IN THE SUPREME COURT OF FLORIDA

NO. 68455

ROY A. HARICH,

Petitioner,

v.

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

Respondents.

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

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I. INTRODUCTION

General

This petition raises three claims. The procedures in this capital case both at trial and before this Court were error-ridden to such a degree that confidence in the fairness and the correctness of the outcome was undermined.

First, the process of death qualification created a jury more likely than normal juries to find guilt of premeditated first-degree murder. This process critically impacts on the second issue raised here, that there was no voluntary intoxication jury instruction at trial, despite the fact that intoxication was raised and debated in the trial court and before this Court. The jury was led to believe in guilt through the death-qualification procedure, and then the jury was incorrectly and illegally told that voluntary intoxication, a hotly contested factual matter, was not an issue for their resolution. Finally, the prosecutor in this case argued grossly irrelevant and inflammatory factors in support of a sentence of death. As discussed below, all these claims are cognizable in this proceeding.

Roy Harich's case presents troubling issues regarding his degree of culpability and the appropriateness of death as punishment, issues not heretofore satisfactorily resolved in this Court. Mr. Harich was convicted of an offense totally and completely alien to his character. He was a hardworking and dedicated member of his community, and had led an exemplary and crime-free life before the offense herein. His evidence that he uncharacteristically consumed nearly a case of beer and smoked as many as seven marijuana cigarettes before the offense went unevaluated by the jury, as a matter of (mistaken) law -- no instruction was given. Mr. Harich was finally unconstitutionally maligned by a vicious and unsupported attack at sentencing, the coup de grace of the unreliable capital proceedings herein.

Claim I. The process of death qualification violates the sixth, eighth and fourteenth amendments of the United States Constitution. The constitutionality of death qualification is an issue under active consideration by the United States Supreme Court in Lockhart v. McCree, No. 84-1865. Mr. Harich's case presents the Lockhart issue even though no veniremembers were excluded. Adams v. Wainwright, 11 F.L.W. 79 (Fla. March 7, 1986), stay denied, No. A-653 (U.S. Feb. 28, 1986), prior order vacated and stay entered, No. A-653 (U.S. March 6, 1986).

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

Adams immediately applied to the United States Supreme Court for a stay of execution pending filing of a petition for writ of certiorari. See Appendix A. That application raised only one aspect of the claim presented to this Court: that death qualification as a process biases the jury. The peremptory challenge dimension of the claim was not raised.

The stay application was assigned order number A-653; the state's response to the stay application included the case number "A-653." See Appendix N. The Court denied the stay 5 to 4, on February 28. See Appendix B. A motion for reconsideration was denied. Adams then filed a petition for writ of certiorari based on Lockhart. See Appendix C. This certiorari petition raised only the "process" aspect of Lockhart and not the peremptory challenge aspect. The State responded to this petition, again noting that the case was designated "A-653." See Appendix N.

Adams then initiated litigation unrelated to his Lockhart claim. Adams v. Wainwright, 11 F.L.W. 93 (Fla. March 3, 1986)

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

Approximately 12 hours prior to Adams' scheduled execution, the Supreme Court granted a stay. The Court's stay order was in case "A-653", the Lockhart certiorari petition and application for stay, both of which were based solely on the "process" aspect of Lockhart and not upon the peremptory exclusion of jurors. See Appendix D. The stay order noted: "The order of February 28, 1986, is vacated." Id. That February 28 order was the Court's 5-4 denial of the Lockhart stay in case number A-653; the Lockhart claim was the only matter before the Supreme Court on February 28. The Court's March 6 stay order leaves no doubt but that Lockhart was the sole basis of the stay in Adams.

Claim II. Mr. Harich was 22 years old at the time of this, his first ever, offense. The evidence of how the offense happened came from the defendant's pretrial statements and trial testimony, and from the surviving victim's testimony. A clear issue of voluntary intoxication, sufficient to negate the specific intent element of premeditation, was raised by the evidence and argued by the State and defense counsel. The State, in closing, misstated the law, telling the jury that voluntary intoxication was no defense to a specific intent crime. No instruction on voluntary intoxication as a defense was requested

or given, even though defense counsel stressed to the jury: "But, suppose a man is so drunk and so stoned out on marijuana that he can't premeditate? What then?" Again, at the hearing on motion for new trial, defense counsel argued that premeditation was missing, "because of the proof that was in the record, which came in during the trial, of the fact that the defendant was intoxicated from the abuse of both alcohol and marijuana, and because of the impulsive nature of the acts proven against him at trial . . . " (R. 1027).

Appellant counsel's lead issue before this Court was that premeditation was not proven beyond a reasonable doubt because of intoxication. The claim was rejected. This was appellate counsel's first capital appeal. Because of unreasonable and prejudicial omissions by appellate counsel, this Court was not apprised of: (1) the trial court's reversible failure to instruct on the law, with regard to plain facts in the record; (2) trial counsel's record ineffectiveness for failing to request an instruction on voluntary intoxication; and (3) the prosecutor's misstatement of the law to the effect that voluntary intoxication was never a defense to first-degree premeditated murder.

This was an unlikely offense for a theretofore exemplary citizen. As the defense attorney argued, if the jury believed that Mr. Harich committed the offense, voluntary intoxication was relevant in deciding whether it was first- or second-degree murder. Mr. Harich's right to have a jury consider the implications of his having drunk a case of beer and smoked six marijuana cigarettes, in order to sort out a perplexing offense by an upstanding citizen, was thwarted by all trial participants: trial counsel said it was a defense, but told the jury to look to the judge's instructions and then failed to request appropriate ones; the State misstated the law, telling the jury voluntary intoxication was never a defense to first-degree premeditated murder; and the judge gave no voluntary intoxication instruction, when the evidence fairly raised the issue.

Appellate counsel flagged none of those deficiencies. This Court did not consider them. This Court's confidence in the reliability of the trial and appellate process in this capital case must be seriously eroded by these fundamental errors. The appropriateness of the conviction and sentence must be determined by a process beyond reproach, and this Court was blinded to the defects in the proceedings because of counsel's failures. A proper appeal is the answer.

Claim III. The prosecutor sought and obtained a recommendation of a death sentence by misinforming the jury about the law and the facts it was to consider. Appellate counsel overlooked these fundamental errors. Had he noticed them and included them in his brief and argument on appeal, Mr. Harich's death sentence would have been reversed.

II. JURISDICTION

Claim I. This Court's jurisdiction over the Lockhart claim derives from the Florida Constitution, Article V, sec. 3(6)(a). See Adams, 11 F.L.W. at 79. See also id. at secs. 3(b)(1), (7), and (9) (1981), and Rule 9.030(a)(3), Fla. R. App. P.; Rule 9.100, Fla. R. App. P. Relief under Fla. R. Crim. P. 3.850 is not available because the issues presented in this application either were or could have been raised at trial.

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

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

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

Claims II and III. This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const.

As described more fully below, Mr. Harich was denied the effective assistance of appellate counsel before this Court at the time of his direct appeal. Since the claim of ineffective assistance of counsel stems from acts and omissions before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). As discussed, the extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substitute appeal. Nevertheless, this and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is completely thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). Petitioner will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental and prejudicial as to

require the issuance of the writ.

Furthermore, this Court has consistently maintained an especially vigilant eye on capital cases. The Court does not hesitate to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings before this Court. Wilson.

III. FACTS UPON WHICH PETITIONER RELIES

Claim I. Penalty was a feature of the voir dire in this case. The importance of the voir dire was underscored at the outset when the jury was told to "listen up." (Tr. 11). Both the court and the prosecutor asked the panel if they knew of anything that would effect their ability to be impartial jurors.

> The Court: Are you conscious of any reason that might render you other than a fair and impartial juror, based solely upon the evidence submitted in this courtroom, for your consideration, and the charges of the law that will be given to you by the Court?

(Tr. 13).

The prosecutor reiterated a short time later.

> Mr. Smith: * * *
>
> At the time do you know of any reason why you could not be a fair and impartial juror at this particular time? And, if not, we can go on.

(Tr. 39-40).

Apparently not satisfied with the panel's expressed willingness to follow the law, the prosecutor repeatedly engaged in the death qualification of both the entire panel as a whole and individuals. Even when individuals were being questioned on the issue, the questioning was conducted in front of the entire panel. The prosecutor's questions assumed the most extreme punishment the law allows -- before the first shred of evidence of guilt was presented. The constant repetition of those questions made both a penalty phase and its outcome seem inevitable.

Smith's comment that the jurors' responses would not disqualify them from panel, intentionally or not, highlights the intolerably prejudicial nature of the entire death qualification

process. Particularly if Smith is taken at his word -- and responses do not affect ability to sit on the final panel -- the only possible reason to inquire on the subject is to predispose the jury. As noted infra at _____, the very question, of course, suggests to the panel, among other things, that a verdict of guilt is inevitable and that they will be required to pass upon sentence.

> Mr. Smith: * * *
>
> Now a lot of people have their pros and cons about the death penalty and that is something that is personal with you. But we are going to need to get into it, probably, a little bit.
>
> Are any of you, at this particular point--and it does not disqualify you from the jury. We just need to know your reaction, a little bit. Are any of you steadfastly against capital punishment under any circumstances?

(Tr. 40-41). The prosecutor continually reiterated the question, inviting the venire to imagine themselves in the penalty phase before the issue of guilt had even been presented to them.

> Mr. Smith: * * *
>
> Mr. Baker and Mrs. Cornwall do you all have any problems with capital punishment? We asked this of the other members of the panel. But are you all opposed to capital punishment under any circumstances whatsoever?

(Tr. 62). When new members were impaneled the prosecutor once again asked the question in front of the entire assembly.

> Mr. Smith: . . . . [A]s we have been discussing, do any of you all have any feelings, one way or another, about capital punishment? Any of you opposed to it under all circumstances or in favor of it under any circumstances? Any of you feel any particular way?
>
> Perhaps we have not gone into it, in detail. And probably one of the reasons why we haven't gone into it in detail is because usually, after having eighteen jurors, we normally have one person that maybe on some grounds are not or do have some feeling about it, one way or another.
>
> But we probably should consider that because it is always difficult. And I know it is counsel's problem, also. It is always difficult to discuss it at this phase of the case because we have what we call a bifurcated trial system.
>
> What that means is that the first part of the trial is on the innocence or guilt phase.

And that is when it is necessary for the State of Florida to produce witnesses to show the facts of the information, information charged in the indictment returned by the Grand Jury.

In the event that there is a guilty verdict, then we go into the bifurcated stage. That is a separate, minitrial such as incorporates the testimony of the first trial. That way it is not necessary to call back everybody. But we have a separate proceeding, separate argument and separate instruction by the Court concerning what the jury's recommendation would be concerning penalty.

And in the event the State has, in fact, proven its case of guilty of murder in the first degree, then it is necessary for the jury to determine one thing and one thing alone. And that is their recommendation concerning whether the recommendation should be life imprisonment or it should be death. Of course, it is a very serious part of the trial and a very serious proceeding.

And in the event that there is a guilty verdict in the first phase of the case, then that is going to be a very vital part of the proceedings, and one which both parties will probably strenuously object as to what recommendations you might should recommend to the Court.

Let me add that yours is a recommendation to the Court. The Court pronounces whatever sentence it sees fit. But yours is a recommendation, giving some direction to the Court as to what the circumstances show.

And as in all proceedings, rather than it being a proceeding based upon sympathy or based upon malice or based upon any emotion situation, it is a proceeding based upon law, law and facts.

You are a fact-finding body. And you must make several findings, or at least in your own mind, before you render verdict, the State has to show you what we call an aggravating circumstance or might be mitigating circumstances. And you are to make a judgment, based upon those proceedings. And so it is a detailed process that we go through. And, of course, I am sure both sides want to make sure that at that point, that your mind is still open as to what you would feel would be the proper verdict in that particular case.

(Tr. 72-75).

Mr. Smith: Do you have any feelings, one way or another, about capital punishment?

Mr. Richard: No. If it is proven. It's got to be the facts there.

(Tr. 89).

Mr. Smith: It was not necessarily apparent. You might have gauged by the Judge reading the indictment, but the Defendant in this case is charged with about five crimes, one of those being murder in the first degree. The crime of murder in the first degree, in Florida, carries with it a possibility of a death penalty.

Are you, in any way, opposed to the death penalty?

Mr. Stroemer: No, I am not.

Mr. Smith: For any particular reason?

Mr. Stroemer: No.

(Tr. 100).

Mr. Smith: Mr. Rowan, we were talking to the other jury panel members at quite some length this afternoon concerning capital punishment. I don't want to go back into all the questions we have. But do you have any feelings, one way or the other, strong feelings one way or the other about capital punishment; whether you disagree with it under all circumstances or agree with it under all circumstances?

Mr. Rowan: Some days yes and some days no.

Mr. Smith: Well, would it be fair to say that it depends on the circumstances and depends on the facts of the case?

Mr. Rowan: Yes.

I would say it would have to be proven in court before I could really make up my mind which way to go.

Mr. Smith: Even if the State of Florida did prove its case of murder in the first degree beyond and to exclusion of reasonable doubt, you realize that we do have a separate phase, a bifurcated-type trial, in which there is not only additional evidence but also additional arguments. And there's a different set of rules which the Court will instruct you on concerning capital punishment at that particular time.

Could you follow the Judge's instructions and follow the evidence that you heard in making your decision in doing that?

Mr. Rowan: Yes sir.

(Tr. 112-114).

Mr. Smith: As I mentioned, you are going to have a solemn duty. This is a very serious case. And the State will be seeking a death penalty in the event we ever get to that stage.

As I say, both sides, we have the problem, we have to discuss these matters now because we

need to know your views on them. We have to go through a trial on the evidence stage. At this particular point we are not trying to put the cart before the horse. If we get to that phase we can't go back and start asking questions and have additional answers at that particular time from you. That is why we have gone so much in detail at this particular phase, to let you know your responsibilities are serious.

Thank you, Your Honor.

(Tr. 117).

Mr. Smith: Do you have any feelings, one way or the other, about capital punishment?

Mr. Rigo: No, sir. No.

Mr. Smith: You sort of seem to hesitate there for a second.

Mr. Rigo: Well, no. You know, it would depend on the case.

Mr. Smith: Sure.

Mr. Rigo: It is pretty difficult to make a broad statement like that.

(Tr. 123). The process -- inevitably -- prompted potential jurors to bring up capital punishment on their own, further reinforcing the impression that the penalty phase was a foregone conclusion.

Mr. Walton: . . . . Someone asked a question about capital punishment.

Mr. Smith: Yes, sir.

Mr. Walton: I don't know whether this is the time to bring it up or not.

Mr. Smith: Go right ahead.

Mr. Walton: If the young man is convicted of first-degree murder, I would go for nothing except capital punishment.

Mr. Smith: Let me dwell on that for a few seconds, if I may.

The Court -- in a bifurcated situation we have a trial on guilt or innocence. And then in the second phase the Court gives instructions that the jury is to follow. Those instructions are handed down by the Supreme Court of Florida and, likewise, by the United States Supreme Court, which gives the criteria for the jury to consider. And if the criteria is not there, of course, the State still has a burden to carry. If the State cannot carry that burden, then the Court will direct you as to the criteria for aggravated circumstances, then, by taking your oath you, in good conscience, could not vote that

particular way.

What I am getting around to is: could you follow the Court's instructions, even though your personal belief is as you have outlined it? But if you follow the Court's instructions--could you follow the Court's instruction, even though this might disagree with your personal belief?

Mr. Walton: I find that difficult.

Mr. Smith: You do realize that we do have to follow the guidelines of the Court throughout the trial and --

Mr. Walton: I believe I have the capability of being totally objective in terms is the man guilty of first-degree murder. But if it comes down to the fact that he is voted guilty, I then have a problem.

Mr. Smith: I understand.

(Tr. 130-131).

Death qualification in this case backed both Mr. Harich and his attorney into an impossible corner. The defense was forced to add immeasurable credibility to the suggestion that the entire guilt phase was a mere preliminary to the penalty phase which, in light of the evidence of voluntary intoxication, was a far from foregone conclusion.

Indeed, in his very first words to the jury, defense counsel conveyed that the <u>real issue</u> was the penalty phase:

The Court: Mr. Pearl, you may inquire.

Mr. Pearl: May it please the Court. Good afternoon, ladies and gentlemen.

My name is Howard Pearl. I am an assistant public defender. I have been appointed to represent Mr. Harich in this case.

Mr. Smith has done such an excellent and thorough job of talking to you I am not left with much to ask. I feel a little empty at this point. But I have a few, in any event.

He spoke about the death penalty. And I want to get straight to that.

Murder in the first degree, if a person is found guilty of murder in the first degree, which is one of the counts in this indictment, then there are two and only two possible penalties for that crime, as the Judge will instruct you. One of them is a life sentence, in which a minimum of twenty-five years must be served, in prison, before eligibility for release on parole, or a sentence of death.

Now, that concerns you because, if you, the jury, unanimously return a verdict of guilty of murder in the first degree during the trial, you will then be required to return, what the lawyers call Phase 2.

Mrs. Fee you are certainly aware of that.

Mrs. Fee: Right.

Mr. Pearl: During that time you will hear further evidence which may be put on by either side. And from that you will be required to make a recommendation to the Judge as to whether the Defendant should receive a life imprisonment sentence or a death sentence.

Now, Mr. Smith has asked you whether there was anyone on this panel who was opposed to the death penalty and/or capital punishment. And there were no responses.

So I take it no one on this jury feels that under no circumstances, whatever, could you say that you were so opposed to the death penalty that you could not vote for it.

Am I being accurate there?

The Jury: Yes.

(Tr. 42-43).

Mr. Pearl: Now, my question to you, then, is this: if you do find that the Defendant is guilty of murder in the first degree -- and please believe, I hope you will believe I am speaking here in sort of a hypothetical sense. I am not saying to you I expect you, I'm only saying if you do. So please don't take from my question that I have any attitudes about what the verdict will be, for I don't.

(Tr. 43-44).

Mr. Pearl: But if you do find the Defendant is guilty of murder in the first degree, is there anyone on this jury panel who would automatically vote to recommend the death penalty, regardless of any other circumstances?

Is there anyone on this jury panel that would say, automatically, if it is first-degree murder it's got to be death? Anyone at all?

May I have a response?

The Jury: No.

Mr. Pearl: In other words, you will, in that event, if you do find the Defendant guilty of first-degree murder, you will hear additional evidence which would bear upon the circumstances you should consider in making your recommendation to the Judge as to life and death?

I merely -- I guess I was asking you, in essence, will you consider that additional evidence before you make up your minds?

(Tr. 44).

Mr. Pearl: May it please the Court. Good afternoon, newcomers.

Mrs. Bishop, Mrs. Cornwall and Mr. Baker, you have been asked about whether you are opposed to the death penalty or not.

Are you really, strongly in favor of the death penalty or are you just sort of neutral about it?

Mrs. Bishop: Neutral.

Mrs. Cornwall: Neutral.

Mr. Baker: Kind of neutral.

Mr. Pearl: You heard what I said to the other jurors, didn't you?

I mean, suppose this jury, with you on it, did find the Defendant guilty of first-degree murder. Let's just suppose that for a minute.

Now, you would then have to come back and do what is called Phase 2. And you would have to recommend, you would have to make a recommendation to the Judge as to whether he should either sentence the Defendant to life imprisonment with twenty-five years before parole or sentence him to death.

Now, would any of the three of you, if you found the Defendant guilty of first-degree murder, without anything and without any further consideration or any further evidence, would any of the three of you automatically, then, vote for the death penalty?

Mrs. Cornwall: No.

Mr. Pearl: You would be willing to listen to additional testimony in order to make up your minds which one you would recommend?

Mr. Baker: Right.

(Tr. 64-65).

Mr. Pearl: We have spoken, previously, about the death penalty, what happens in a trial of this kind which involves a capital felony. And murder in the first degree is a capital felony.

The Judge will instruct you, much later in this case, that if, in fact, you find Roy Harich guilty of murder in the first degree, and I am not suggesting that you will, I am just arguing a point, if you do, then it will be necessary for you and your fellow jurors to come back to what we call a Phase 2, a second phase of the trial, in which you will

hear additional evidence concerning the testimony in order that you and your fellow jurors may make a recommendation to the Court as to whether he should receive one of only two penalties which are possible in murder in the first degree. One is a recommendation of a life sentence with a minimum twenty-five years to be served in prison before parole. The other is a recommendation that he suffer death. Those are the only two possible sentences that can be meted out to a person who is convicted of murder in the first degree; life with a minimum of twenty-five years or a sentence of death.

Now, sir, you have said that you have no particular objection to capital punishment. But I ask you, sir, if it does happen that you and your fellow jurors find Roy Harich guilty of murder in the first degree, would that, in your mind, automatically, without anything more, require you to recommend death?

Mr. Stroemer: No.

Mr. Pearl: I wonder if I made myself understood.

Do you feel that anyone who is convicted of murder in the first degree must automatically suffer death instead of life imprisonment?

Mr. Stroemer: No.

Mr. Pearl: In other words, you would listen to the additional evidence, weigh it, and then return with what you think is a right recommendation as between life and death?

Mr. Stroemer: Right.

Mr. Pearl: Mr. Rowan, you said that you have no particular objection to capital punishment.

Mr. Rowan: That is right.

Mr. Pearl: But I wonder, sir, if you and your fellow jury panel members were to decide and return a verdict that Roy Harich was guilty of first-degree murder, would you automatically assume that he should suffer death?

Mr. Rowan: No, sir, I would not.

Mr. Pearl: You would listen to whatever additional evidence was offered?

Mr. Rowan: That is correct.

(Tr. 118).

Mr. Pearl: Now, sir, you say you have no objection to capital punishment.

Do you have a conviction that any person, regardless of the circumstances or his background or personality, who is convicted of

murder in the first degree, should, for that reason alone, suffer death?

Mr. Rigo: No, sir.

Mr. Pearl: Thank you, sir.

(Tr. 125).

The voir dire emphasis on death came full circle when the prosecutor argued, at the close of the penalty phase, that "we knew there was a reasonable possibility . . . and the State knew it would be more than a reasonable possibility, that we would be here at this stage" (Tr. 856).

Claim II. A clear issue of voluntary intoxication, sufficient to negate the specific intent element of premeditation, was raised by the evidence and argued by the State and defense counsel. The State, in closing, misstated the law, telling the jury that voluntary intoxication was no defense to a specific intent crime. No instruction on voluntary intoxication as a defense was requested or given, although it was argued, and at the hearing on motion for new trial, defense counsel argued that premeditation was missing, "because of the proof that was in the record, which came in during the trial, of the fact that the Defendant was intoxicated from the abuse of both alcohol and marijuana, and because of the impulsive nature of the acts proven against him at trial . . . " (R. 1027).

Appellant counsel's lead issue before this Court was that premeditation was not proven beyond a reasonable doubt. The claim was rejected. Because of unreasonable and prejudicial omissions by appellate counsel, this Court was not apprised of: (1) the trial court's fundamental reversible failure to instruct on the law, with regard to plain intoxication facts in the record; (2) trial counsel's record ineffectiveness for failing to request an instruction on voluntary intoxication, and (3) the prosecutor's misstatement of the law to the effect that voluntary intoxication was never a defense to first-degree premeditated murder.

Appellate counsel flagged none of those deficiencies. This Court did not consider them.

A. FACTS AT TRIAL

Mr. Harich was charged with first-degree premeditated murder (R. 194). The State's homicide theory was expressly premeditation (R. 23, 665-91), and the jury was instructed on premeditated, not felony, murder (R. 718-37).

First-degree premeditated murder is a specific intent crime: the state must prove beyond a reasonable doubt that the accused premeditatedly intended to kill. Voluntary intoxication is a "defense" to any specific intent crime, including premeditated murder, because intoxication may prevent the formation of specific intent.

When intoxication is raised by the evidence during the trial of a specific intent crime, the jury must be instructed that that intoxication can be considered a bar to conviction. At the time of Mr. Harich's trial in 1982, the law of Florida was clear that premeditated murder was a specific intent crime, and that an appropriate jury instruction was required when intoxication was raised:

> (c) INTOXICATION
>
> Voluntary drunkenness or intoxication (impairment of the mental faculties by the use of narcotics or other drugs) does not excuse nor justify the commission of crime, but intoxication (impairment of the mental faculties by the use of narcotics or other drugs) may exist to such an extent that an individual is incapable of forming an intent to commit a crime, thereby rendering such person incapable of committing a crime of which a specific intent is an essential element. When the evidence tends to establish intoxication (impairment of the mental faculties by the use of narcotics or other drugs) to this degree, the burden is upon the state to establish beyond a reasonable doubt that the defendant did, in fact, have sufficient use of his normal faculties to be able to form and entertain the intent which is an essential element of the crime.

Florida Standard Jury Instructions in Criminal Cases, Second Edition (The Florida Bar) 2.11(c); see also Gardner v. State, 10 F.L.W. 628 (Fla. Dec. 12, 1985); Edwards v. State, 428 So. 2d 357 (Fla. 3d D.C.A. 1983).

As will be detailed hereinafter, the degree of Roy Harich's intoxication at the time of the offense was hotly contested at trial, and its effect on premeditation was debated during the State's and the defendant's closing arguments. Defense counsel unreasonably failed to request a jury instruction with regard to intoxication, and the trial court gave no voluntary intoxication instruction. The intoxication issue was one for jury resolution, but the jury was precluded from considering it by counsel and court action. As discussed below, the intoxication issue was central to Mr. Harich's appeal, but no one informed this Court of the instructional error. These fundamental errors by defense counsel, the trial court, and appellate counsel violated Mr. Harich's sixth, eighth and fourteenth amendment rights.

The closing arguments at guilt-innocence discussed intoxication in two ways: first, how intoxicated Mr. Harich had been, and second, whether intoxication was relevant to premeditation. One passage from the State's argument illustrates both these discussions.

> Well, perhaps it might come to your mind, might come up later on, well, there's a lot of drinking. Does that take away the premeditation? There was some, even though, as you recall, Debbie did not say she thought the Defendant was drunk. She said she thought he was sober. He had two beers, only, while she was with him. That they didn't smoke any pot. That they couldn't get it dried out. So that, at least, her characterization, at that time, of the Defendant, was that he was not intoxicated, nor had he been on drugs, from her observation. The Defendant disagrees with that. He's had a lot of beer. And he's had drugs. But regardless of which point of view you might take, you will still find that the acts took such a deliberate intent and over a period of time, and <u>that the alcohol was consumed voluntarily, not involuntarily, and that makes a difference</u>, that that the pot, if, in fact, pot got smoked, <u>that was done voluntarily, not involuntarily, so that drunkenness</u>, and there's been no testimony from any of the State's witnesses concerning that there was any drunkenness or that, but drunkenness <u>in the situation that you have before you</u>, I submit to you, <u>even that would not be a defense to premeditated murder in this particular case</u>. Nor had it been argued. Like I say, I only have one argument.

(R. at 677-78). This argument was a misstatement of the law <u>and</u>

the facts. Intoxication is a defense regardless of whether it is voluntary. Further, the State went on to argue that Mr. Harich had told police officers the truth when he told them that he had been drinking and smoking marijuana, and that he did not remember what had happened (R. 692).

The defense argument likewise highlighted the importance of intoxication. The defense told the jury that "[t]he law will come from the judge," and then discussed how the jury's determination on intoxication could be dispositive on premeditation:

> You, and you alone, are the judges of the credibility of the witnesses and the evidence. And you, and you alone, will decide. For example, Mr. Smith was talking, again, about the law. And he said premeditated design doesn't take very long. It could happen in a minute. Maybe so. Listen to the Judge and, if you still don't remember it, read it for yourself, what premeditated design is. Will you do that?
>
> Let me ask you a question. Now, before I ask the question, I want to be very sure about one thing. And that is, I am here to say to you, on behalf of Roy Harich, as his lawyer, that he says he is not guilty of any of these offenses. Okay. And, so, if I argue anything that sounds any different than that, take it as theory, take it as an answer in part to Mr. Smith's argument. But still I feel that is something that should be said, because Mr. Smith commented on the law with respect to premeditated design.
>
> And first-degree murder, as charged in Count I of the indictment, is to effect the death of another human being by premeditated design. So if you find there is no premeditation, no premeditated design, it was done without premeditated design. And, once again, I say this, again, you are the sole judges of the evidence. You are the sole judges of whether Roy Harich is guilty or innocent of any offense in the indictment or any necessarily lesser included offense under any count of the indictment.
>
> Now, I am not going to stand up here and tell you what to do. I have too much respect, both for you and this system, to try to suggest that I am going to try to ram anything down your throats.
>
> You are the judge and all I am doing is standing up here and giving you what I think is a valid, logical viewpoint on the evidence which has been presented.
>
> But, suppose a man is so drunk and so stoned out on marijuana that he can't premeditate? What then? Suppose he's not

> capable of forming rational, logical thoughts, courses of conduct? Then where is the premeditation if he can't premeditate?
>
> So, if you find from the evidence that Roy Harich, in fact, committed the killing, or any other offense, remember and give effect, if you will, to the rules of the law as they may be, as they will be given to you as to whether or not he could really premeditate and plan and design what happened here.
>
> Deborah Miller, if you believe her, said that she, herself, found that Roy was not planning anything. Nothing was planned.

(R. 700-02; emphasis added).

However, the "rules of the law" given by the Court completely omitted any reference to intoxication. The Court told the jury that "[i]t is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case" (R. 739). (See also R. 731, "You must follow the law as set out in these instructions.") Thus, the answer to defense counsel's rhetorical questions ("But, suppose a man is so drunk or so stoned out on marijuana that he can't premeditate? What then? Suppose he's not capable of forming rational, logical thoughts, courses of conduct? Then where is the premeditation if he can't premeditate?", (R. 702)) was, convict Mr. Harich -- the instructions provided no answer to "What then?"

The evidence at trial was in fact replete with references to intoxication:

a. State's Case:

1. Witness Thomas Wall -- This police officer spoke with and arrested Mr. Harich. He related at trial what Mr. Harich had said upon arrest:

> [H]e made a comment that all he could remember was that he was drunk and high. And he said something about he would appreciate it if I didn't say anything to his relatives about him being drunk and high.

(R. 368).

> All he remembered was one minute he was driving through the woods with the girls, and the next thing he knew he was driving away and they were laying back behind the van.

(R. 370). These statements were repeated under cross-examination:

> [I]s it true that Roy said that he remembered nothing else of this, in effect, because he was drunk, high, or both?
>
> A. Yes, sir. He did say he didn't remember too much.

(R. 371).

2. Witness Deborah Miller -- This witness/victim was present with Mr. Harich the night of the offense and detailed her account of how much he had to drink and smoke. She said that he was not intoxicated (R. 456), but that he had drunk some beer and smoked some pot:

> Q: He bought some beer?
>
> A. A six-pack, yes.
>
> . . . .
>
> Q: And how about this Roy, this person driving the van, did he have any?
>
> A: I think he might have had two. I wasn't really watching that, really. I think he might have had two.

(R. 454).

The State's theory was that Mr. Harich had told officers he had been intoxicated, but that the only other person capable of knowing this, victim-Miller, refuted the contention. Thus, the victim's credibility was critical to the State's case, and she was, in fact, impeached with regard to her own degree of intoxication at the time of the offense. She claimed at trial that she had taken one-half hit of speed and drank one-half of a beer, but at a pretrial deposition she said she had more beer and a "head" of speed (R. 477-79).

b. Defense Case:

1. The defense gave no opening statement. The defense theory, pre-closing argument, emerged through cross-examination of State's witnesses, and then through the testimony of the only defense witness: Roy Harich.

2. Mr. Harich testified that he did not commit the offense and that he could not remember what had happened at

first, but that his memory gradually returned. As noted above, however, the defense theory at closing, argued alternatively, was: (1) Mr. Harich did not commit the offense, but (2) if the jury believed that he had, they also should find that his degree of intoxication rendered him incapable of forming the requisite specific intent. According to Mr. Harich's testimony, he was indeed heavily intoxicated at the time of the offense.

a) Mr. Harich testified that he had been working very hard for several days, and got off work at 4:00 p.m. the day of the offense. He bought a beer, cashed his paycheck, and bought a six-pack of beer (R. 500-03). He went home, smoked three joints of marijuana at home, drank the six-pack, and went to a friend's house. Id.

b) At the friend's house, Mr. Harich drank two more beers, and smoked two or three joints. He left there between 8 and 8:30 p.m. (R. 500-04).

c) After leaving the friend's, he bought a six-pack of tall Budweiser beer, bought a hamburger, and ate at the beach. He then went driving and stopped to buy some gasoline (R. 504-06).

d) He met the victims at the gas station. They voluntarily left with him, pulled out some of their marijuana, and they smoked it. He bought another six-pack of beer, and they went to a field to get some marijuana. While there, he was "mildly drunk" and "feeling pretty drunk" (R. 508-09). He testified that he took the victims back to a store and left them there (R. 509). He testified that he remembered telling an officer he "couldn't remember what happened that night because you were so drunk and so high on drugs" (R. 511). During his direct testimony, he denied saying that the girls were behind the van on the ground as he drove away. He testified that he remembered them being behind the van, but that was when he left them at the store (R. 511-12).

e) The State's cross-examination was intended to demonstrate that Mr. Harich was lying on the stand, and that he

earlier had told the officers the truth, except, perhaps, with regard to his degree of intoxication. Oddly, the State emphasized how much he said he had drunk:

> Q. You had a lot of beer?
> A. Yes sir, I did.
>
> Q. A lot of pot?
> A. Yes, sir.
>
> Q. Problems with your memory?
> A. Yes, sir.

(R. 519).

> Q. You decided to do a little serious drinking.
> A. Yes, sir.

(R. 554).

3. Mr. Harich testified that he drank a case of beer (some of it, 16 oz.), and that he smoked about seven joints of marijuana.

At the jury charge conference, counsel made no request for a jury instruction regarding intoxication, and had no objections to the jury charge (R. 575-76). No objections or requests were made after the jury charge (R. 737), despite invitation by the judge.

B. APPELLATE FACTS

In their briefs on the first issue on appeal, the State and defense counsel squabbled over whether the evidence of intoxication was sufficient to negate premeditation. All (including this Court) agreed it was a jury question. The State and this Court counted on the jury's resolution of the issue, confident (as it should be) that a properly instructed jury's resolution of factual matters should not be disturbed on appeal.

Everyone missed one point -- the jury was not instructed on voluntary intoxication at all, and the jury thus never resolved the very lead issue the parties fought about before this Court. The verdict is entitled to no deference, and Mr. Harich has never had a determination with regard to premeditated intent to kill. In fact, the prosecutor at trial told the jury it could not even consider voluntary intoxication, and its effect on premeditation.

The briefs reveal the extent to which this Court was lulled

into believing it was faced with a presumptively proper verdict of premeditated murder, arrived at by a properly instructed jury:

Appellant's Brief

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL WHERE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH PREMEDITATION, THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.
>
> At the conclusion of the State's case, Appellant moved for a judgment of acquittal based upon the failure of the State to prove that the murder was accomplished from a premeditated design. (R490-491). This motion was denied by the trial court. (R490-491, 496) The motion was renewed at the close of all of the evidence and denied. (R617-618) These same grounds were also specifically argued at the hearing on Appellant's motion for new trial. (R1025, 1027-1029)
>
> Deborah Miller's testimony was the only evidence that the State presented to refute the Defense evidence which established intoxication. Ms. Miller had consumed at least some amount of amphetamines earlier that evening. (R444, 449, 477-481) She also admitted to drinking some beer (R444, 449), but denied smoking any marijuana with Harich, although it was not due to a lack of trying. (R448, 450-452, 1164-1166) Ms. Miller was aware of Harich drinking two beers in her presence. (R454) She stated that although he took his time walking, he accomplished this task very well. She concluded that he did not appear to be on drugs or intoxicated. (R454-456)
>
> . . . .
>
> Murder in the first degree demands the element of premeditation (or felony-murder, which is not an issue in the present case); where the evidence does not establish this element, a judgment of guilt must be reversed. Brooks v. State, 158 Fla. 184, 28 So.2d 261 (1946); Taylor v. State, supra; Douglas v. State, 152 Fla. 63, 10 So.2d 731 (1942); sec. 782.04(1)(a), Fla. Stat. Therefore, in order to constitute first degree premeditated murder, it must be established beyond a reasonable doubt not only that a Defendant committed an act resulting in death, but that before the commission of the act he had formed a definite purpose to take life and had deliberated for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968); Hines v. State, 227 So.2d 334 (Fla. 1st DCA 1969).
>
> Although it is not a complete defense, voluntary intoxication is available to negate the specific intent of premeditation such that first degree murder is not proven. Cirack v.

> State, 201 So.2d 706 (1967). This is clearly present in the instant case. The facts sub judice can be distinquished from those in Stone v. State, 378 So.2d 765 (1979). In Stone, supra, many witnesses saw the Defendant at various times shortly after the homicide and on each occasion he seemed normal and not intoxicated. In the instant case, the State presented only the testimony of Deborah Miller concerning her perception as to Roy Harich's condition. Understandably her own perception may have been clouded by her own consumption of various drugs. Since the State failed to adequately refute the appellant's evidence of his intoxication (and resulting lack of the requisite premeditation), the trial court should have entered a directed verdict as to second degree murder. The failure to do so resulted in a denial of Appellant's constitutional rights to due process of law guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida.

Appellant's Brief, 17-20.

Appellee's Brief

The State responded with its own recitation of the facts, predictably disagreeing with Appellant's version. The State then relied on the jury verdict:

> Recognizing the established principle that, where a jury's verdict is supported by competent, substantial evidence, an appellate court should not substitute itself as the trier of fact, the jury's evaluation of the evidence was accepted. [referring to Songer v. State] See also Daniel v. State, 108 So.2d 755 (Fla. 1959); Connor v. State, 106 So.2d 416 (Fla. 1958); Withers v. State, 104 So.2d 725 (Fla. 1958); McDaniel v. State, 226 So.2d 856 (Fla. 1st DCA 1969); and Coggins v. State, 101 So.2d 400 (Fla. 3d DCA 1958).

Appellee's Brief at p. 7. This Court accepted Appellee's invitation to accredit the jury verdict, but Daniel, Connor, Songer, Withers, McDaniel, and Coggins are inapposite -- there was no resolution by a "trier of fact" on this acknowledged jury question in Mr. Harich's case.

During oral argument before this Court, the intoxication issue was discussed, as was the alternative defenses argued at trial. This Court correctly recognized that the facts properly presented alternative theories of defense: (1) that Mr. Harich consumed a large amount of alcohol and drugs but did not commit the offense; or (2) that Mr. Harich consumed a large amount of

alcohol and drugs and committed the offense but did not have specific intent. For example:

> Justice: Well, if he says its because his mind was blown because of the use of drugs.
>
> Attorney General: That was his defense throughout the trial to avoid the death penalty.
>
> * * * *
>
> Justice: He claims he wasn't even there.
>
> Attorney General: That's correct. He claims that he dropped the girls off and he arrived at home.
>
> Justice: He doesn't just claim that he killed them while he was, while his mind was blown. He claims he didn't kill them.
>
> Attorney General: That's correct.
>
> Justice: Well, then, he later says, I may have, there was evidence that he indicated he may have been involved in some things.
>
> Attorney General: I think the evidence was clear that he . . .
>
> Justice: Early, early in the game he is reported to have, hey, I don't know what went on, but I may have been involved in this matter.
>
> Attorney General: Right.

(Transcribed from tape of oral argument, provided by this Court.)

This Court was not informed that there was no jury resolution allowed on the "while his mind was blown" defense.

Claim III. From beginning to end, the prosecutor violated the ethical and constitutional standards which govern closing argument. He attempted to sway the jury in favor of a death sentence by stressing his expertise and personal conviction that death was the appropriate sentence; he commented on the defendant's exercise of his constitutional rights to counsel and to remain silent; he intentionally misrepresented the law governing statutory mitigating circumstances; and he repeatedly exceeded the bounds of the evidence in his comments. "The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded." United States v. Young, ___ U.S. ___, 84 L.Ed. 2d 1, ___ (1985).

The prosecutor's opening salvo was an argument that the jury should rely on the expertise and judgment of the State, rather than its own assessment of the evidence, in deciding whether the appropriate sentence was life or death:

> This proceeding which we have at this stage of a murder trial is always a difficult one. And I am sure, it applies, likewise, to everyone concerned. Don't think that anyone at any time takes it lighter than anyone else, by any means.
>
> It is a decision which is made after a lot of thought on your part concerning guilt or innocence. And it is a decision which the State has to make in order to determine whether or not to go forward with this proceeding and the request that the State would make. And it is always a difficult decision. It is not taken flippantly or without a careful analization [sic] of all the circumstances involved.
>
> In fact, in the thirteen years which I have been in this position, in over a hundred thirty-nine, forty cases of this magnitude that I have been associated with, its only been on four, and now five occasions which have come to the conclusion that this stage of the proceedings is one in which the State must come before you and to argue the aggravating circumstances that the State feels is necessary in this particular situation.

(Tr. 855-56, emphasis added). This argument was wholly irrelevant to any issue to be tried in the penalty phase, and was based completely on nonrecord "evidence." It was an intentional and flagrant invitation to the jury simply to adopt the prosecutor's expert judgment that death was the proper sentence. This argument rested upon a "proportionality review" which was not part of the evidence submitted to the jury, and which neither the defendant nor his counsel had any means to rebut.

To add credibility to his demand for the death penalty in this case, the prosecutor argued, "I think all of us share that same understanding because most, and I should say not even most, but the majority of homicide, capital punishment type cases, do not come to this stage, or they should not be at this stage" (Tr. 857).

The prosecutor ended, as he began, with an argument for death based upon his personal evaluation of the defendant's

culpability. His final remarks, reflecting the rising passion of his summation, made patent what he had only strongly implied before:

> This crime is the most heinous, atrocious and evil and cruel crime that I have known. And believe me, these days, murder becomes something which really is something that doesn't bother us any more. Doesn't bother me. But not this. Not this one.

(Tr. 886). The meaning was clear: in the opinion of this reasonable, experienced prosecutor, a man all but indifferent to murder, "there is only one conclusion" for the jury to reach in the penalty phase (Tr. 886). As the prosecutor said, "if that is the way it is handled all of the time, that is the way it is handled. If that is what it calls for, that is what it calls for" (Tr. 886).

The prosecutor's argument was not merely inflammatory and irrelevant to the law and the facts, it also expressly transcended constitutional boundaries. The prosecutor claimed that the jury could infer from Mr. Harich's exercise of his constitutional rights to remain silent and to consult an attorney that the <u>murder</u> was motivated by a desire to avoid lawful arrest:

> Even when it showed up in the papers, his first reaction was not to call the police and assist them in their investigation. His first reaction was to call a lawyer.

(Tr. 871). From that, "[w]e know his intent was not to be apprehended, and therefore, another aggravating circumstance was committed with the intention of avoiding detection or from escaping of any possible custodial situation" (Tr. 871-2). Apart from the specious logic of inferring a <u>motive</u> for a homicide from acts which supposedly evince a desire to avoid <u>responsibility</u> for the homicide, this argument is constitutional error of the first magnitude. The exercise of the right to consult an attorney and to remain silent cannot be used against a criminal defendant at all. Surely, the exercise of these fundamental rights cannot be transformed into an aggravating circumstance under Florida's narrow and carefully constructed statutory scheme. This error, without further discussion, warrants forceful condemnation,

reversal of the death sentence, and a resentencing before a jury uncontaminated by this kind of outrageous misconduct.

The comments on the defendant's exercise of the right to remain silent were not limited to the penalty phase closing argument. During his summation in the guilt or innocence phase of the trial, the prosecutor referred even more explicitly to the defendant's post-Miranda silence (Tr. 670).

The prosecutor reinforced the impression that Mr. Harich's exercise of his constitutional rights was improper or incriminating by contrasting the procedural safeguards afforded to the defendant with the safeguards offered the victim: "Carlene didn't get the opportunity to be evaluated by a psychologist. She didn't have the opportunity to let her side be heard. Carlene will not return to society in twenty-five years" (Tr. 884).

The prosecutor's improper remarks concerning the right to remain silent and to consult with counsel were not, however, the last of the prosecutor's efforts to misinform the jury about the law they were to apply. Although the prosecutor was well aware that the Florida state legislature had determined, as had almost every State and the United States Supreme Court, that the defendant's age was a circumstance to be considered in mitigation, he argued to the jury:

> The age of the defendant. I think the testimony, at least the appearance, would show that the Defendant is probably twenty-three years old, maybe twenty-two, at the time of this occurrence. That, we would show, is not really a mitigating circumstance since our common knowledge and our experience shows us that most crimes are committed by people in the eighteen to twenty-five year range.

(Tr. 863, emphasis added). There was no evidence for this assertion, other than the "expertise" of the elected prosecutor. As important, though, it contradicts the theory which guided the legislature in drafting the capital punishment statute, which is that younger persons should be punished less severely than older ones because they are less likely to understand and reflect on the consequences of their acts. The prosecutor was not saying

that the jury should give little weight to the mitigating circumstance in this case. Rather, he was arguing that the jury was free to discard this part of the statute entirely, since it was, in his opinion, and based upon his personal knowledge of facts outside the record, "not really a mitigating circumstance." In fact, as the prosecutor told the judge during the charge conference during the penalty phase: "That should be an aggravating circumstance rather than a mitigating" (Tr. 851). This prosecutor's personal view of the validity of a statutory mitigating circumstance was simply not relevant; when he expressed that opinion to the jury he intentionally induced the jury to ignore an essential part of the law governing its penalty phase deliberations.

The prosecutor repeated this ploy when he discussed the statutory mitigating circumstance that the defendant's ability to conform his conduct to the law at the time of the offense was substantially impaired. Although the psychologist who examined Mr. Harich concluded, based upon a "reasonable psychological certainty" that Mr. Harich's ability to conform his conduct to the law at the time of the offense was substantially impaired (Tr. 821), the prosecutor responded:

> I remind you on that particular point that the doctor stated that in her opinion the defendant was sane. That not only was he sane, but at the time, I actually read a quote to her which she agreed with, from her report, was that it was her opinion that he was not suffering from any disease or defect of the mind such that he was unable to know and appreciate the consequences of his behavior and know that it was wrong. So that Dr. McMahon, without a doubt, has testified that he knew the difference at the time of the crime, of right and wrong, and he could understand the nature and consequences of his act. So that the mitigating circumstance, I would submit to you, is not applicable.

(Tr. 862). This argument intentionally misled the jury. The "substantial impairment" mitigating circumstance is not equivalent to legal insanity. An insane defendant, one who does not appreciate the difference between right and wrong, will never get to the penalty phase of a capital trial. He or she must be

acquitted. "Substantial impairment" addresses the broader question of the defendant's ability to conform his conduct to his knowledge of right and wrong. Although many states adhere to this broader insanity defense, under Florida law, the two concepts are distinct. The prosecutor's argument was therefore unresponsive, and served only to misinform the jury about the law. In fact, Dr. McMahon had expressly and without rebuttal, opined that Mr. Harich's ability to conform his conduct was substantially impaired, the exact words of the statute. The state misinterpreted her testimony and the statute.

There was evidence in mitigation, although as we will show in post-conviction proceedings, competent counsel would have offered much more. The prosecution's strategy was not to attack this evidence directly, but to discredit it by misinforming the jury about its legal significance. In addition, he offered his personal opinion about the severity of the offense.

The prosecutor also invoked the testimony of Investigators Vail and Burnsed to prove an aggravating circumstance listed nowhere in Florida's capital punishment statute. The Florida Supreme Court has already recognized that their testimony should not have been admitted in the penalty phase of the trial or the guilt or innocence phase. State v. Harich, 437 So. 2d ___ (Fla. 1984). The prosecutor skillfully exploited this testimony to besmirch the defendant's general character. After reviewing Mr. Harich's testimony in the guilt or innocence phase, and the testimony of Vail and Burnsed offered to corroborate Officer Wall's account of his conversation and to discredit the defendant's testimony concerning his loss of memory, the prosecutor discussed the defendant's truthfulness, not in connection with any particular facts in issue, but with his character:

> Now is that an assumption we can make in this case? That we can assume that the Defendant is and was, on December the 11th of 1982 [sic] telling her the truth? When we look back over the other opportunities that the defendant has had to tell the truth, he has not done so. He has not done so. And so the character comes into serious question.

(Tr. 870, emphasis added). Earlier, the prosecutor had explained:

> ...today, you heard evidence which goes to the character of the Defendant or which may go to the aggravating or mitigating circumstances. And this is particularly important because today you heard additional evidence which you had not heard prior to your decision on innocence and guilt.
>
> What you heard was some evidence concerning the character of the Defendant.

(Tr. 865). This crucial "new" character evidence was the impeachment testimony of Vail and Burnsed, which the prosecutor went on to argue showed that Mr. Harich had not been truthful when he denied having any memory of the offense. The prosecutor included this argument based upon "character" in the midst of his summary of aggravating circumstances, intentionally leading the jury to believe that Vail and Burnsed's -- as we now know -- inadmissible testimony was firm proof of an aggravating circumstance: bad character. The State relied on this same theory on appeal:

> We would submit that it was not in fact impeachment testimony, it was testimony going to the defendant's character, which is allowed under 921.141.
>
> * * * *
>
> The State under 921.141 is limited to the aggravating circumstances and also items or evidence that goes to the nature of the crime or the character of the defendant. Before a trial judge can impose the death sentence, he has got to look at the totality of everything that happened, all the circumstances, and we would submit that the trial court permissibly looked at this as going to the character of the defendant. . . .

(Transcribed from tape of oral argument, provided by this Court.)

The United States Supreme Court has said that arguments such as the one in this case, which misinform the jury and distort the delicate balancing process created by the legislature in a capital sentencing law, are "intolerable". Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). But long before Caldwell, the courts had condemned the kind of arguments the prosecutor made here. The death sentences which they improperly produce must be set aside unless it is possible to say with confidence that the improper

argument had "no effect" on the sentencing decision. The trial court expressly relied in its Findings upon the jury's decision, which was tainted by inflammatory, improper, and most of all, inaccurate statements about the law and the evidence. Caldwell requires a new sentencing in this case.

Mr. Harich's appellate counsel did include a challenge to the prosecutor's penalty phase argument in his brief, but he never addressed the serious and fundamental errors discussed above. This omission deprived this Court of meaningful guidance in its review of Mr. Harich's sentence and concealed prejudicial violations of the Constitution.

IV. LEGAL BASIS FOR WRIT

FIRST GROUND FOR RELIEF

A. MR. HARICH'S EXECUTION MUST BE STAYED PENDING DECISION IN LOCKHART v. MCCREE.

Mr. Harich's entitlement to a stay is controlled by Adams v. Wainwright. As in Adams, Mr. Harich's jury underwent the death qualification process and as in Adams that process did not result in the excusal for cause of prospective jurors. Adams, 11 F.L.W. at 79. As in Adams, Mr. Harich's attorneys failed to preserve the claim at trial or on direct appeal. The United States Supreme Court, after initially denying a stay, ultimately stayed Adams' execution based on Lockhart. A stay is appropriate here.

As discussed above, the United States Supreme Court stayed Adams' execution solely on the basis of the "process" challenge to death qualification: Although veniremembers were excused peremptorily in Adams, such excusal was not an issue presented to the United States Supreme Court in the application for stay or in the certiorari petition. See Appendices A, B. Although the peremptory challenge aspect of the Lockhart claim was presented to this Court in Adams, the argument was not pursued in the United States Supreme Court. This point bears repeating: The sole basis of the Supreme Court's stay in Adams was the "process" aspect of the Lockhart claim.

Adams is not the only case in which the Supreme Court granted a Lockhart stay even though no veniremembers were excluded for cause. In Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985), stay granted, 106 S. Ct. _____ (1985), the Supreme Court granted a stay even though no jurors were excused for cause. This is clear from the voir dire transcript in Moore. See Appendix E.

The Adams and Moore cases cannot be separated from those cases, such as Johnson and Kennedy, involving the actual excusal of jurors for cause. Both types of cases depend on the constitutional acceptability of the death-qualification process, and thus both types of cases must be held pending Lockhart.

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

The United States Supreme Court's actions in granting stays in Lockhart cases have made clear that procedural defaults will not preclude a stay of execution. The Court has granted stays in postures of procedural default and in cases raising the Grigsby claim in successive habeas petitions. The Adams case is only the most recent example of this.

Willie Celestine, a death row inmate in Louisiana, did not raise the Grigsby claim in his first petition for habeas corpus relief. When he attempted to bring the issue in a successive petition, the district court denied relief. Memorandum Ruling at 2-3, 5-6, Celestine v. Blackburn, ____ F. Supp. ____ (W.D. La. Sept. 19, 1985). See Appendix G. The Fifth Circuit affirmed:

> The sole issue raised in the present petition is based upon the exclusion of potential jurors because of their expressed inability as a matter of conscience to consider imposition of the death penalty. Witherspoon v. Illinois, 88 S.Ct. 1770 (1968). The claim is that a jury from which are excluded those persons who are conscientiously opposed to the death penalty violates the right to an impartial jury at the guilt or innocence phase of the trial. The theory is that persons opposed to the death penalty are less likely to convict, and persons who are not opposed to the death penalty are more likely to convict. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), petition for cert. filed sub

nom. Lockhart v. McCree, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (No. 84-1865).

Petitioner explains the failure to raise this issue in his earlier petition for habeas corpus on the ground the Grigsby case had not yet been decided. Until the Grigsby decision and the Supreme Court's stay of execution pending decision on the petition for certiorari, the contention is that the law had been settled that a jury from which had been excluded those who have conscientious scruples against the death penalty was nevertheless competent to decide the issue of guilt or innocence.

The immediate issue before the Court is whether a certificate of probable cause should be granted to allow the full consideration on appeal of petitioner's contention. This Court has just spoken definitively to this issue in the case of Sterling Rault, Sr. v. State of Louisiana, No. 85-3281, decided September 13, 1985. Because this opinion has not yet been published, we quote in full the Court's disposition of the contention:

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

The application for a certificate of probable cause to appeal the denial of habeas corpus relief under 28 U.S.C. [Section] 2254 and the motion for a stay of execution are denied. The appeal is dismissed.

Celestine v. Blackburn, ____ F.2d ____, No. 85-6445, slip op. at 4-5 (5th Cir. 1985). See Appendix G. However, the United States

Supreme Court granted a stay. Celestine v. Blackburn, 106 S. Ct. 31 (1985).

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

> BY THE COURT:
>
> The United States District Court for the Middle District of Georgia has dismissed petitioner's successive petition for the writ of habeas corpus and denied petitioner a certificate of probable cause to appeal. Presently pending is his petition for a certificate of probable cause and for his stay of execution pending appeal.
>
> The petition presents only one issue involved in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom Lockhart v. McCree, ____ U.S. ____, 106 S. Ct. ____, 87 L. Ed. 2d ____ (Oct. 7, 1985). In this Circuit, prior to and since Grigsby, we have rejected that contention. See Jenkins v. Wainwright, 763 F.2d 1390 (11th Cir. 1985), Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), and Smith v. Balkcom, 660 F.2d 573, 575-84 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148.
>
> Since granting certiorari in Grigsby, the Court has stayed executions in Celestine v. Blackburn, ____ U.S. ____, 106 S. Ct. 31, 87 L. Ed. 2d ____ (1985), and Moore v. Blackburn, 774 F.2d 97 (1985). It is asserted that these two stays by the High Court were granted because of the Grigsby issue involved in each of them; the orders granting those stays do not sufficiently advise us of the basis for them.
>
> Under the precedent binding us in this Circuit, the District Judge's dismissal of the successive petition is correct and the petitions for certificate of probable cause and stay of execution are without merit. Were we to grant CPC and reach the merits of the proposed appeal on consideration of the petition for stay of execution, See Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L.Ed.2d 1090 (1983), we should be bound to affirm the district court. The grant of the

> writ of certiorari in Grigsby is no authority to the contrary; any implications to be drawn therefrom may be discerned by application to the Supreme Court.
>
> The petition for certificate of probable cause is DENIED.
>
> The petition for stay of execution is DENIED.

Id. at 1494. However, the Supreme Court unanimously granted a stay. Bowden v. Kemp, 106 S. Ct. 213 (1985). See Appendix H.

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

> It is ORDERED that petitioner's application for a certificate of probable cause and his motion for a stay of execution are denied.
>
> The first issue raised in the petition concerns the exclusion from the jury of persons with scruples against the death penalty, resulting in a "death qualified jury." See Grigsby v. Mabry, 758 F.2d 129 (8th Cir. 1985) (en banc), petition for cert. filed sub nom., Lockhart v. McCree, 53 U.S.L.W. 3870 (U.S. May 29, 1985) (no. 84-1865). This issue was squarely raised in petitioner's previous petition, and thus is a successive writ, disallowed under Rule 9(b), Rules Governing Section 2254 Cases. The issue was

> determined adversely to petitioner in the prior petition, the prior determination was on the merits, Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984), and the ends of justice would not be served by reaching the merits of this application. Sanders v. United States, 373 U.S. 1, 15 (1963); 28 U.S.C. [Section] 2244.

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

The Grigsby claim was in procedural default by the time it reached federal court in the North Carolina case of John William Rook. The Fourth Circuit denied a stay, but the Supreme Court granted the stay despite the default. Rook v. Rice, No. A-593, 54 U.S.L.W. 3558 (U.S. Feb. 25, 1986). See Appendix I.

Thus, procedural obstacles are no barrier to the grant of a stay in cases raising the Lockhart claim. See also Kenley v. Missouri, Docket No. 85-5533, stay granted (October 8, 1985); Guzmon v. Texas, 697 S.W.2d 404 (Tex. Cr. App. 1985), stay granted, 54 U.S.L.W. 3391 (December 6, 1985); Gilmore v. Missouri, 697 S.W.2d 172 (Mo. 1985), stay granted, 54 U.S.L.W. 3423 (December 24, 1985). See also Rault v. Louisiana, ____ F.2d ____, Case No. 85-3281, slip op. (5th Cir. October 7, 1985) (denying rehearing but granting stay of execution in light of Moore and Celestine).

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

C. THE DEATH QUALIFICATION OF MR. HARICH'S JURY WAS PREJUDICIAL

The question of premeditation was a close one, but the jury was predisposed with regard to it. First, they received an instruction on it. Second, the process of death qualification itself -- the searching voir dire inquiries of prospective juror's attitudes toward the death penalty -- biases jurors on

the question of guilt and the degree 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 K. 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; and 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 "mini-

mize 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 Lockhart 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 Lockhart 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). See Appendix J.

The general constitutional attack in Lockhart 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 relevant to Mr. Harich's 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 did not occur in Mr. Harich's case. But regardless of the cross-sectional implications of actually excusing such jurors, the Lockhart 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.

The death-qualification process in the instant case displayed many of the features which led to the psychological consequences described. See Haney, Examining Death Qualification: Further Analysis of the Process Effect, 8 Law and Human Behavior 133, 136-143 (1984) (describing common variations in death qualifications procedure and how they contribute to bias effects). See Appendix K. For example, the great attention paid by court personnel to the penalty phase implied that the jurors' real job would be to assess punishment:

> (By Defense Counsel): Mr. Smith (prosecutor) has done such an excellent and thorough job of talking to you, I am not left with much to ask. I feel a little empty at this point. But I have a few, in any event. He spoke about the death penalty. And I want to get straight to that.

(Tr. 42).

Other comments, even those aimed at clarification, implied guilt by suggesting the inevitability of the penalty phase and by encouraging prospective jurors to assume that the guilt phase of

the trial had been completed.

> (By Defense Counsel): Let me ask you this: Would you follow the Judge's instructions and the evidence as to the bifurcated trial in the event that we came to that particular stage?
>
> A: I didn't understand the question.
>
> Q: Well I can understand. I probably didn't make myself clear. When we get to the second phase of the trial, and let's at this time assume that there has been a guilty verdict. And when the jury comes to a bifurcated stage, where we have a second trial, based upon more evidence or the State can use the evidence which it already presented at trial, and additional arguments. Plus, the Court gives you additional law.

(Tr. 149-150, emphasis added).

The veniremen were also invited to imagine themselves in the penalty phase, thereby contributing to the process of "desensitization" and increasing their estimate that the penalty phase would, rather than could, occur:

> (By Defense Counsel): You heard what I said to the other jurors, didn't you? I mean, suppose this jury, with you on it, did find the Defendant guilty of first-degree murder. Let's just suppose that for a minute. Now, you would then have to come to Phase 2 . . .
>
> Now, would any of the three of you, if you found the Defendant guilty of first-degree murder, without anything and without further consideration or any further evidence, would any of the three of you automatically vote for the death penalty?
>
> (Mrs. Cornwall): No.
>
> (Counsel): You would be willing to listen to additional testimony in order to make up your minds which you would recommend?
>
> (Mr. Baker): Right.

(Tr. 65).

Other comments indicated to prospective jurors that, in someone's opinion, at least, the case they were about to hear would be worthy of the most extreme punishment permitted by law:

> (By Prosecutor): Let me add, we are talking about a very serious, serious case here, that of murder in the first degree . . . Also, because it is a murder in the first degree, there is always a situation involved in that particular situation where the maximum penalty for a case of this nature could be the death penalty.

(Tr. 40).

Finally, the procedure as used here required public affirmation of each venireman's willingness to take the most extreme legal action available to a juror, intensifying commitment to that course of action:

> (By Prosecutor): So I take it no one on this jury feels that under no circumstances, whatever, could you say that you were opposed to the death penalty that you could not vote for it. Am I being accurate there?
>
> (Jury): Yes.

(Tr. at 42).

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, 11 F.L.W. at 65 (emphasis added). While the Kennedy opinion involved the actual exclusion of one juror, id., the exclusion of a lone juror cannot in and of itself bias a jury. The exclusion of that juror 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 three parts: the defendant's unquestioned constitutional right to a trial by a fair and impartial jury; 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, sec. 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 . . . [and that] 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." 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 impanelling of jurors they believe will be partial to their adversary and at the same time they will be seeking the impanelment 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 limitation 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. See Appendix J. 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, the 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. See Appendix J. 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 thought 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) 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 Lockhart and earlier in Spinkellink, that juries which are not death qualified may be "defendant prone." Discussing this position, the Eighth Circuit observed that this is "the wrong issue." The issue is not whether nondeath-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 partiality

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 sen-

tence. 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 impaneled 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 impanel 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 impaneled 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.

(3) <u>The Right to Trial by an Impartial Jury Outweighs the State's Interest in Death Qualification before Trial.</u>

"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.'" <u>Witherspoon</u>, 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.

SECOND GROUND FOR RELIEF

In 1982, this Court was shielded from a fundamental flaw in the trial proceedings. Intoxication was fairly raised by the trial evidence. Everyone argued about whether the intoxication issue had been resolved correctly, but no one (on appeal) disputed that the question was relevant.

What this Court did not know was: (1) the jury was not instructed on the law of voluntary intoxication and its potential effect on the specific intent crime of premeditated murder; (2) the state attorney incorrectly told the trier of fact that voluntary intoxication was not and could never be a defense to premeditated murder; and (3) trial defense counsel unreasonably failed to request a jury instruction on voluntary intoxication. Appellate counsel unreasonably and prejudicially failed to alert the Court to these dispositive issues. This Court cannot have confidence in the appeal process produced by appellate counsel, when such fundamental information went undisclosed.

A. STANDARDS FOR EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> "The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent

> dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Wilson v. Wainwright, Nos. 67,190, 67,204, slip op. at 5 (Fla. August 15, 1985).

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

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

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657, 664 (1984). Counsel is crucial, not just to spew the legalese unavailable to the lay

person, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S. Ct. 830, 835, n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S. Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

Appellant's counsel should discover fundamental error, including trial counsel ineffectiveness, which appears on the face of the record. Foster v. State, 387 So. 2d 344, 345 (Fla. 1980); see also Stewart v. State, 420 So. 2d 802, 867 (Fla. 1982) ("Because the facts on which this claim [ineffective assistance of counsel] is based are evident on the record before this Court, this contention is cognizable on appeal").

B. UNREASONABLE PREJUDICIAL OMISSION BY APPELLATE COUNSEL

Appellant's counsel failed "to discover and highlight possible error and to present it to the court." Wilson, supra, p. 5. The fundamental error not discovered was that the jury was never instructed with respect to the battle fought before this Court regarding whether voluntary intoxication had negated premeditation. This Court has recently reaffirmed the bedrock principle that a defendant is entitled to this instruction, and that resolution of the intoxication issue, upon proper jury instruction, is central to this Court's review of a premeditated murder conviction. Gardner v. State, 10 F.L.W. 628 (Fla. Dec. 12, 1985). The instruction error rises above the fray before this

Court in 1982 -- this Court has never resolved the issue of whether the trial was fundamentally flawed due to incorrect jury instructions. The Court, uninformed by counsel, assumed proper instruction, and then performed a normal appellate review of jury findings. Mr. Harich asks this Court to grant him an appeal so as to present an issue not ruled upon before, not ruled upon due to the fault of counsel.

1. Mr. Harich was entitled to a voluntary intoxication jury instruction.

This Court knows the law:

> Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Bell v. State, 394 So.2d 979 (Fla. 1981); State ex rel. Goepel v. Kelly. 68 So.2d 351 (Fla. 1953). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985) (emphasis added). Voluntary intoxication as a defense to specific intent crimes is not new. Garner v. State, 28 Fla. 113, 9 So. 835 (Fla. 1891). While the court noted in Gardner that not in every case where intoxication is mentioned will an instruction necessarily follow (citing Jacobs v. State, 396 So. 2d 1113 (Fla.), cert. denied, 454 U.S. 973 (1981), discussed infra), the Court underlined the Florida law reflecting how little evidence of intoxication is needed before an instruction is mandatory in a premeditated murder case.

This Court's citation to Mellins in Gardner is a good starting point. There, the defendant testified she was not intoxicated:

> At the charge conference defense counsel requested an instruction on the defense of intoxication. The request was denied because of appellant's testimony to the effect that she had not been intoxicated. Conviction and

this appeal followed.

Appellant takes the position that there was some evidence of intoxication so that she was entitled to an instruction on this theory of defense.

Appellee counters by pointing out that while inconsistent defenses are permissible this is so only so long as proof of one does not disprove the other. In addition, appellee maintains that even if there was error in this regard it was harmless because defense counsel "fully and completely argued the meaning of intent and intoxication." Therefore, the jury had an opportunity to consider the effect of intoxication in this context so that the failure to instruct could not have "injuriously affected the substantial rights of the appellant" citing Paulk v. State, 376 So.2d 1213, 1214 (Fla. 3d DCA 1979).

There were no scientific tests made to determine whether appellant was intoxicated at the time of the alleged offense. There could therefore be no empirical evidence of intoxication. The only evidence on this issue was the testimony of the police officers. We have concluded in a previous case, however, that evidence elicited solely in the cross-examination of the state's witnesses may be sufficient to give rise to a duty to instruct on a defense suggested by that testimony. To hold otherwise would seriously jeopardize the right of the accused to refrain from testifying. Weaver v. State, 370 So.2d 1189 (Fla. 4th DCA 1979).

Voluntary intoxication is a defense to the crime of battery on a police officer, Russell v. State, 373 So.2d 97 (FLa. 2d DCA 1979), as in other crimes requiring a specific intent. Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979). Where intent is a requisite element of the offense charged and there is some evidence to support this defense, the question is one for the jury to resolve under appropriate instructions on the law. Frazee v. State, 320 So.2d 462 (Fla. 2d DCA 1975).

The law is very clear that the court, if timely requested, as here, must give instructions on legal issues for which there exists a foundation in the evidence. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976).

It is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the *scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction. The jury is admonished to take the law from the court's instructions, not from argument of counsel. It must be assumed that this admonition is generally followed. For this reason the error may not be considered harmless.

Mellins, 395 So. 2d at 1208-10 (emphasis added).

The Fourth District Court of Appeals has subsequently acknowledged that voluntary intoxication defenses must be pursued by competent counsel if there is evidence of intoxication, even when trial counsel explains in post-conviction that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). See also Presley v. State, 389 So. 2d 1385 (Fla. 2nd DCA 1980) (ineffective to induce guilty plea with misinformation that intoxication is not a defense); Price v. State, No. BH-155 (Fla. 1st DCA Feb. 20, 1986) (ineffective assistance of counsel reversal based on Gardner). What is important is that there be some evidence, any evidence. Gardner; Parker v. State, 471 So. 2d 1352 (Fla. 2d DCA 1985); Heathcoat v. State, 430 So. 2d 945 (Fla. 2d DCA), aff'd, 442 So. 2d 955 (Fla. 1983). Even when (1) the evidence arises from cross-examination of state's witnesses, (2) the evidence is not supported by empirical evidence, (3) the defendant doesn't testify, or does and denies intoxication, or (4) where the defense is proffered as an alternative theory of defense, an instruction is required. Pope v. State, 458 So. 2d 327 (Fla. 1st DCA 1984); Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983); Mellins, Price, Gardner.

This is so because intoxication is an issue particularly suited for juror or fact-finder resolution. A defendant's right to fact-finder resolution of drunkenness is ironclad:

> It is axiomatic that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such an instruction, and the trial court may not weigh the evidence in determining whether the instruction is appropriate. Smith v. State, 424 So.2d 726 (Fla. 1982). The evidence need not be "convincing to the trial court," before the instruction can be submitted to the jury. Edwards, at 359, as it suffices that the defense is "suggested" by the testimony. Mellins, at 1209. "'However disdainfully the trial Judge may have felt about the merits of such defense from a factual standpoint, however even we may feel about it, is beside the point.'" Laythe v. State, 330 So.2d 113, 114 (Fla. 3d

DCA 1976).

> The testimony in the instant case concerning the degree of appellant's state of intoxication might have been conflicting, but it certainly constituted evidence of intoxication sufficient to go to the jury as an issue of fact. Consequently, the trial court erred in failing to instruct the jury on the defense of voluntary intoxication.

Pope, 458 So. 2d at 329. See also Frazee v. State, 320 So. 2d 412 (Fla. 3rd DCA 1975) ("the resolution of such question is solely for the trier of the facts"). Jurors are entrusted to discover drunkenness and determine its effect, and courts are to stay out of it.

We have had no fact-finder resolution of this intent issue. Mr. Harich, if guilty, acted totally against his law-abiding character and history. The consumption of alcohol and drugs testified to by Mr. Harich is literally staggering (a case of beer and six joints), and the parties fought about its implications at trial and before this Court. Nobody told this Court that the question had never been resolved by the fact finder -- indeed, the fact-finder was told that the law was that Mr. Harich was guilty of premeditated murder even if he was intoxicated, because, according to the State, voluntary intoxication is no defense. Not true.

Appellate counsel is required to bring substantial and meritorious issues to this Court's attention. It is plain from the record that trial counsel was ineffective for failing to request a voluntary intoxication instruction, after telling the jury it was the law. This record ineffectiveness should have been raised by appellate counsel, and the failure to have raised it denied Mr. Harich a meaningful appeal. See Foster v. State, 387 So. 2d 344, 345 (Fla. 1980); see also Stewart v. State, 420 So. 2d 802, 867 (Fla. 1982) ("Because the facts on which this claim [ineffective assistance of counsel] is based are evident on the record before this Court, this contention is cognizable on appeal").

Petitioner requests an appeal that is not blinded by counsel oversight. This Court and Mr. Harich are entitled to more than was delivered. Petitioner acknowledges this Court's Gardner nod

to Jacobs v. State, 396 So. 2d 1113 (Fla.) cert. denied, 454 U.S. 973 (1981), but the facts, language and ruling in Jacobs do not deprive Mr. Harich of his rights here. While Jacobs would certainly be freely discussed in the new brief on appeal requested by Mr. Harich, it is sufficient here to discuss differences which make Jacobs nondispositive to this habeas proceeding. Jacobs involved a felony murder and premeditated murder general verdict, and this Court noted that the felony murder issue watered down the premeditation question. More importantly, Jacobs lacked evidence present here. "It is not error to refuse such an instruction where there is no evidence of the amount of alcohol consumed during the hours preceding the crime and no evidence that the defendant was intoxicated." Gardner, discussing Jacobs, 480 So. 2d at 93. Those facts are not these facts.

Mr. Harich said a case of beer and a lot of pot. The victim said two beers and a little pot. Police officers said Mr. Harich told them he could not remember the offense because he had been so drunk and high. The jury was prohibited from resolving the matter, and this Court incorrectly accepted the jury's verdict.

This Court's recent decision in Wilson, supra, compels a new appeal here. In Wilson, appellate counsel failed to address the sufficiency of the evidence of premeditation. This Court granted a new appeal, saying:

> The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case. If, in fact, the evidence does not support premeditation, petitioner was improperly convicted of first degree murder and death is an illegal sentence. To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.

The heart of this case was similarly overlooked. While the parties fought a lot about intoxication and its impact on premeditation, no one alerted this Court to the heart of the issue -- no fact finder addressed the question, because they were told they could not. The failings in this case violated Mr. Harich's

sixth, eighth and fourteenth amendment rights, and he should be allowed a new appeal, and this Court has the power to order a new appeal.

As a final aside, it should be noted that the importance of intoxication is central to all facets of this case. Mr. Harich was convicted of several offenses, all of which were specific intent crimes. The trial court found four aggravating circumstances, virtually all of which involved specific intent. Intoxication affected the entire case, but the jury did not know it, and the trial court did not consider it. Appellate counsel unreasonably and prejudicially failed to argue the effect of intoxication on these other significant findings.

For example, the trial court, without saying why, found that the offense had been committed in a cold and calculating manner. Oddly enough, the trial judge had no idea why he found this aggravating circumstance:

> THE COURT: Mr. Smith, before you begin, Mr. Pearl, have you seen any case law on this last finding of fact by the court that the capital felony was committed in a cold, calculated, and premeditated manner?
>
> MR. PEARL: No, Your Honor. I have asked my appellate division if they could come up with something. They have reported to me that they have nothing that would be very new at this time.
>
> THE COURT: We agree. I couldn't find anything, either. That's one of the reasons that I included it.
>
> MR. PEARL: Yes, Your Honor.
>
> THE COURT: I felt that the facts required me to find that existed is the reason I included it, but I haven't likewise, found any law.

(R. 1040). In fact, neither the law nor the facts required this finding, particularly in light of intoxication. The jury never knew the effect of intoxication, however, and the judge would not consider it.

The trial court should not find an aggravating circumstance based on the court's failure to find any law on it. "That's one of the reasons that I included it. I felt that the law required me to." The "law" that could have been found was the effect of

voluntary intoxication on premeditation, something the jury was not instructed about, but upon which the judge looked to the jury for guidance.

THIRD GROUND FOR RELIEF

The prosecutor's closing argument was a skillfully crafted effort to persuade the jury to recommend a death sentence on the basis of misinformation about the law and the facts before it in the penalty phase. The prosecutor spoke first; his remarks were not made in response to the excesses of defense counsel in the heat of the moment. Rather, an analysis of the closing argument shows an intentional effort to mislead the jury about the basis for its decision. Reversal of the death sentence imposed upon Mr. Harich is necessary, because it cannot be said that this misconduct had "no effect" on the jury's sentencing recommendation, Caldwell v. Mississippi, _____ U.S. ____, 105 S. Ct. 2633 (1985), and appellate counsel unreasonably and prejudicially failed to bring the most egregious arguments to this Court's attention.

The standards which the prosecutor violated were so well established by the time of Mr. Harich's trial that it is simply inconceivable that any prosecutor could have violated so many of them unintentionally, and were so established at the time of his appeal that no competent lawyer could have overlooked these violations in the appellate brief. For example, DR 7-106, Code of Professional Responsibility provides, in relevant part:

> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no basis to believe is relevant to the case or that will not be supported by admissible evidence.
>
> * * *
>
> (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil

> litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

The new Model Rules have incorporated these provisions wholesale. Rule 3.4(e). Likewise, the ABA Standards for Criminal Justice, The Prosecution Function (2d ed. 1980), Section 3-5.8 provide:

> (a) The prosecutor may argue all reasonable inferences from the record from evidence in the record. It is unprofessional conduct for a prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it might draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
>
> (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

The prosecutor in this case violated each of these proscriptions.

The Code, the Model Rules, and the ABA Standards are not, even by dint of the universality of the consensus they express, incorporated ipso facto into the due process clause of the fourteenth amendment. But they are not simply arbitrary rules of the game, which have no bearing on justice. "Rules of evidence and procedure are designed to lead to just decisions and are a part of the framework of the law . . .; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider." EC 7-25. In United States v. Young, the Supreme Court recently looked to the ethical standards established by the bar for "[t]he line separating acceptable from improper advocacy". 84 L.Ed.2d at 7. This line accords with the one the Court has drawn in Donnelly v. De Christoforo, 416 U.S. 637

(1974). It was equally clear at the time of appeal that the prosecutor's remarks concerning Mr. Harich's efforts to secure the assistance of counsel and his invocation of his constitutional right to remain silent were prohibited.

A. THE IMPROPER INVOCATION OF "PROSECUTORIAL EXPERTISE"

The prosecutor argued he almost never sought the death penalty (5 out of 140), and suggested to the jury that his personal assessment of the offense, based upon his many years of experience, should influence the jury's verdict in the penalty phase. This argument culminated in an inflammatory and irrelevant exhortation:

> This crime is the most heinous, atrocious, and evil that I have known. And believe me, these days, murder becomes something which really is something that doesn't bother me. But not this. Not this one.

(Tr. 886). The jury had no way to evaluate (and had to accept) this statement, which was purportedly based on the prosecutor's personal experience; defense counsel had no way to respond. Certainly the penalty phase of Mr. Harich's trial was no place for a comprehensive recital of the many homicides which the prosecutor had tried and in which he had not sought the death penalty. Since the jury had no evidentiary basis for a proportionality decision, and indeed, since this is no part of the jury's task under Fla. Stat. sec. 921.141, this remark was simply prejudicially improper. The jury was responsible for weighing the evidence introduced against Mr. Harich and the evidence offered in mitigation, after considering the statutory aggravating circumstances and all mitigating circumstances. It was misleading to argue to the jury that it should or could rely on the prosecutor's expertise and judgment in deciding whether a death sentence was warranted in a particular case.

This Court and the federal courts have repeatedly condemned this type of argument. Darden v. State, 389 So. 2d 287 (Fla. 1976); Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985); (William) Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985),

reinstating in part Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984), vacated, ___ U.S. ___, 106 S. Ct. 517 (1985); (Richard) Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985). The condemnation in these cases has not consistently resulted in reversal, with the result turning on what prejudice test is applied.

B. COMMENTS ON THE EXERCISE OF CONSTITUTIONAL RIGHTS

The former Fifth Circuit held, in United States v. McDonald, 620 F.2d 559 (5th Cir. 1980), that a prosecutor's comments on the defendant's decision to consult an attorney were improper, and, even without a contemporaneous objection, reversible constitutional error. In McDonald, the prosecutor argued the presence of the defendant's attorney at his house at the time that police executed a search warrant suggested that the defendant had ample time to dispose of incriminating evidence before the police arrived. The comment on the exercise of the right to counsel there was, by comparison to this case, oblique. See 620 F.2d at 562. Here, the prosecutor used the fact that Roy Harich called a lawyer for help rather than going directly to the police as evidence of a specific statutory aggravating circumstance: that Mr. Harich committed a murder to avoid lawful arrest. The prosecutor did not require the jurors in Mr. Harich's trial to speculate about what he meant: going to a lawyer, he argued, proves that the defendant had a motive, before committing the homicide, to kill to avoid punishment. As McDonald holds, and as this Court knows, it is improper for the jury to draw an inference of guilt from the exercise of the constitutional right to legal assistance. This should be doubly true in the penalty phase of a capital trial when the evidence is relied upon to establish an aggravating circumstance. Worse yet, the improper argument was virtually the only "evidence" supporting this aggravating circumstance. All of the other circumstances the prosecutor discussed were equally applicable to any homicide following the commission of a felony. Doyle v. State, 460 So. 2d 353 (Fla. 1984).

Mr. Harich's sentence must be set aside because this comment

by the prosecutor was damaging, improper, intentional, and appellate counsel missed it. This was no slip by a novice. Rather, it was part of a calculated effort to win a death sentence by distorting the jury's decisionmaking process. "Comments that penalize a defendant for the exercise of his right to counsel and also strike at the core of his defense cannot be considered harmless error. The right to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." 620 F.2d at 564. For this reason alone, Roy Harich's death sentence must be reversed, and a belated appeal is necessary to protect his rights.

The prosecutor's comments on Mr. Harich's right to consult an attorney do not stand alone. In addition to the statements discussed above, in which the prosecutor sought the death penalty based upon his personal beliefs and experience, the prosecutor coupled his comment on the exercise of the right to counsel with the observation that Mr. Harich had not gone directly to the police -- that is, he exercised his constitutional right to remain silent. This was not the first occasion when the prosecutor misused Mr. Harich's silence against him. In the guilt or innocence phase he argued that Mr. Harich's silence, after he had been advised of his Miranda rights, could be used as evidence against him. This is error.

The United States Supreme Court has repeatedly stressed "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." Wainwright v. Greenfield, ___ U.S. ___, 106 S. Ct. ____ (1986); South Dakota v. Neville, 459 U.S. 553, 565 (1983); Fletcher v. Weir, 455 U.S. 603 (1982); Jenkins v. Anderson, 447 U.S. 231 (1980); Roberts v. United States, 445 U.S. 552, 561 (1980); Anderson v. Charles, 447 U.S. 404 (1980). This proposition is so well established, and was so firmly entrenched at the time of Mr.

Harich's trial, that no reasonable prosecutor could have uttered such a remark without knowing that it was improper. Neither could effective counsel have ignored this error in a brief. Reversal of Mr. Harich's death sentence is warranted or at least the opportunity to provide meaningful briefing and oral argument.

C. MISINFORMATION CONCERNING STATUTORY MITIGATING CIRCUMSTANCES

The jury was instructed it could consider Mr. Harich's age, and the fact that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the offense in mitigation. After the prosecutor's closing argument, however, those instructions might as well not have been given. The prosecutor misinformed the jury about the law governing the application of these two important mitigating circumstances which would have supported a recommendation of life imprisonment. The jury voted 9 - 3 for death. In the guilt or innocence portion of the trial, the prosecutor misled the jury to believe that Mr. Harich's strongest defense against a first-degree murder conviction -- voluntary intoxication -- was unavailable to him see Claim II, supra. In the penalty phase, the prosecutor told the jury that Mr. Harich's age was not a mitigating circumstance because a majority of crimes are committed by persons between the ages of 18 and 25. This assertion, which had no basis in the record, misrepresented the basis of the statutory mitigating circumstances, and led the jury to believe that it could disregard Mr. Harich's youth as a matter of law -- a disagreement with the Florida legislature about whether age is mitigating -- rather than because it was not relevant to this case as a matter of fact. The prosecutor committed the same error in his comments upon the unrebutted testimony that Mr. Harich's capacity to conform his conduct to the law was substantially impaired at the time of the offense. He misled the jury to believe, as a matter of law, that "substantial impairment" was equivalent to legal insanity under the M'Naughten test. This is not true in Florida, and the prosecutor's misrepresentations also

denied Mr. Harich the benefit of a statutory mitigating circumstance proven at trial.

1. Age

The capital sentencing law passed in 1972 included, as a circumstance in mitigation of punishment, the age of the defendant at the time of the offense. "[A]ge is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them." Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984). See also Barclay v. State, 343 So. 2d 1266 (Fla. 1977), cert. denied 439 U.S. 892 (1978). Cf. Eddings v. Oklahoma, 455 U.S. 112 (1982). Whether Mr. Harich's age -- 22 -- a mitigating circumstance was a question of fact for the jury to decide in light of all of the information about his personality and maturity. See, e.g., Mikenas v. State, 367 So. 2d 606 (Fla. 1979) (age of 22 found mitigating). It was improper to invite the jury to nullify this mitigating circumstance based upon the prosecutor's unsubstantiated personal observation that age is not an aggravating circumstance because of the number of violent crimes committed by persons in that age group. In effect, despite the mitigating circumstance in the death penalty statute, the prosecutor placed Mr. Harich in the same position as the defendant in Eddings. In Eddings the judge did not consider the defendant's age in sentencing because he believed that he could not do so under Oklahoma's capital sentencing law. In this case, the jury must have concluded from the prosecutor's argument that it should not consider Mr. Harich's age, as a matter of law. The trial court offered no reasons for its own failure to find age a mitigating factor, except for a cryptic reference to the jury's "rejection" of mitigating factors. The prosecutor's argument was therefore both improper and prejudicial; a new sentencing hearing should be held for this reason alone. Mr. Harich's counsel should have drawn this error to the attention of this Court, and a belated appeal is the time it must now be done.

2. Substantial Impairment

Florida limits the defense of insanity to persons who were incapable of appreciating the difference between right and wrong at the time of the offense. This standard, which derives from the English rule established in the case of Daniel M'Naughten, is much more difficult for a defendant to meet than the test the American Law Institute adopted in its Model Penal Code.

The State of Florida recognizes, however, that there are mental states short of legal insanity under the M'Naughten rule which diminish the defendant's moral responsibility for an offense and which constitute compelling mitigation. For this reason, the legislature included mental mitigating circumstances in the capital sentencing statute: the offense was committed under extreme emotional distress, and the defendant's capacity to conform his conduct to the law was substantially impaired. Fla. Stat. secs. 921.141 (6)(b) and (f). These mitigating circumstances are not equivalent to the insanity defense, which negates criminal responsibility entirely, and they need not satisfy the rigorous M'Naughten Rule.

However, the prosecutor argued to the jury that the "substantial impairment" mitigating circumstance was inapplicable because Dr. McMahon concluded that Mr. Harich understood the difference between right and wrong at the time of the offense and was not legally insane. The argument was improper, and the prosecutor knew he was misstating the law. This was yet another calculated effort to diminish the force of the evidence presented in mitigation by persuading the jury to overlook the evidence in its decision.

D. THE CUMULATIVE EFFECT OF THE IMPROPER CLOSING ARGUMENT

The overall effect of the prosecutor's closing argument in the penalty phase was the complete distortion of the weighing process the jury is required to conduct under Florida law. Instead of weighing the aggravating circumstances which were proved by admissible evidence beyond a reasonable doubt against

any evidence offered in mitigation, Mr. Harich's jury -- if they did as the prosecutor encouraged them to do -- considered evidence which was not relevant to any statutory aggravating circumstance, considered aggravating circumstances which were not proven beyond a reasonable doubt and could be supported only by constitutionally impermissible inferences from the exercise of the right to counsel and the right to remain silent.

Against this inflated evidence in aggravation, the jury compared mitigating evidence diminished by misinformation. The prosecutor rebutted two very important statutory mitigating circumstances, not by showing that the evidence did not support them, but by misinforming the jury about the legal standard it was to apply to the evidence. The prosecutor's two-fold assault on the statutory balancing process succeeded; this Court should order a new appeal and a new sentencing hearing which will result in a reliable advisory verdict uninfected by improper prosecutorial remarks.

E. APPELLATE COUNSEL WAS INEFFECTIVE

Mr. Harich's appellate lawyer did argue that the prosecutor's closing argument was improper. Initial Brief, Harich v. State, Case No. 62,366. Inexplicably, he overlooked the most egregious and prejudicial aspects of that argument. While it is possible for this Court to scrutinize every page of every trial transcript for error, the inevitable constraints of other judicial business make that an unreasonable burden, even in a capital case. As this Court said in Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985):

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of the advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Counsel's omission was unprofessional and harmful. This Court should and would not tolerate arguments of the type

exhibited in this case. Counsel should have pointed a guiding hand to the errors identified here. Had he done so, this Court would have set aside Mr. Harich's death sentence and remanded for resentencing before a jury untainted by these improper arguments.

G. STANDARD OF REVIEW

In the three years since Mr. Harich's direct appeal, the United States Supreme Court has issued an important opinion establishing the standard for determining when an improper closing argument in the penalty phase of a capital case. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Although it was apparent long before Caldwell that the prosecutor's arguments in this case were improper, and unlike Caldwell cannot explain why counsel failed to raise the issues presented in this petition, this Court should apply the Caldwell standard to the argument if it grants relief and agrees to hear a new appeal. Even under the law as it stood before Caldwell, however, the prosecutor's argument was fundamental reversible error. Had appellate counsel properly represented Mr. Harich on direct appeal, his death sentence would have been reversed.

V. RELIEF SOUGHT

Claim I. Mr. Harich 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 claim is currently before the United States Supreme Court. Lockhart v. McCree, Docket No. 84-1865. During argument on January 13, 1986, the Supreme Court Justices specifically inquired into the implications of Lockhart for the State of Florida, presumably because in Florida judges, not juries, have ultimate responsibility for sentencing decisions. In Kennedy v. Wainwright, which raised the Lockhart issue in the context of actual exclusions for cause, this Court voted 4-3 to deny a stay. Kennedy v. Wainwright, 11 F.L.W. 65 (Fla. Feb. 12, 1985). The United States Supreme Court subsequently unanimously stayed Mr.

Kennedy's execution, based upon the only issue raised in the application: Lockhart. Kennedy v. Wainwright, No. A-622, 54 U.S.L.W. 3558 (Feb. 25, 1986). This Court then unanimously stayed the execution of Paul Johnson, whose habeas petition also raised the Lockhart issue within the context of actual exclusions for cause. This Court thereafter denied a stay in the Adams case (where no jurors were excluded for cause) by a 4-3 vote. Adams, 11 F.L.W. at 79. As discussed above, the United States Supreme Court initially denied a stay in Adams (based on Lockhart) by a 5-4 vote, but the Court later vacated its prior order and granted a stay (based on Lockhart) by a vote of 7-2. The United States Supreme Court has stayed executions in several other cases presenting the Lockhart issue even in successive petitions for a writ of habeas corpus. Bowden v. Kemp, 106 S. Ct. 213 (1985); Moore v. Blackburn, A-261 (October 4, 1985).

The importance of the question, the probability of a landmark decision by the United States Supreme Court in the next few months, and Mr. Harich's entitlement to relief should the Supreme Court affirm the Eighth Circuit in Lockhart suggest that a stay is necessary and appropriate on this claim. Furthermore, since the issue presented in this claim 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. Harich requests an evidentiary hearing at which he would present many of the studies which are in the Lockhart record. If this Court concludes that an evidentiary hearing is needed before it may decide the merits of Mr. Harich's claim, it should remand this case to the trial court for such a hearing. It may well be, however, that the United States Supreme Court's decision will determine, as a matter of law, how much injury a criminal defendant suffers as a result of death qualification. It will only remain for this Court to decide how much weight to

attach to the State's countervailing interest, which, as we show, is negligible, because of the sentencing procedure used in Florida but not in Arkansas.

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

Claims II and III. Petitioner seeks a stay of execution so that he can pursue a new appeal. If necessary to prove his claim of ineffective assistance of appellate counsel, he also requests an evidentiary hearing by special magistrate or otherwise to resolve any disputes as to issues of fact. Finally, Petitioner seeks the vacation of his convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U. S. MAIL to Sean Daly, Assistant Attorney General, 125 North Ridgewood Avenue, Beck's Building, 4th Floor, Daytona Beach, Florida 32014, this 17th of March, 1986.

_____
JONATHAN F. HORN