first degree. There are two ways in which a person may be convicted of murder in the first degree. One is known as premeditated murder and the other is known as felony murder.

(R 543).

> Three, that the defendant was the person who actually killed the victim, or that the victim was killed by a person other than the defendant who was involved in the commission of or attempting to commit the crime of robbery or burglary; that the defendant was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of the crime of robbery or burglary.

(R 545).

> If two or more persons help each other commit or attempt to commit a crime, and the defendant is one of them, the defendant must be treated as if he had done all of the things the other person or persons did if the defendant, first, knew what was going to happen; second, intended to participate actively in the sharing of an expected benefit; and, third, actually did something by which he intended to help commit or attempt to commit the crime.

(R 556).

> To be a principle, the defendant does not have to be present when the crime is committed or attempted.

(R 556).

In addition to the above instructions, the prosecutor counseled the jury during voir dire:

> Let's take a look at murder in the first degree. Mr. Tibe**, I've told you to forget everything you know. This is the reason why: Because we all know that first degree murder is commonly referred to as premeditated murder. And that is simply forming a conscious intent to kill somebody. It doesn't necessarily mean that I have to go home and plan it out. That can be a split second decision, intending to kill somebody. It's nothing necessarily thought out, although it

can be. And that is a fully formed, conscious intent to kill somebody.

There is another way . . . it's called felony murder. Alright? And felony murder is that, if I am participating, in the course of committing a felony, for example, a robbery, which Mr. James is charged with, and in the course of that robbery, a person is killed, than I am responsible or the perpetrator is responsible for that killing.

That means that I could go inside the 7-11, and I could rob the cashier, and I could shoot a gun into the ceiling when I am leaving. The bullet could ricochet down and kill you, the clerk. Did I intend to cause that death? Did I intend to cause that? I didn't mean to cause it at all. I am real sorry it happened, but its in the course of a robbery, therefore, the law says I'm guilty of first degree felony murder.

(R 45, 46).

You got it? That is important, because I think the evidence is going to show in this case that Mr. James is not the individual that killed Mr. Satey. Okay? So, it's very important. Does anybody not understand that concept? It's called felony murder. The end result is the same. It's still first degree murder.

(R 46).

It's either premeditated murder we got here, or felony murder we get here. And the punishment is the same. And the punishment is the same, two punishments, one of two, death or life in prison. Alright? Think about that. And if you have any problems as we go along, let me know.

Also, that will tie in, there is a law called the law of principles. Does anybody have any idea what that is about?

The law of principles says anybody who aids or assists another person in the commission of a crime, to whatever degree, the degree is not important - to whatever degree, is just as guilty as the person who committed the crime, just as guilty as the perpetrator of the crime.

So, I will go back to Mr. Martin, I am robbing you again. And I have a friend, Mr. Herd here, who is my getaway driver three blocks away. I shoot the gun, not meaning to kill you, but it kills you. Would his culpability count? He can be charged with first degree murder because he knew I was going to rob the store. He is there helping to rob the store. He is involved in the felony. Okay? Even though he is three blocks away, he is guilty under those facts, if we believe those facts, of murder in the first degree and robbery, armed robbery. Does anybody have any problems with that?

> Okay? Think about that, because you will see that again.

The state continued to educate the jury as to the law of principles and of felony murder:

> For those of you that are new we have talked about a few items that may come up during the course of this trial, one of those being how we arrived at this conclusion of murder in the first degree. We talked about premeditated murder, and also, we discussed previously felony murder, the killing of an individual in the course of a felony, such as robbery.
>
> We arrive at the same conclusion; only there are two ways of doing it. Both of those are first degree murder; both of those have logical theories you come to in arriving at that conclusion. If you believe the evidence shows that, we will get to the second phase. Alright?
>
> Is there anybody who does not understand the law there, arriving at the same conclusion? We also talked about principles, teamwork, principles. If I aid and assist you in the commission of a crime, to whatever degree, if I knew you were going to commit that crime, I am a principle and I am equally responsible for the conduct that you exhibit.

(R 79,80).

> And, of course, I guess you could say that during one of these episodes your conduct is my conduct, and my conduct is yours, because we are working toward a common goal, whether it's a robbery or homicide or whatever the crime be.

(R 81).

Finally, there is the state's closing argument. The state argued as follows:

> So, how do we show, what is the responsibility of Mr. James for these crimes? We need to look at what we have talked about time and time again. But it's very important, and that is the law of principles. And that is what I call the teamwork theory. If two or more persons help each other commit a crime or attempt to commit a crime, and the defendant is one of them, now, the defendant in this case is Davidson Joel James, he must be treated as if he had done all of the things that the other persons or person did, if Davidson Joel James knew what was going to happen, intended to participate actively, or by sharing in an expected benefit and actually did something by which he intended to help commit the crime. Help means to aid, plan or assist.
>
> What that is saying is that the conduct of

> Larry Clark is the conduct of Davidson James visa versa. Davidson Joel James is accountable for everything that Larry Clark did inside the A-1 Decal Shop, if you believe that Mr. James aided, assisted or helped Larry Clark.
>
> And remember Monday we talked about it. I gave you an example of: I am going in to rob the 7-11 and you are seated out in the car three blocks away. You are guilty of armed robbery. And if I carry a gun, and you are the getaway driver, you are guilty of armed robbery with a firearm. That's the application of the law of principles.

(R 495-96).

In the penalty phase, the trial court instructed the jury with regard to Enmund.

> You need to find whether Davidson Joel James killed Dorothy Satey or attempted to kill Dorothy Satey or intended that killing take place, or intended that a lethal force would be employed.

In charging the jury the court specifically stated:

> In determining this, you will rely on the same evidence that you heard in the first phase of this trial. You will use the same rules for deliberation that you were given in the first instructions, and weigh the evidence in the same manner.

This Court's review of the Enmund question relied both on the jury finding which was infected by the theory of imputed liability ("[t]he jury could reasonably infer . . ."), and on its own pre-Enmund case law of imputed intent, holding:

> [w]e next observe that it is clear that this entire episode was a joint operation by James and Clark. The jury found that James met the Enmund test. Although CLark did the actual killing, James was present and actively participated inn the events. In such a situation we have held that who is the actual killer is not determinative because each participant is responsible for the acts of the other. Hall v. State, 403 So.2d 1321 (Fla. 1981). . . .

James v. State, 453 So.2d 786, 791-2 (Fla. 1984).

This Court's pre-Cabana opinion is thus lacking in the necessary appraisal of the individualized "personal responsibility" and moral guilt of the defendant", required by Enmund v. Florida, 458 U.S. 782, 801 (1982).

> "The focus must be on his culpability, . . . for we insist on 'individualized consideration as a constitutional requirement

> in imposing the death sentence.' Lockett v. Ohio, 438 U.S. 586, 605 (1978) (footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender.' Woodson v. North Carolina, 428 U.S. 280, 304 (1976)."

Id. at 798.

While the Supreme Court in Cabana held it was within the province of the federal courts to review the sufficiency of evidence under Enmund, federalism and comity considerations counseled that the issue be presented to the state courts in the first instance. Id. at 4109. Mr. James urges this Court to carefully consider his individual culpability in the killing which doesn't come close to that deserving the punishment of death.

No party involved in this case, and no Court reviewing this case, has ever contended anything but that it was the co-defendant Clark, and not Mr. James, who carried a weapon and committed the killing of Mrs. Satey. The state admitted as much from the beginning of the trial, and this Court has so found. James v. State, 453 So.2d 786, 789, 791-2 (Fla. 1984).

The only basis for determining that James had an intent to kill was to infer that intent by referring to James' continued presence at the scene after Mr. Satey was shot. Id. The record reflects that James stood by motionless, doing nothing. (R 1134, Exhibit P, page 52)

Clearly, then, under Cabana and Tafero, the jury's Enmund findings cannot and should not have been relied upon by this court.

In addition to the major changes in the law wrought by Enmund it is imperative that the court take notice that several facts upon which it based its opinion were erroneously found. Appellate counsel neglected to point out these descrepancies to the court in the motion for rehearing. First and foremost, the court found, in holding that two separate robberies occurred that "Evidence showed that some money had been taken from the office where Mrs. Satey's body was found." James, 453 So.2d 786 n.7. This crucial point is incorrect. Mrs.

Satey's body was not found in the office. She was found at the other end of the building by the bathroom in the residence portion of the building. (Exhibits O, P, Q, R, R 167,168, R 1080). Officer Fletcher testified, "The lady that got killed, was in the bathroom at the time lying right in front of the bathroom." (R 1080). Officer Johnson notes, "I worked my way back to the south portion of the building where I observed other fire department personnel tending . . . to Mrs. Satey." (Exhibit M, page 5). "Satey told me . . . his wife . . . had gone to the bathroom, which is located in the living quarters in the rear, south portion of the building." (Exhibit M, page 5). Then there is the testimony of Officer Reynolds. "The location is a very large crime scene itself. We're talking almost like a warehouse, because where his wife, Mrs. Satey, had been shot was a different location in which Mr. Satey was shot. It took time to walk from the side door to the bathroom in back. And even more time from the back to the office." (R 1241). "Mr. Yokum then went back . . or attempted to go through the shop, which was very cluttered and found Mrs. Satey in the back." (Exhibit N, page 5 - Officer Downs). The robbery took place, "out front at the north" end of the building, in the "northwest side of the building." (R 1080).

It is therefore clearly established by the record Mrs. Satey was nowhere near the front office where the robbery took place. It is also clear that when Mrs. Satey was shot only Clark , who all parties admit was the actual killer, was in the back with her. It is clear that Clark went to the back of the building where Mrs. Satey was shot. It is equally clear the other individual went to the office, and on the way took the phone away from Mr. Satey. (R 1132).

Based on the court's determination that Mrs. Satey was killed in the office it found that a second robbery occurred, to satisfy State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). This is a clearly erroneous ruling based on a misinterpreted fact. Mr. James' sentence is therefore unconstitutional.

More important however is the fact the court inferred

that James was present when Mrs. Satey was shot. James could not have even heard the shot. Mr. Satey, who was between the office and the residence quarters, has stated more than once that he heard no more shots after the two were fired at him. (R 428, 1132, Exhibit M, page 9). "He added that he never heard any gun shots other than the two that were discharged into him." (Exhibit 1, page 9). "And while he was in the office calling for help, he heard this side door go down and he heard his wife moaning, but never did hear any shots." (R 1132). It is clear that the court's conclusion on the Enmund claim was colored by the misconception that the shooting took place in the office in James' presence.[1]

---

[1]The court has also misinterpreted another fact which may also have affected its Enmund considerations. The court has been led to believe that Mrs. Satey was an invalid in a wheelchair. That is not true. She was not an invalid and she was not confined to a wheelchair. "My wife was a semi-invalid. She had fell (sic) in the plant and bruised her hip and she was moving around in a typist's chair." (Exhibit P, page 14).

> Question: Was she confined to a wheelchair?
> Answer: No. I rolled her in the chair when I would take her to the bedroom.
> Question: Prior to that time she wasn't an invalid or immobile in any way was she?
> Answer: No.
> Question: So she was suffering at that point from a temporary hip injury?
> Answer: That's correct.

(Exhibit P, pages 15-16).

The court can note trial exhibits reflect the typist chair was in fact still in the front office after the killing. (See R Exhibit 3, picture of the office). There are no chairs by Mrs. Satey. Mrs. Satey was found in the hall by the bathroom. Indeed, the police report indicates that Mrs. Satey walked from the bedroom toward the dining area and was shot in the hall by the doorway. (Exhibit Q). Neither the court nor the trial court in its findings was disabused of the notion that Mrs. Satey was not "a wheelchair bound woman, powerless to escape or resist." James, 453 So.2d at 794. Appellate counsel should have responded here and corrected the court's notion.

This court in James v. State, 453 So.2d at 786 stated that "the jury could reasonably infer therefore that James by his continued presence intended or contemplated that lethal force might be used or that life might be taken." The court further found that the jury "had been fully instructed on felony murder during the first portion of the trial, and, during the penalty instructions, the court told the jury it could rely on the evidence presented previously." 453 So.2d at 792. The court then proceeded to determine that this entire episode was a joint operation by James and Clark.

> In such a situation we have held that who is the actual killer is not determinative because each participant is responsible for the acts of the other.

The court cited Hall v. State, 403 So.2d 1321 (Fla. 1981). The court's reliance on Hall v. State is misguided at this point and time. Hall was decided pre-Enmund and it is precisely the fact pattern in Hall that Enmund was meant to correct. In Hall the court determined that Hall and his partner Ruffin did everything together. They planned a robbery were present at the assault and death of the victim. The court held that jury could have found that the criminal acts were the result of a common scheme. The court noted that the law of principle applied in this situation and that an aider and abetter is responsible for all acts committed by his accomplice in the furtherance of the criminal scheme.

It is essential to note that the United States Supreme Court has granted certiorari based on Enmund in companion cases which present the question whether a non shooter "who neither verbalized intent to use deadly force nor actually committed a killing" may be executed. Tison v. Arizona, 690 P.2d 755 (Ariz. 1985) and Tison v. Arizona, 690 P.2d 747 (Ariz. 1985); cert. granted, 54 U.S.L.W. 3561 (Feb. 24, 1986). This is the precise question in the instant case.

Because this issue is now pending before the United States Supreme Court in Tison v. Arizona, this Court should stay

petitioner's execution pending its final resolution by that Court.

C. THIRD GROUND FOR RELIEF

THE STATE VIOLATED BRADY v. MARYLAND AND PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY WITHHOLDING EVIDENCE WHICH WOULD HAVE NEGATED THE GUILT OF PETITIONER.

Lastly, the court was of the notion that counsel could have obtained a court order to obtain the files of the "juvenile" picked out of the photo pak by Mr. Satey. What was either not brought to the Court's attention, or overlooked in its decision was that that task would be simply impossible since the state declined to make the name of the juvenile available to defense counsel. Counsel for the defense made several motions under Brady for specific and general discovery. Counsel specifically asked for the name of the gentleman that Mr. Satey picked out of the first photo pak. (R 144-147, 663, 692).

The importance of that picture cannot be measured. Mr. Satey specifically picked picture number five out of the first photo pak. The "juvenile" was identified by Satey as being Clark's partner. James is not the picture depicted in picture number five.

Satey says the first time he saw the photo pak was the first night he stayed in the hospital. (Exhibit P, pages 23-24). And he recognized the "robber".

> Question: Okay. These approximately ten or so polaroid photographs that you were shown the first time in the hospital, did you recognize any of the people in those photographs?
> Answer: The first time, yes.
> Question: And who did you recognize?
> Answer: I recognized the guy that calls himself Robert.

(Exhibit P, pages 24-25).

> Question: Okay. So one person without your glasses you were able to pick out the person named Robert?
> Answer: Well.
> Question: Is that right?
> Answer: That was a recent picture of the guy that calls himself Robert.
> Question: Okay. Without your glasses you

were able to pick out Robert?
Answer: Uh-huh.
Question: Is that right? And I assume you picked out Robert and you told the police that that's the guy that was known as Robert, the fella that worked for you that day?
Answer: That's correct.
Question: Okay. And there was another picture in there which you said, without your glasses, may have had a resemblance to the other person who was Clark; was that right?
Answer: That's correct.

(Exhibit P, page 26).

Officer B. D. Fletcher affirms this identification.

Question: When you showed that to Mr. Satey in the hospital it was obviously on October 31, 1981?
Answer: Yes, it was in the early morning hours.

(R 1099).

Answer: I asked him to look through these photographs and see if he could see either one or either of the men that were involved in the robbery.
Question: What did Mr. Satey do?
Answer: He looked at them.
Question: And for long of a period of time did he view those photographs before making any statement with regard to any of the persons depicted in any of the photographs?
Answer: Two or three minutes.
Question: At the end of those two or three minutes what were his, as best you can recall, precise words with regard to any of the persons depicted in the photographs?
Answer: He looked at the third picture and at the fifth picture and said it looks like them.

(R 1100-1102).

Finally there is an additional confirmation of positive identification in the deposition of Mr. Satey.

Question: So you did point out two pictures in the first group, one of which you were sure was Robert, the other which you thought was Mr. Clark?
Answer: Correct.

(Exhibit P, page 55).

At trial however, Mr. Satey can no longer remember picking out picture number five out of the photo pak. (R 393). Mr. Satey instead states that he picked the picture of Robert Gibbs on November 10, 1981, ten days after he was shot. (R 396). There is an inconsistancy here as well. The following dialogue took place at Mr. Satey's deposition.

Question: Okay. Might there have been a third photo pak later in which you positively identified Robert?
Answer: I can't, uh-uh, it could have been.
Question: That was the way a phrased the question. You said you weren't sure that's why I asked whether it might have been.
Answer: Yeah, because I know that when I woke up I was, uh, coherent, not incoherent.
Question: Okay, actually I'm talking about something like about ten days after the shooting, the third photo pak?
Answer: No, no, no, ten days I wasn't even there.
Question: Well were you shown any photo paks then after you were out of the hospital in which you might have identified Robert?
Answer: Not that I know of.

(Exhibit P, pages 55-56).

Although there are names that appear on other pictures on the photo pak, (See R 22 and 24), the police and the state contended they did not know the name of the person in the photo pak picture number five. (R 1088). It should be noted that in the trial of Larry Clark, Mr. Satey also changed his story. (Exhibit R).

The fundamental importance of the picture is made clear by trial counsel's argument at guilt phase. His concluding statement was that the jury should convict "the person in that picture." (R 534). Without the picture, the defense of mistaken identity was rendered useless, and the argument rendered meaningless.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral
Representative

STEVEN H. MALONE
Senior Assistant

MARK A. EVANS
Assistant

Office of Capital Collateral
Representative
Univ. of So. Fla. - Bayboro
140 7th Ave So., RM COQ-216
St. Petersburg, FL 33701
(813) 893-9186

By: _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William I. Munsey, Jr., Assistant Attorney General, Office of the Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, FL 33602, this 14th day of March, 1986.

Attorney