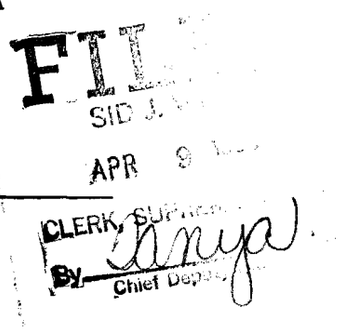
IN THE SUPREME COURT OF FLORIDA

NO. 68573



ED CLIFFORD THOMAS,

Petitioner,

vs.

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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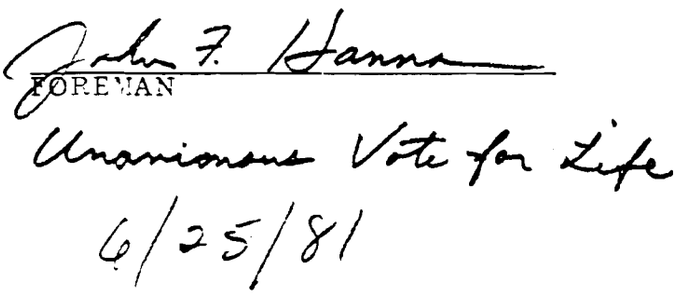
I. INTRODUCTION



(R. 1538).

Twelve jurors who saw twenty year old Ed Thomas believed that he should live. The foreperson proclaimed the unequivocal sentencing recommendation: "Not only a majority, but a unanimous decision, judge" (R. 1314). The trial judge, the Honorable Thomas M. Coker, Jr., Broward County, overrode the jury recommendation, and a majority of this Court affirmed that override on direct appeal.

In all capital cases, but especially in jury override cases, this Court is painstakingly careful to scrutinize the entire record in order to ensure that the conviction and death sentence were not imposed arbitrarily or capriciously. Fla. Stat. sec. 921.141(3). As this Court has candidly confessed, however, "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." Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985). This Court, and Petitioner, were denied careful, partisan scrutiny by an effective appellate advocate, and consequently, this Court's review of the propriety of the sentence in this case was skewed: among other startling shortcomings, (1) appellate counsel did not make sure that this Court received the complete record, and specifically failed to provide this Court with the presentence investigation report which the overriding judge expressly relied heavily upon, and (2) appellate counsel failed to reveal that the overriding judge clearly excluded nonstatutory mitigating circumstances from the life/death balancing process, a

fundamental violation of Lockett v. Ohio.

Appellate counsel's performance on appeal was patently inadequate. No meaningful attempt was made to marshall the facts apparent from the record which demonstrate clearly that the 12-0 jury recommendation of life was imminently rational, and should not have been overridden. Appellate counsel submitted three pages of "brief" regarding penalty, with one reference to the record. This Court was not challenged and persuaded by an advocate, and this petition will demonstrate that a new appeal is required.

This was twenty-year old Ed Thomas' first offense. He testified twice before the jury. Many non-statutory mitigating circumstances were presented, as the jury learned about Ed Thomas' troubled upbringing, splintered home, abusive alcoholic father, and natural mother who was forced by Ed Thomas' father to leave the family when Ed was seven years old. Their informed and reasoned recommendation was overridden by a trial judge whose performance in this case was riddled with error of constitutional magnitude. Counsel who he appointed failed to alert and inform this Court of serious trial error which strips these proceedings of any gloss of procedural rectitude and constitutional integrity.

The override in this case was wrong. A splintered court affirmed it. Petitioner is not attempting merely to reraise old issues: appellate counsel's performance shielded this Court from what occurred in the trial court, and a new appeal is mandatory if the real record below is to be reviewed, and the real errors rectified.

II. JURISDICTION

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. This petition presents issues of ineffective assistance of appellate counsel, fundamental error, and other constitutional error in the direct appeal, the review of which is this Court's exclusive province.

Claims I-VII involve ineffective assistance of appellate counsel. 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 control over 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. This Court must and does have the power to do justice. Fundamental error is presented, and this court should correct the error pursuant to its inherent habeas corpus jurisdiction.

Claim VIII involves a claim under Lockhart v. McCree. 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.

III. FACTS UPON WHICH PETITIONER RELIES

CLAIM I. This Court reviewed the propriety of the death penalty without having the complete record. The jury unanimously recommended a life sentence for Ed Thomas. Judge Coker, upon hearing the jury recommendation, "defer[ed] imposition of sentence . . . and order[ed] a presentence report." R. 1315. This was not a pro forma continuance, as later became clear -- Judge Coker relies on presentence investigation reports (P.S.I.). As he told the jury during voir dire, he would order a P.S.I. regardless of their recommendation. (R. 24).

The sentencing hearing was postponed three times, as the judge awaited his P.S.I. At a Motion for New Trial hearing conducted before sentencing, Judge Coker stated:

> "I found [sic] the responsibility for sentencing very heavy. I don't take it lightly. I don't do it until I see my P.S.I."

(R. 1352). At the conclusion of the New Trial hearing, Judge Coker and trial counsel discussed when the P.S.I. would be ready, and when sentencing would occur:

> MR. KENT: All right. The only other thing I have before the Court is that the sentencing is set now for August 26th. Would it burden

you if the sentencing were pushed back to the 31st? It has been delayed. I want to get the thing disposed of so we can go ahead and get it done tomorrow.

THE COURT: I anticipate getting the PSI in the morning, and I'm not going to do anything until I get the PSI.

It is my understanding that --

MR. KENT: I think I am going to ask her out tonight, Judge.

THE COURT: Are you going out of town this weekend?

MR. KENT: Well, I wanted to go this weekend. I had hoped to go away before my arrest, July 16th, for two weeks.

THE DEFENDANT: Norman.

MR. KENT: Excuse me.

THE COURT: What is that?

MR. KENT: The Defendant has pointed out that it's his birthday next week, and he was preferring to stay in Broward County for his birthday rather than go to prison. The sentencing is Monday. If I can go tomorrow, would you accommodate that?

MR. HANCOCK: That's fine.

MR. KENT: I was going to leave on Friday.

THE COURT: Well, Friday is tomorrow, Norman. I have to stay here to go over the PSI. What's today.

MR. HANCOCK: It's Thursday.

MR. KENT: I understand, Judge.

I have to be here Monday. I will be here for the sentencing Monday. I would like to go ahead and leave it as it is scheduled.

I don't think Kelly has contacted me to notice me whether or not the PSI is ready.

THE COURT: If you would like to check with me or my office in the morning, I will let you know.

Are you going to be in the office tomorrow?

MR. HANCOCK: I am, Judge. I will be there all day. I understand that she had just dictated her portion last night, so I thought that it would be typed up, but we can check with her.

THE COURT: I am denying the motion for a new trial, based on the content of the motion and the testimony before the Court.

MR. KENT: Okay. Thank you, Your Honor.

THE COURT: Thank you.

(Thereupon, the hearing was concluded).

(R. 1356-58).

The next Monday, Judge Coker stated that he had "ordered a presentence report, which I have now received." (R. 1361) The court "received it late Friday," but defense counsel had not seen the report before sentencing. At sentencing, counsel stated clearly on the record that he had not yet seen the report (R. 1362). Sentence was immediately imposed.

Several weeks later, a Motion for Rehearing hearing was held, predicated upon a written motion by trial counsel. Counsel complained specifically about inaccuracies, misstatements, and misinterpretations of the law contained in the P.S.I., (R. 1549-58), stated that he had not read the P.S.I. before sentencing, and then requested "a re-hearing on resentencing so that the probation officers determinations, can be contested." (R. 1505).

At the rehearing hearing, the P.S.I. was repeatedly discussed: Judge Coker, the state attorney, and defense counsel had all read the P.S.I., and they were all well versed in its contents. At the time of this hearing, the trial court had not received the motion for rehearing or memorandum in support, and so deferred ruling on whether resentencing was proper. However, the following references were made to the P.S.I.:

> [Kent]: I would lay that out because the second part of the motion has to do directly with the P.S.I.
>
> It is my judgment that the presentence investigation report did not correctly analyze the aggravating and mitigating circumstances.
>
> THE COURT: Well, you will note, I am sure you have noted, that I didn't agree with all of the probation officer's suggestions, either. She recommended certain applied, and certain didn't. I didn't agree with her on all of these.

(R. 1376). The state was asked to respond to the motions, and did:

> MR. HANCOCK: May it please the Court, the State doesn't really have anything. As a reasonable person I didn't differ. I recommended death, the probation officer did . . .

(R. 1378).

The Motion for Rehearing on sentencing was never granted or denied. No decision whatsoever appears in the record disposing of this issue. The P.S.I. was apparently not introduced at any hearing, although its words and effect saturated the sentencing process.

The record on appeal was initially designated by trial counsel, who believed that a capital case was properly appealed to the Fourth District Court of Appeals. (R. 1562-63). Trial counsel learned he was incompetent to handle the appeal, (a "field of expertise which at present is beyond my scope" R. 1379), and other appellate counsel was substituted. (R. 1566). Substitute counsel did no supplementation of the record.

The P.S.I. was not in the record before this Court on direct appeal. Appellate counsel discussed the P.S.I., in Mr. Thomas' brief, without ever realizing it was not in the record. See Appellant's Brief, p. 31. This Court requested a copy of the P.S.I., See Appendix 1, but according to Honorable Sid White, Clerk, Florida Supreme Court, the P.S.I. was never received by the Court. This Court did not see the P.S.I. which was relied upon by the court below, which all parties below discussed and fought over, and which the parties thought this Court had.

Petitioner has filed herewith as Appendix 2 what counsel believes is the P.S.I. However, counsel has no way of knowing, without returning to the trial court, whether this is the P.S.I., whether it is the complete P.S.I., and whether any other items were attached to the P.S.I. If petitioner is granted a new appeal, he will move to supplement the appellate record herein to include the P.S.I. that formed a part of the lower court's opinion.

CLAIM II. The record on appeal reveals plain Gardner variety error. The P.S.I. contained in Appendix 2 appears to be the P.S.I. submitted to the trial judge. It is undisputed that neither trial counsel nor Ed Thomas saw this report before sentencing:

> [THE COURT]: I would inquire of you as to whether or not you, or anyone on your behalf, have any legal or other cause to show why sentence should not now upon you be pronounced.
>
> MR. KENT: None at this time, Your Honor.
>
> THE COURT: You haven't seen the P.S.I.?
>
> MR. KENT: No, I have not, Your Honor.

(R. 1362). Sentence was imposed immediately thereafter.

In the Petitioner's Motion for Rehearing on sentencing, it was revealed that counsel did not review the P.S.I. because he did not receive it sufficiently in advance of sentencing to do so:

> "That the defense counsel was not prepared for sentencing, and so advised this Court at a hearing on August 20, 1981, a motion for new trial.
>
> (2) That the defense counsel was not prepared for sentencing, and asserted on August 24, 1981, the arguments made on August 20, 1981,
>
> . . . .
>
> (4) That the pre-sentence investigation was not made available to the undersigned counsel in the above-styled case, until less than four (4) hours before sentencing.
>
> (5) That although the pre-sentencing investigation was apparently completed on Friday, August 21, 1981, by 5:00 P.M., the undersigned attorney received no notification of the same. Consequently, the soonest the undersigned attorney could review the pre-sentence investigation would be on Monday morning, August 24, 1981.
>
> (6) The undersigned attorney, on Monday, August 24, 1981, at 9:00 a.m., had and made a scheduled appearance before the Honorable Judge Coralis of the Broward County Court.
>
> (7) Given the above circumstances, it was quite impossible for the undersigned attorney to have an opportunity to review the P.S.I. and make comments, criticisms, or commendations with respect to the same.

> (8) Having now read the P.S.I., particularly paragraph 6, as to the analysis of the aggravating and mitigating circumstances in the above styled cause, the undersigned attorney hereby requests a re-hearing on resentencing so that the probation officer's determinations, can be contested.

(R. 1547-50). A non-evidentiary hearing was held on this Motion, but the trial court deferred ruling. No ruling was ever entered on this Motion, as far as the appellate record reveals.

The jury unanimously recommended life imprisonment. If the P.S.I. we have is correct, the probation officer who prepared the P.S.I. relied upon by Judge Coker came to some incredibly harsh and incorrect conclusions, in direct opposition to what the jury thought. The conclusions were unsupportable, but could not be refuted, because of the circumstances outlined above. For example, the P.S.I. preparer stated:

> It appears that the major causative factor in these offenses stems from the defendant's lack of regard for the right of other individuals and the manifestation of learned anti-social behavior and lack of morals.
>
> Considering the nature of the crime it is felt that the elements exist in order to consider the defendant at this point a habitual offender and a menace to society. It is without a doubt that if this defendant is allowed to be free in society, he will find himself back in the criminal justice system.
>
> This officer found that the defendant's denial of his involvement and lack of remorse is again a factor that helps to illustrate the lack of morality and simple human compassion on the part of the defendant.
>
> In count II it is felt that the aggravating circumstances outweigh the mitigating circumstances and that in conjunction with the seriousness of the offenses lead this Officer to professionally recommended that the court impose the maximum penalty allowed by law: death.

All of this information is wrong. No opportunity was given to rebut it. This petitioner is anything but a habitual offender (no prior record) and there was abundant testimony that he was rehabilitatible, and not in fact a "menace to society." There was plain evidence that Ed Thomas was a compassionate person, and

that he did have remorse.

The "expert" conclusions by the P.S.I. preparer were simply vacuous. The analysis in the P.S.I. of the aggravating and mitigating circumstances was similarly wanting and inaccurate. For instance, the P.S.I. preparer stated that there was absolutely no statutory mental mitigating circumstances:

> "(b) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> It is the opinion of this writer that this mitigating circumstance does not apply. There is nothing in the defendant's background to indicate that he was acting under the influence of extreme mental or emotional disturbance.
>
> . . . .
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> The mitigating circumstance is not felt to have been present. Even though the subject might have been under the influence of alcohol this factor does not appear to have influenced him to commit the offense, and it is the writer's opinion that it did not affect his capacity to realize the criminality of the offense ."

Further, the preparer says "[i]t is this officer's opinion that the subject does not suffer from any delusional thinking, and displays an attitude that he can discern right from wrong."

However, a psychiatric report excerpted in the P.S.I. has much to say about mental condition, in direct conflict with the preparer, and in unrefuted direct support of statutory mitigation. The psychiatrist went through a background history, including child abuse of Mr. Thomas:

> The very act of getting even with Mr. Walsworth may have been his unconscious attempt to get even for the evils that he felt may have been done to him by his father for many years. This may have directly impaired his ability to conduct himself in a reasonable degree and to reasonably appreciate the criminality of his acts. That is not to say that he was psychotic at the time, but he was under significant emotional diress [sic].

Appellant's counsel failed to apprise this Court of Gardner

error, even though counsel sort of recognized that trial court action which limits a litigant's ablity to prepare can be reversible error, and in fact, counsel quoted Gardner. Appellant counsel complained that the trial court refused to grant a continuance of a hearing on a post-trial motion, at which trial counsel was trying to prove that the jury heard the trial judge say "Get him out of here," in reference to one of Mr. Thomas' witnesses. Trial counsel had been unable to get his witnesses to this post-trial hearing, a hearing that occurred pre-sentencing.

To support his proposition that the refusal to grant a continuance on the new trial hearing was error, appellate counsel used the following logic:

> It is the obligation of the court to provide a reasonable time to prepare for trial, for a hearing on pre-sentence investigation reports for sentencing, or post-trial motions. Barclay v. State, 362 So.2d 657; Kampff v. State, 371 So.2d 1007. The court denied defense counsel's motion to continue even though advised of the extraordinary circumstances. The court required counsel to proceed without the availability of necessary witnesses, or the opportunity to examine and rebut the pre-sentence investigation report. [Note--the P.S.I. had not even been prepared, much less presented, at the time of the complained of continuance denial.] (T. 1334-1338). As this Court said in D. W. Gardner v. State, 313 So.2d 675, 96 S.Ct. 3219, 428 U.S. 908:
>
> > "Petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain".

Appellant's brief, p. 24. The clause "or the opportunity to examine and rebut the presentence investigation report" and the miscite to Gardner, appearing at the end and in support of an argument regarding the failure to grant a continuance on another issue before the P.S.I. had ever been prepaared or presented, is at least perplexing. The brief makes no sense, and the State and this Court interpreted Appellant's language and argument as applying only to the new trial hearing matter. See Appellee's brief. pp. 10-13; Thomas v. State, 454 So.2d 456 (Fla. 1984).

No reply brief or petition for rehearing was filed by appellate counsel. This Court was not properly presented with, and did not rule upon, the Gardner fundamental error.

The only other reference to this issue comes at page 31 of Appellant's brief, when counsel stated "the trial court did not provide defense counsel with a reasonable opportunity to present all mitigating factors it might." This innocuous statement was posited without supporting facts, record cite, or subsequent argument. During oral argument before this Court, no mention was made of this issue.

Other equally prejudicial, but completely unrebuttable matters were contained in the PSI. For example, the unrebuttable words of interested persons foreshadowed the conclusions of the preparer. One victim's wife felt that Ed Thomas "is a menace to society. He laughed and joked during the trial apparently having no conscience. I felt he should get the death penalty not only because of my personal feelings but because we have to deter crime somehow." This persons' daughter agreed: "I think he should be sentenced to the electric chair."

According to the report we have, Ed Thomas' step-mother felt "Ed was a good kid until he turned 16, and then he turned into a Jeckyl and Hyde type character . . . He's a person with no conscience." Finally, the P.S.I. preparer said that Ed Thomas was arrested for auto theft at age 16, and spent eight days in jail for a separate incident of breaking into his father's home.

CLAIM III. The Lockett violation was not presented to this Court. The trial judge in this case did not consider non-statutory mitigating circumstances when determining the appropriate punishment. This failure is apparent on the face of the record, but was not brought to the attention of this Court, due to appellate counsel's unreasonable omissions.

It is quite plain that Judge Coker did no more than add up the statutory aggravating circumstances found to exist, add up the statutory mitigating circumstances he found to exist, and

decide that life imprisonment was proper when there were more statutory mitigating circumstances than statutory aggravating circumstances, and death was proper when there were more statutory aggravating circumstances than statutory mitigating circumstances. Appellate counsel stated that this occurred, but completely failed to garner record support for the issue, complained of it in one line, did not tie it to an Eighth Amendment Lockett violation, and abandoned the matter in oral argument.

The first evidence of this improper process by the trial court comes from the non-record PSI. In arriving at a recommendation, the preparer examined "the aggravating and mitigating circumstances which Florida Statutes 921.141 requires the court to consider. . . ." Appendix 2, p. 9. The preparer then went through the statutory list, without any discussion of non-statutory mitigating circumstances, and arrived at a "simple mathematical process:"

> In summation, the entire incident is a tragedy. Any time a life is taken it is a heinous crime. However as a simple mathematical process the aggravating circumstances and mitigating circumstances required for the death penalty are not present in count I, therefore the death penalty is not recommended.
>
> In count II it is felt that the aggrivating (sic) circumstances outweigh the mitigating circumstances and that in conjunction with the defendant's past social background, his degree of remorse, the seriousness of the offenses lead this Officer to professionally recommended (sic) that the court impose the maximum penalty allowed by the law: death.

Appendix 2, p. 12.

This latent and insidious mathematical process was mirrored in the judge's sentencing order. He too made findings "[p]ursuant to the provisions of Florida Statue 921.141(3)," R. 1545. He too listed only the statutory criteria. He too made no mention of non-statutory mitigating circumstnaces. He too used a simple mathematical process:

> In summary, the Court finds that of nine aggravating circumstances, one is

> applicable as to Count I, and five were applicable as to Count II. As to the mitigating circumstances, two applied in this case as to each Count.
>
> Based upon the preceding opinions of fact, and it being the opinion of this Court that:
>
> As to Count I, the single aggravating circumstance is outweighed by the two mitigating circumstances, and it is therefore,
>
> THE JUDGMENT OF THE COURT and the SENTENCE OF THE LAW that you be confined in the state prison for a term of life imprisonment.
>
> As to Count II, there are sufficient aggravating circumstances existing to justify the sentence of death and this Court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no sufficient mitigating circumstances exist to outweigh the aggravating, it is, therefore,
>
> THE SENTENCE OF THE COURT that you, ... be sentenced to death.

R. 1547-48.

During a telling colloquy at the hearing on Motion for Re-Hearing, the judge indicated his disdain for non-statutory mitigating circumstances and his belief that they are irrelevant:

> [MR. KENT] [T]hey, after speaking with different jurors after the fact, took into account certain mitigating circumstances such as the defendant's youth and the defendant prior --
>
> MR. HANCOCK: I apologize for interrupting, but I would object.
>
> THE COURT: I don't want to hear any discussions that you have had with someone else.
>
> MR. KENT: Right. I am going to assume that in making that recommendation the jurors took into account the defendant's youth.
>
> THE COURT: So did I.
>
> MR. KENT: His lack of involvement in other criminal activity.
>
> THE COURT: So did I.
>
> MR. KENT: And his likelihood and hope for rehabilitation.
>
> THE COURT: That is not in the mitigating.

(R. 1374-75.) (emphasis added). It certainly was in evidence: several witnesses explicitly verified Ed Thomas' very real potential for rehabilitation. (R. 1254, 1257, 1267, 1273, 1783).

But the trial judge is absolutely correct -- this type of mitigating circumstance "is not in the mitigating" covered by the statutory list.

Restriction to statutory mitigating circumstances arises in two other contexts during trial, adding support to the already evident proposition that Judge Coker did not consider and give independent mitigating consideration to non-statutory mitigating circumstances. First, the sentencing jury instructions contain no hint that anything but statutory mitigating circumstances were relevant. Second, the state attorney, when recommending death in a written pleading, referred to only 921.141(6), and the age of Ed Thomas, a statutory mitigating circumstance.

Non-statutory mitigating circumstances should have played an important part in sentencing and appellate review in this case. Such evidence was rampant. The failure by the trial court to consider the evidence, and appellant counsel's failure to properly highlight it before this Court, led to two separate but related errors: first, the trial judge's failure to consider non-statutory mitigating evidence when overriding the unanimous jury recommendation of life was a direct violation of the Eighth and Fourteenth Amendments, Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 116 (1982); second, had a proper presentation and evaluation of non-statutory circumstances occurred, it would have been apparent that the copious evidence in mitigation before the trial jury provided a rational basis for the unanimous jury recommendation of life, and the override was simply inappropriate.

Non-statutory mitigating evidence was abundant. First, compelling non-statutory mitigating evidence was before the jury:

1. Even though Ed Thomas had been abandoned by his family at an early age, he managed to fend for himself without trouble while living in the hardened street world. He was preyed upon in this underworld of degradation and anarchy, where, as the police witnesses testified, drugs, alcohol, crime, abject poverty, and

illicit homosexual prostitution were pervasive. This is the world, in Fort Lauderdale and elsewhere, where twenty-year-old Ed Thomas was forced to live, and the world in which older, experienced, and moneyed men sought him out for front seat sexual favors. (R. 79, 87, 109, 215-26, 153, 189, 113, 92-93).

2. Ed Thomas was the product of a broken home, and the early victim of an abusive alcoholic father. His father testified, the jury saw him, and he acknowledged that he was a heavy drinker, who would drink until he was drunk, and then pass out. (R. 675, 676, 678, 1052, 1280). Ed Thomas' mother left home when Ed was seven years old, when she was driven away by his father, who was drunk. (R. 1052, 1286). The father was simply mean when he got drunk. (R. 1052). His mother has not talked to Ed since he was seven years old. (R. 1287). His father threatened to kill her if she ever returned. (R. 1054).

3. Ed Thomas has not sat down to a family meal since he was six and a half years old. (R. 12895). His life at home was miserable. His father remarried without telling the children, and then basically ignored Ed from that time on. (R. 1288).

4. Ed Thomas went to school through the eighth grade. He took tests while he was in jail on this charge, in an attempt to improve himself. The tests showed he was at a fifth grade level. (R. 671, 1280). When he actually did attend school, his father took no interest in what he was doing, and would not meet with Ed and his teachers, even though Ed was having trouble. (R. 1280).

5. Ed ran away from home for the first time at age 14. (R. 1204). His father's habitual drunkenness and the beatings he administered caused him to run away. He actually lived under a bridge during this time. His father dealt with the running away situation by having Ed arrested, and then accused Ed of breaking into his own home when he returned, and had him arrested again. (R. 1205). When Ed tried to return home at age 17, he was turned away for the last time.

6. The people who knew Ed in Fort Lauderdale liked and

respected him. He was termed an excellent worker (other than prostitution), and received commendations for his work. (R. 574). All agreed that he was a non-violent individual (R. 1254, 55, 57, 58, 60, 61, 62, 64, 65, 66), with good work habits. (R. 1254, 1258, 1282, 1289). He was motivated, and had a real desire to help other people. (R. 1254, 1267, 1268). He was a good friend, was well liked, and was considered to be a good person. (R. 1255, 58, 60, 62, 67-69, 1282).

7. He was never angry, but was warm and friendly (R. 1268). He was never known to fight (R. 1265-67). He was very kind and helpful to his friend Bill Ayer's grandmother, who was frail. (R. 1254).

8. Before the incident happened, Ed Thomas had emotional problems. He also spent a week in the hospital for brain seizures, and his family offered him no help during this time. (R. 1289).

9. From the time he was arrested, Ed Thomas caused no problems with police and jail personnel. (R. 1272, 1275, 1280). He tried to obtain his GED while he was in jail awaiting trial. (R. 1255, 1259, 1279). Jail experts described him as a model prisoner, who would be no problem in jail.

10. Many witnesses testified that Ed Thomas had high goals and aspirations, and that he was rehabilitable. (R. 1267, 1268).

11. The case against Mr. Thomas came solely from his own statements. There was no physical evidence to connect him with the crimes. The state twice told the jury during voir dire that guilt did not have to be proven beyond all doubt, just beyond a reasonable doubt. (R. 27, 34) Lingering doubt was very real in this case.

Compelling additional mitigation surfaced in the P.S.I. report, seen by Judge Coker, but not by the jury (or this Court):

> SOCIAL HISTORY:
>
> Family and Personal Background:
>
> Subject's father is William Charles Thomas,

age 48 who resides at 5916 Gilman Street, Garden City, Michigan. Mr. Thomas is employed by Allied Supermarket as a high-low Operator.

The defendant's natural mother is Jeanette Brandon age 40 who resides in Las Vegas, Nevada. Defendant's mother left Mr. Thomas, the defendant and two siblings when the defendant was 7 years old. When the defendant was 8 years old Mr. Thomas began residing in a paramour relationship with Bonnie Thomas until marrying in 1977. Defendant has two siblings, they are: Chuck Thomas age 24 and Nancy Thomas age 19.

During this interveiw the defendant stated, "In the beginning I didn't mind her staying with dad but they just went out and got married without even telling us kids. That's when they started drinking heavy. They're alcoholics. They probably put away 10 cases of beer a week. My father used to whip us with a mallot hammer, a dog chain and you name it, he'd use it. He'll deny it because he doesn't want his frineds to know what he's like. I don't like my step-mother at all."

Education:

Records reflect that the subject completed the 9th grade at Garden City High School located in Garden City, Michigan. The defendant entered into the 3rd grade on three occasions before passing into the fourth grade.

The defendant stated that he had difficulties in school because, "I didn't like the teachers attitude and they would make fun of me because of my age. I was 17 in the 9th grade. Then my parents started talking about getting married and I started running away. I ran away 27 times from 1974 to 1977. I guess you could say that I was the class clown in school. I was so busy making people laaugh that I didn't learn anything at all. I took the G.E.D. here in jail and found out I'm on a 5th grade level. That hurt."

Marital: The subject has never been married nor has he fathered any children. Subject stated that he has entered into homosexual experiences since the age of 14 mostly for money. Defendant also stated "there were a few guys I didn't charge but they gave me a place to stay." The defendant further related "I wouldn't choose homosexuals now though because it's a sin. You can't believe in one thing and do another."

Residence: At the time of the subject's arrest, the subject was residing on the roof of McCrory's Department store and on occasion resided with Bill Ayers in a three bedroom trailer located in Margate, Florida.

Religion: The subject is of the Pentacostal

faith and related at the time of this interview "I have strong beliefs in God. As far as I'm concerned, they can give me the death sentence because I know I haven't done anything. I guess I'll just be the first one in line to see Jesus."

Interests & Activities:

The subject stated he enjoys spending his leisure hours going to bars and drinking. Subject stated his use of alcohol to be that of approximately 15 cans of beer daily and related that he has experimented with Cocaine and LSD and has used Marijuana on an occasional basis.

Military: Subject has never served as a member of the United States Armed forces.

Health:

Physical: The defendant will be 21 years of age on August 26, 1981, stands 5' 6 1/2" tall and weighs approximately 160 lbs. The defendant has brown hair and blue eyes and is of a medium body build. The defendant related that he has suffered from epilepsy in the past and has had reoccuring seizures. The defendant evaluates his present health as "excellent."

Mental: Subject related he has never suffered from any mental or emotional problems. [It is this Officer's opinion that the subject does not suffer from any delusional thinking and displays an attitude that he can discern right from wrong.]

According to Arnold S. Zager, M.D.P.A. "there is a rather significant past psychiatric history which apparently has a most direct bearing upon the present crimes. The subject was born in Marion, Illinois, and raised primarily in Detroit, Michigan. He was intitially raised by his father and mother but apparently his mother deserted the family when the subject was only age 7. He was thereafter raised by his father and future step-mother. Teh subject additionally had an older brother, age 23, and a younger sister, age 19. He recalls his father being an alcoholic and an apparent child abuser. He described a rather stormy and tumultuous and conflictual childhood, wherein he was frequently savagely beaten by his father on only limited provacation. He specifically recalls that at age 6, he was whipped by his father with a dog chain and later on by a broom handle. He recalls that he was primarily the child who was physically abused and punished by the father in contrast to the other two siblings. He states that he always had an angry and stormy relationship with his father, whom he pictures as a rather brutal, sadistic individual. he parenthetically adds that he thought more of a science teacher in this school than of the relationship that he

had with his father. He alluded to feelings of deprivation and isolation which were prominent feelings and features of his growing years.

In order to gain social acceptance by his family and the world, he became the class clown. In fourth grade and thereafter, he went great lengths to make his fellow school children laugh at his humor. He was also accused of being the bully of the neighborhood, specifically by his father. He impulsively quit school in the 9th grade and apparently engaged in various run-a-way behavior. At age 14, he ran away to California and on his way there hitchhiking, had his first homosexual experience. The subject describes himself basically as a bi-sexual individual who is physically attracted to women but feels out of place and extremely self conscious engaging in relationships with them. He notes that any homosexual relationships are typically associated with older men. Indeed when he meets a homosexual of his own age, he thinks of him more as a competitor for "clients" rather than a possible sexual object itself. His particular attraction and involvement in homosexual relationships only with older men may have a direct bearing upon his rather stormy and sadistic relationship that he experienced with his natural father.

Mental status examination discloses a husky, muscular well built young white male who was quite cooperative to the interview setting and related in reasonable and positive fashion to this particular physician. His nails were bitten down and he was dressed in a t-shirt and pants. As the interview progressed, he appeared to pick at pimples present on his face. There was no over evidence of a psychotic thought disorder during the interview nor did he manifest evidence of a schizophrenic process. His associative processes for the most part were intact, although self image and self esteem were significantly impaired. He did not manifest evidence of delusions, hallucinations nor ideas of reference. Sensorium was in-tact as judged by orientation to time, person and place; and memory for recent and past events appeared to be fair. General finding of information was in the below average range, although patient was competent and aware of the present charges facing him. His judgement and insight at times are impulsive and likewise impaired.

It is also noteworthy that the subject is quite aware that he may very well be given the death penalty if he is convicted of these charges. He adds, "I want to die on my terms. I don't care if I die, but I want to be crucified. He states that he would like such a crucifixion to be placed on national television and feels that it would be quite reasonable that the Pope of the catholic

church would make a special trip to this country to witness such a crucifixion. He states this with a rather calm and quite demeanor.

Impressions:

While Ed appears to know the difference between right and wrong at the time of the committment of the alleged crime, there appear to be rather definite and significant factors which have a direct bearing upon his carrying out such an act. His apparent history of being physically and perhaps sadistically abused by his father, may have provoked the intensive anger and rage expressed at the victim (Mr. Walsworth). He again felt abused and perhaps ridiculed by Mr. Walsworth and, indeed may have transferred the rage that he felt for many years at his father for his constant physical harrassments, to the victim, who may have been comparable in age to his father. The very act of getting even with Mr. Walsworth may have been his unconscious attempt to get even for the evils that he felt may have been done to him by his father for many years. This may have directly impaired his ability to conduct himself in a reasonable degree and to reasonably appreciate the criminality of his acts. That is not to say that he was psychotic at the time, but he was under significant emotional diress. [sic] I would likewise add that when he was interrogated by the Detectives and Police Officers one week later, the stress of that environment may have again rekindled his interrogation and abuse by his father of many years ago and he may very well have admitted to any and all acts to be again free of such harrassments."

Employment: The defendant's only employment record in the Ft. Lauderdale area is a sporatic one as a laborer for the Labor Pool located at 101 SW 2nd Street, Ft. Lauderdale, Florida. The subject stated he has no specific trades or years of experience and his preferred employment would be that of a Laborer.

Subject related that he had managed financially by residing in a paramour relationship with Bill Ayers and therefore did not contribute financially for his room and board.

Economic status: The subject stated he has absolutely no assets or any liabilities. The subject estimates his net worth to be zero.

. . . .

Bill Ayers, the defendant's past lover and adoptive father stated "as of July 6, 1981, we have changed our relationship to that of father-son. I know he didn't do it. He told the police that he did it because he was drunk. He lived with me since November,

> 1978. I trusted him to take care of my grandmother and she's 81 years old. I would stake my life on him. Ed says Tom Woods did it. I know that there is no way that the kid could ever hurt anyone. I've never seen him show any signs of violent behavior. He used to stay with me three or four days and then go visit his friends. He's not a drifter. We were separated from June til the end of October. He went up North and I went to California. I don't think we'll have any problems with the father-son relationship even though we had a sexual one in the past. We both have the same religious beliefs. I'm glad it's changed now because we never really either one of us wanted a sexual realtionship. Ed's 20 years old going on 15 and he's got the education of a 12 year old. He belongs at home with me getting the rest of his education so he can become the man I know he can be instead of sitting in jail convicted of 2 murders that I know he didn't commit."

Appellate counsel did mention minute portions of this Lockett claim on direct appeal, but in an opaque manner and without record support. In discussing the impropriety of the jury override, and without detailing the proof behind his claim, appellate counsel accused the trial court of engaging in a "simple numerical balance" when comparing mitigating and aggravating. Counsel then referred to the P.S.I., which was not in the record:

> [T]here was nothing contained in the presentence investigation report supporting a sentence of death beyond the aggravating circumstances earlier referred to, while there were many circumstances regarding the Defendants' background, such as the home life background, his propensity toward alcoholism, his clean record, which were obviously not considered by the trial court.

Appellant's brief, p. 31. This was a woefully inadequate description of the non-statutory mitigating circumstances before the jury and court. Appellant counsel failed to show that the trial court did not consider non-statutory mitigating evidence and circumstances when rejecting the unanimous jury recommendation.

CLAIM IV. The trial court did not refer to the unanimous jury recommendation of life when he imposed the death penalty. No discussion of why the jury recommendation was unreasonable or

irrational was attempted. This Court was left to speculate. The trial jury saw all witnesses, judged credibility and observed demeaner, heard from Ed Thomas twice, and promised during voir dire to be prejudice free. The trial judge, on the other hand, freely admitted that homosexuals "disgust me."

CLAIM V. The trial judge arbitrarily denied defense counsel the right to "backstrike" during voir dire. The issue was preserved at trial, and appellate counsel did not raise it on appeal.

After allowing backstrikes at the beginning of voir dire, the judge changed his mind to expedite the process: "We are going to get the jury before we leave this room tonight. If you want any more backstrikes, now is the time to do it. So there will be no more backstrikes." (R. 193) Thereupon the judge excused four jurors, and the remaining jurors were sworn and told to retire to the jury room. (R. 194) As soon as the new jurors were impanelled counsel objected to the arbitrary withdrawal of the right to backstrike. (R. 194) The court responded:

> It was my discretion to allow you to have it at the beginning. I can certainly withdraw it whenever I choose to, having given you the opportunity to exercise it.

R. 196. Counsel again objected. Id. This is reversible error affecting the verdict and sentence, and appellate counsel unreasonably failed to raise the issue on appeal.

CLAIM VI. Jurors must be sworn. The record does not reveal that juror Joy Wicker was sworn in. This is automatically reversible error, but was not raised on appeal.

CLAIM VII. The trial judge walked off the bench and left the courtroom during voir dire, ordering the juror questioning to continue in his absence. Defense counsel objected. The judge left. (R. 235-240) A reversal is required on this record, but the error was unreasonably omitted on appeal.

CLAIM VIII. This case presents the issue presently pending before the United States Supreme Court in Lockhart v. McCree. Prior to trial, the defense filed a Motion for Individual Voir

Dire and Sequestration of Jurors During Voir Dire and a Motion to Preclude Challenge for Cause. R. 1392-93, 1398-99. Both motions were denied. R. 2-4.

The collective voir dire in this case meant that the individual veniremembers were saturated with the death penalty before they heard a bit of evidence on guilt or innocence. See, e.g., R. 20-25, 32-33, 36, 39-40, 42, 44, 49, 51, 54, 57, 62, 67, 69-70, 72-73, 92-93, 111-12, 136, 143-44, 165-66, 172, 178, 197, 205, 215, 218, 228, 231, 234, 239-40, 248, 252.

The death qualification process resulted in the peremptory exclusion of one veniremember who clearly would have been fair and impartial in deciding guilt or innocence. The court questioned veniremember Strauss as follows:

> [THE COURT:] The alternate, Mr. Strauss. Okay, do you think you cannot serve as a juror in this case?
>
> MR. STRAUSS: I think it might, deep within my heart, I would be very reluctant to sentence somebody to death.
>
> THE COURT: Well, you really didn't listen to what I just said, because you are not going to be sentencing someone to death. The punishment is meted by the Court. Let me explain in another fashion.
>
> MR. STRAUSS: May I try to explain what I feel, Your Honor?
>
> THE COURT: Yes.
>
> MR. STRAUSS: I feel that I might hesitate in finding a defendant guilty if, on a particular decision of guilt, he might be sentenced to death.

R. 23. Later, the prosecutor questioned Mr. Strauss:

> MR. HANCOCK: . . . Mr. Strauss, I think you indicated you had a problem with capital punishment?
>
> MR. STRAUSS: I don't particularly believe in an eye for an eye. That is the extent of my belief.
>
> . . . .
>
> MR. HANCOCK: You can give the State of Florida a fair trial, correct?
>
> MR. STRAUSS: I could, yes.

MR. HANCOCK: And you can determine the guilt or innocence of Mr. Thomas as the first phase, is that right, no matter what your opinion is?

MR. STRAUSS: The first phase, yes.

MR. HANCOCK: Thank you very much.

R. 67-70.

IV. LEGAL BASES FOR RELIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

1. Standards

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:

> [T]he 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 derivations 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 idigent, 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 as 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 layperson, 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 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.").

2. Unreasonable Prejudicial Omissions by Appellate Counsel

> THE COURT: You can screw up on appeal on a capital case from now to breakfast and they are still going to consider it. You don't have to worry about that.

R. 1380.

a. CLAIM 1: Appellate Counsel Failed to Ensure that the Record Before the Trial Court Was Fully Presented on Appeal, In Violation of the Eighth and Fourteenth Amendments

A P.S.I. was relied upon by the trial court. Sentencing was three times postponed as the court awaited "my P.S.I." Judge Coker stated that he never imposed sentence without receiving a P.S.I.

On the day of sentencing, trial counsel had not seen the P.S.I. Sentence was imposed. Trial counsel later complained that this procedure prevented him from rebutting and/or explaining the information contained in the P.S.I., and requested rehearing on sentencing. The trial court delayed ruling on the rehearing request, and the record shows no order being entered with respect to it.

The P.S.I. is not contained in this Court's direct appeal records in Mr. Thomas' case. Honorable Sid White, Clerk, Florida Supreme Court, has informed counsel that this Court made a request for the P.S.I., but never received it, during the pendency of the direct appeal. Appellant's counsel referred to the P.S.I. in Appellant's brief, as if it were contained in the record, which it is not and was not.

This critical document was not before this court when Judge Coker's override of a 12-0 jury recommendation of life was affirmed. Counsel's failure to get it here is inexcusable, and a new appeal is necessary.

1. This Court's Reviewing Function in Capital Cases is Well-Defined.

This Court's death sentence review process involves at least two functions:

> First, we determine if the jury and judge acted with procedural rectitude in

> applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed -- in that case a non-statutory aggravating circumstance was considered.
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all past cases to determine whether or not the punishment is too great. In those cases where we find death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). This Court has emphasized that, "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fufilled that responsibility" of acting with procedural rectitude. Lucas v. State, 417 So.2d 250 (Fla. 1982).

This Court could perform neither appellate function, when the P.S.I. was not (and still is not) in the record. The mitigating circumstances contained in the P.S.I. should be important in this Court's proportionality review, especially in light of the fact that an expert psychiatrist opined that a compelling statutory mitigating circumstance existed: Mr. Thomas was diagnosed as being under significant emotional distress at the time of the incident. Myriad other nonstatutory mitigating circumstances are in the P.S.I. See pp. 15-22, supra. When comparing this case with others (especially in a 12-0 jury override setting), this Court's consideration of the statutory and the non-statutory mitigating circumstances contained in the P.S.I. would seem proper.

Second, the P.S.I. and its circumstances shed significant light on the trial judge's failure to conduct the sentencing proceedings with procedural rectitude. There was a wealth of non-statutory mitigating evidence contained in the P.S.I., but the judge refused to even consider it. This is a fundamental procedural flaw in the sentencing proceedings. Lockett v. Ohio, 438 U.S. 586 (1978); Straight v. Wainwright, 422 So.2d 827, 831

(Fla. 1982). See section IV, A, 2, c, infra. Furthermore, the P.S.I. contains the proof central to a basic procedural irregularity -- it contains the very information which trial counsel was given no chance to rebut. Failure to provide adequate time to rebut or explain information in the P.S.I. is constitutionally improper procedure.

Thus, the record was incomplete in a way which absolutely prevented this Court from conducting meaningful appellate review. A new appeal must be allowed, so that the effect of the P.S.I. can be properly considered. This result is constitutionally required:

> Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S., at 250-258, 96 S.Ct., at 2966-2967, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed.
>
> . . . .
>
> In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Gardner v. Florida, 430 U.S. 349, 361 (1977) (emphasis added).

2. Appellate Counsel's Duty to Provide this Court with the Proper Record.

By statute, this Court is required to review all death penalty cases. The review occurs "after certification by the sentencing court of the entire record . . ." Fla. Stat. 921.141 (4). In furtherance of this statutory mandate, this Court has issued administrative orders requiring "the appropriate chief judge to monitor the preparation of the complete record for timely filing in this Court." See Appendix 13 (copy of administrative order mailed to the chief judge in Ed Thomas' case (emphasis in original)).

It appears as if the P.S.I. was never made an exhibit to any

proceeding in the trial court. It was not, technically, in the record. However, the State must concede that all participants received the P.S.I., and that the trial court relied on the P.S.I. In short, there can be no question but that the P.S.I. was considered, and that it properly should have been before this Court on appeal. In fact, this Court itself requested a copy of the P.S.I., but never received it.

Notwithstanding any duty this Court may have, it is appellate counsel's responsibility to ensure that the record on appeal is complete. Fla. R. App. P. 9.200(e). If the record is incomplete, it can be supplemented. Fla. R. App. P. 9.200(f). The Committee Notes to section (f) reveal its purpose, and are salient here:

> The new rule is intended to assure that appellate proceedings will be decided upon their merits and that no showing of good cause, negligence or accident be required before the lower tribunal or the court orders the completion of the record. This rule is intended to assure that any portion of the record before the lower tribunal which is material to a decison by the court will be available to the court. . . . The purpose of the rule is to give the parties an opportunity to have the appellate proceedings decided on the record before the lower tribunal. . . .

The P.S.I. was material to several matters which this Court was required to decide on the merits. Appellate counsel's absolute failure to bring the matter before this Court is inexcusable. If supplementation proved to be unavailable, this Court could readily have remanded the case for findings regarding the P.S.I., and required its inclusion in the record. Cf. Cave v. State, 445 So. 2d 341 (Fla. 1984).

This Court must rely on advocates to help point up the shortcomings in capital cases. Wilson, supra. Counsel in this case was constitutionally inadequate. Trial counsel, originally appointed to be appellate counsel, withdrew after designating the record to be filed in the district court of appeals. Trial counsel designated the record before the hearing on the motion to reconsider sentencing. No further designation occurred, and

it is not even known whether the motion was denied.

3. This Court's Actions on Appeal Should Be Considered Void.

Due to a failure in the appellate process, manifestly not Mr. Thomas' doing, this Court affirmed the override of a 12-0 jury recommendation for life without reviewing an integral ingredient in Judge Coker's decisionmaking process -- the P.S.I. This Court was not presented with fundamental issues going to the heart of capital sentencing, such as counsel and defendant's right to meaningfully refute and explain matters contained in a P.S.I. The insufficient record and argument reviewed by this Court casts a pall on the direct appeal process, which only a new direct appeal can remedy. A new appeal should be granted without regard to prejudice -- the process did not work right, and even present counsel does not know if the P.S.I. submitted in Appendix 2 is an exact photocopy of the one relied upon by the participants at trial. However, Petitioner will present hereinafter some specific examples of prejudice, which can only properly and completely be addressed upon a new appeal.

b. CLAIM II: Trial Counsel Unreasonably Failed to Present The Gardner Issue

In Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court ruled that when a death sentence is imposed based on information known to the trial court but unknown to counsel or the defendant, the Eighth Amendment requirement of reliability in capital sentencing proceedings is violated. The Court specifically held "that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362.

The Court specifically rejected the notion that "the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts." Id. This Court followed the Gardner dictates by ordering "Gardner remands" in countless cases. Gardner remands

were not intended to be hearings at which counsel was provided a P.S.I., but by ambush, requiring spontaneous discourse against the information contained in the P.S.I. Instead, this Court "'require[d] that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal.'" Barclay v. State, 362 So. 2d 657, 658 (Fla. 1978).

This was part of the Court's recognition that form (provision of a report) over substance (provision of the report the moment before sentencing) is untenable under Eighth Amendment jurisprudence: "counsel [must have] a meaningful opportuniity to be heard on any of the matters contained in the pre-sentence investigation report which the trial judge had considered in his original sentencing order. Dougan v. State, 398 So. 2d 439, 440 (Fla. 1981). See also Raulerson v. Wainwright, 598 F. Supp. 381, 389 (M.D. Fla. 1980)("That right is the right of petitioner as well as his counsel. Petitioner must be given the opportunity to rebut and deny any portion of the report and such opportunity clearly requires personal knowledge of the information to be rebuted. Both the 'appearance and reality of due process' must exist in a sentencing proceeding.")

Gardner law was straightforward and black letter by the time appellate counsel filed Appellant's Brief in February, 1982. The record before counsel was unmistakably clear: trial counsel appeared in court the day of sentencing and was handed the P.S.I. He stated, and the state must concede it, that he had not read the report. The trial court immediately imposed sentence.

The P.S.I. was of vital importance to Judge Coker as he had acknowledged that he takes no action in capital cases until he sees "my P.S.I." Sentencing was continued twice while the participants awaited the document, and action was swift upon its arrival -- the court immediately imposed death as recommended in the report, a verdict rejected by the entire 12-person jury who saw petitioner throughout his trial, heard him testify twice, saw

and listened to his father, and heard and evaluated all of the evidence in the case. The P.S.I. preparer heard and saw none of the trial. The preparer included inflamatory and untrue information in the report, which Petitioner had no opportunity to rebut.

Trial counsel complained, and asked for a resentencing, with an opportunity to be heard and rebut. The record contains no ruling on the request. Trial counsel explained why he had not been able to read the P.S.I.; even had he read it, however, it was completed only the Friday before the Monday he received it, leaving him no time, even over the weekend, to react to and refute the P.S.I. allegations.

This Court was unaware of the fact that no meaningful rebuttal to this critical P.S.I. was possible. The appellate process went awry.

c. CLAIM III: Appellate Counsel Failed To Demonstrate that Judge Coker Would Not Consider Non-statutory Mitigating Evidence When Overriding the Unanimous Jury Recommendation of Life

At the time of Petitioner's appeal in 1982, the constitutional imperative that capital sentencers must consider non-statutory as well as statutory mitigating circumstances was crystal clear. Lockett v. Ohio, 438 U.S. 583 (1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 so.2d 1142 (Fla. 1971). Resentencing is required whenever a sentencer "held the mistaken belief that he could not consider non-statutory mitigating circumstances," Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981); see also, Perry v. State, 395 So.2d 170,174 (Fla. 1981), and when such circumstances were present.

In a 1981 decision, also out of Broward County, this Court on direct appeal reversed the override of a jury recommendation of death when it was apparent that the trial judge did not consider non-statutory mitigating circumstances. In Jacobs v.

State, 396 So.2d 713 (Fla. 1981), the rule that controls in this case was announced--an override by a judge who will not consider non-statutory mitigating circumstances when such circumstances exist is invalid:

> The trial judge held the mistaken belief that he could not consider nonstatutory mitigating circumstances. In Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), we ruled to the contrary. The jurors in this case may have considered the fact that Ms. Jacobs was the mother of two children for whom she cared. They could have found that her role was mostly passive and that she was under the influence of her lover, Tafero. They may have felt that her actions were what she perceived to be a necessary measure to protect her family. Additionally, Jacobs had no past history of violence. All in all, the evidence is not sufficient to override the jury's recommendation of a life sentence.

Id.

There were countless non-statutory mitigating circumstances before the jury in Ed Thomas' case, and new and compelling ones were presented to the judge in the P.S.I. See pp. 15-22, supra. Appellant counsel did nothing to bring this non-statutory information before this Court on appeal, when the law was quite clear that it should be considered. As outlined at pages 11-22, supra, Judge Coker absolutely refused to consider non-statutory mitigating circumstances. This fact is apparent from the sentencing order itself, from comments the court made about not considering evidence that is "not in the mitigating", and from the actions of the P.S.I. preparer (who the trial judge depended upon) who analyzed only statutory mitigating circumstances in the "simple mathematical process" followed by Judge Coker. Appendix 2.

This failure by Judge Coker has been recognized in this Court when other appellate counsel have presented the issue. In Herzog v. State, 439 So. 2d 1372 (Fla. 1983), involving a case also tried in 1981 in which Judge Coker overrode a jury recommendation of life, this Court reversed the override because, inter alia, there was no indication that Judge Coker considered

the non-statutory mitigating circumstances that were available:

> The trial court properly found that no statutory mitigating circumstances existed; however, there is no indication in the sentencing order that the court considered non-statutory mitigating circumstances.

Id. at 1376.

It is beyond dispute here that (a) there were many non-statutory mitigating circumstances presented to the jury, (b) the trial court overrode the unanimous jury recommendation of life, (c) the trial court did not consider nonstatutory mitigating circumstances, and (d) appellate counsel did not present this issue. Unquestionably, there is a reasonable probability that but for counsel's unreasonable omissions, the result on the appeal would have been different. Strickland v. Washington, 104 S.Ct 2052 (1984).

Judge Coker, until recently, consistently refused to consider non-statutory mitigating circumstances, as this Court's official files vividly illustrate. Herzog has already been discussed; a comparison of the sentencing order in Herzog and the sentencing order in this case shows that they are identical in their absence of any acknowledgment of non-statutory mitigating circumstances. Judge Coker signed the sentencing order in Herzog on December 1, 1981 (See Appendix 4). He signed the sentencing order in this case August 19, 1981 (See Appendix 5). In five other capital cases decided around the same time as Mr. Thomas' case, Judge Coker followed his practice of ignoring non-statutory mitigating circumstances. See Wilson v. State, 436 So.2d 908 (Fla. 1983) (new appeal granted because of ineffective assistance of appointed counsel) (sentencing order dated September 30, 1981; included as Appendix 6); Jackson v. State, 464 So.2d 1181 (Fla. 1985) (sentencing order dated December 2, 1981, included as Appendix 7); Livingston v. State, 458 So.2d 235 (Fla. 1984) (sentencing order signed January 5, 1982, included as Appendix 8); McCray v. State, 416 So.2d 804 (Fla. 1982) (sentencing order dated August 30, 1980, included as Appendix 9)

(override reversed); O'Callaghan v. State 461 So.2d 1354 (Fla. 1984) (sentencing order dated May 12, 1981, included as Appendix 10). It was not until 1984, in the first death sentence imposed by Judge Coker following the decision in Herzog, that he changed his sentencing order to include language acknowledging non-statutory mitigating circumstances. In State v. Thompson, 84-148CF, Judge Coker signed a sentencing order on November 8, 1984. In that order, the judge stated: "Also, there were no non-statutory mitigating circumstances presented to the court." (Appendix 11, page 4). The court further stated in summary, "As to the mitigating circumstances none applied in this case, statutory or non-statutory." (Appendix 11, p. 5). It is manifestly clear that Judge Coker has now realized the need to consider non-statutory mitigating circumstances. It should not be too late for Petitioner.

Of special interest is Maxwell v. State, 443 So.2d 967 (Fla. 1983). This case was tried in 1981 before Judge Coker, and affirmed on direct appeal. A habeas corpus petition was filed in this Court in 1984 on Mr. Maxwell's behalf, while an execution date loomed. Maxwell raised the same claim raised here: "the trial court [Judge Coker] restricted its consideration of mitigating evidence to that deemed to fall within the parameters of the statutory mitigating circumstances." See Maxwell habeas corpus petition, Appendix 12. A stay was issued by this Court, and Maxwell is still pending.

This Court has recently reaffirmed the power and importance of Lockett. "It is our independent view that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute. . . ." Harvard v. State, No. 67,556 (Fla. February 6, 1986). This was true (and had been so held) in 1982, and reversal is required if the error appears of record on direct

appeal, Perry; Jacobs, in state habeas corpus proceedings, or in post-conviction. Harvard. Ed Thomas' attorney did not present the issue.

Judge Coker has presided over nine death penalty cases. Eight have reached this Court. Judge Coker has never imposed life; he has overridden every jury recommendation of life (4). While this pattern is not inherently suspect, questions arise when the judge regularly ignores non-statutory mitigating circumstances. A new appeal is proper.

d. CLAIM IV: Appellate Counsel Failed to Demonstrate that There Was a Rational Basis for the Unanimous 12-0 Jury Vote for Life, and that the Trial Court Followed Improper Procedure When Overriding the Jury's Recommendation.

The jury override procedure in Florida is constitutional only to the extent that it is rationally applied and overseen. Under Tedder v. State, 322 So.2d 908 (Fla. 1975), and its progeny, a jury recommendation of life can only be overridden under special circumstances: "[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910. In upholding Florida's jury override procedure, the United States Supreme Court applauded this Court's exemplary actions in policing jury overrides:

> This Court already has recognized the significant safeguard the Tedder standard affords a capital defendant in Florida. We are satisfied that the Florida Supreme Court took that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. . . . We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary and discriminate application of the death penalty, either in general or in this particular case.

Spaziano v. Florida, 104 S.Ct. 3154, 3165-66 (1984). See also Proffitt v. Florida, 428 U.S. 242, 252 (1976); Dobbert v. Florida, 432 U.S. 282, 294-96 (1977); Barclay v. Florida, 103 S.Ct. 3418, 3420 (1982). Because of the failings of appellate counsel for Ed Thomas, this Court was not apprised of the arbitrariness of the trial court's override of this 12-0 jury

recommendation of life.

First, the trial court completely failed to follow override procedure. The Herzog case, another jury override by Judge Coker, is a good starting point for comparison purposes. This Court in Herzog, after finding non-statutory mitigating circumstances that Judge Coker failed to consider, stated "We must again reiterate that a jury recommendation is to receive great weight, and, before overruling the jury the trial court must find that the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 1381. (citing Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (emphasis added). The Court concluded by stating "[i]ncidentally, there is no evidence in the record that the jury was mislead, nor did the trial court find that the jury made its recommendation based on an emotional appeal of defense counsel." 439 So. 2d at 1372 (emphasis added).

There is similarly a complete absence of fact finding by the trial court in the instant case. There is no acknowledgment of non-statutory mitigating circumstances in the sentencing order, and there are no facts found that would show that the jury had no reasonable basis for its unanimous life recommendation. Indeed, no mention is made of the jury or its unanimous verdict. There is no statement of facts which set forth the notion that the jury was swayed by emotional appeal. The record is devoid of any stated facts upon which the court relied in rejecting the jury's findings. See also Smith v. State, 403 So. 2d 933, 935 (Fla. 1981) ("trial judge did not articulate any reason for rejecting the jury's recommendation of a life sentence"); Cannady v. State, 427 So. 2d 723, 732 (Fla. 1983) ("[W]e find the trial judge's rejection of the jury's recommendation of a life sentence is deficient in two respects. First, we note that the trial judge did not specifically find that the jury based its recommendation of life sentence upon emotional sympathy for appellant's family instead of upon the proven statutory mitigating circumstances.

The jury's recommendation of a life sentence could have also been partially based upon appellant's lack of criminal activity and upon his age. See McKennon v. State, 403 So. 2d 389 (Fla. 1981); Stokes v. State, 403 So. 2d 377 (Fla. 1981)".); Thompson v. State,. 328 So. 2d 1, 5 (Fla. 1976) ("[T]he advisory opinion . . . must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation to overrule a jury's advisory opinion of life imprisonment . . .").

The trial court apparently relied solely on the recommendations in the presentence investigation report. The court ordered a presentence investigation report noting that it relied heavily on them. Indeed, the court stated "I'm not going to do anything until I get the P.S.I." (R. 1356). The analysis in the presentence investigation report is strictly limited to statutory mitigating circumstances, and does not mention non-statutory mitigating circumstances whatsoever.

The presentence investigation report was the only evidence the court had that the jury did not see. That report contained no new factual information with regard to statutory aggravating circumstances, but did contain prejudicial and inaccurate comments and statements, and "did contain a subjective evaluation and opinion of the probation supervisor." Neary v. State, 384 So. 2d 881 (Fla. 1980) (override invalid). The trial court followed the recommendation of the report to the total exclusion of a consideration of the jury's unanimous verdict and the overwhelming evidence of non-statutory mitigating circumstances the jury could have relied upon, and to the exclusion of new mitigating evidence contained in the report. As in Washington v. State, 432 So.2d 44 (Fla. 1983), "[i]n this case the jury's recommendation could have been based not only on the two statutory mitigating factors found by the trial judge, but also

on the non-statutory mitigating factors. . . ." Id. at 48.

Because there was no statement by the trial judge regarding why there was no rational basis for the jury recommendation of life, this Court was left to speculate if the override was to be upheld. Clearly this Court was affected by the purported witness elimination. This Court decided that the jury recommendation was bad because the jury was somehow swayed by the explicit homosexual atmosphere of the offense:

> The fact that the first victim may have been a homosexual and that he may have used the services of appellant as a prostitute, even if it were a valid basis for mitigating the first murder, which we do not hold, is clearly not a valid basis for mitigating the second murder.

456 So.2d at 459. There is no particular reason for believing that the jury unanimously recommended life based on disdain for either victim. The jury was repeatedly questioned regarding homosexuals throughout the voir dire process, and all jurors expressly denied any prejudice against homosexuals, and affirmed that they would follow the law. (R. 79, 87, 109, 215-216, 92-93, 189, 153, 113, 137-38).

In fact, the only person who expressed any prejudice was Judge Coker himself. One of Petitioner's witnesses was someone who was "straight", but who was a prostitute for men. The trial court said "get him out of here" after he testified. Then the judge said, at the bench, "he disgusts me."

Ed Thomas is a "straight," but he is also a male prostitute. This the judge knew. We thus know the trial judge's opinion of Ed Thomas: "he disgusts me." The override was produced by prejudice; the jury recommendation was not. A new appeal is required.

d. CLAIM V: Appellant Counsel Unreasonably Failed to Raise the Backstrike Issue

It is well settled in Florida that a criminal defendant has an absolute right to peremptorily challenge a juror at any time before the jury is sworn. Rivers v. State, 458 So.2d 762 (Fla.

1984); Jones v. State, 332 So.2d 715 (Fla. 1976); Jackson v. State, 464 So.2d 1181 (Fla. 1985); Edge v. State, 455 So.2d 626 (Fla. 5th DCA 1984); Barrack v. State, 462 So.2d 1196 (Fla. 4th DCA 1985); King v. State, 461 So.2d 1370 (Fla. 4th DCA 1985); Blanco v. State, 438 So.2d 404 (Fla. 4th DCA 1983); Holloway v. State, 413 So.2d 94 (Fla. 3rd DCA 1982); Walden v. State, 319 So.2d 51 (Fla. 1st DCA 1975); Shelby v. State, 301 So.2d 461 (Fla. 1st DCA 1974); Knee v. State, 294 So.2d 411 (Fla. 4th DCA 1974). This right dates back to O'Connor v. State, 9 Fla. 215 (1860), and has been followed consistently by the courts. Jackson v. State, 464 So.2d 1181 (Fla. 1985).

This right to peremptorily challenge, while requiring reversal when violated, is not, however, absolute, as this court has previously articulated. First, the issue must first be preserved by either an objection by counsel or an attempt to backstrike by counsel, after the court had declared it would no longer allow backstriking. Rivers v. State, supra; Denham v. State, 421 So.2d 1082 (4th DCA 1982). The instant case is not unlike Rivers. In Rivers, the trial judge announced that "she was not going to allow any more backstriking." 458 So.2d at 764. In the case at bar the trial court made the same comment to counsel, after having allowed both defense and the State to backstrike jurors. (R. 154, 193) The court stated "We are going to get the jury before we leave this room tonight. If you want any more backstrikes, now is the time to do it. So there will be no more backstrikes." (R. 193) Thereupon the court excused four jurors and the remaining jurors were sworn and told to retire to the jury room. (R. 194) As soon as the new jurors were impaneled counsel lodged an objection to the withdrawal of the opportunity to backstrike. (R. 194) The court responded: "It was my discretion to allow you to have it at the beginning. I can certainly withdraw it whenever I choose to, having given you an opportunity to exercise it." (R. 196) Counsel then renewed the objection. (R. 196)

Second, notwithstanding preservation of the issue, non-compliance with the rule will not result in reversal absent a showing that the violation of the rule resulted in prejudice to the Petitioner. Prejudice is not shown where the evidence of guilt is overwhelming. In Jones this Court, applying the provisions of the harmless error statute to the rule, succinctly stated "where the evidence of guilt is overwhelming even a constitutional error may be rendered harmless." Jones v. State, 332 So.2d at 619; Rivers v. State, 458 So.2d at 764. In the instant case the evidence of guilt was far from overwhelming. The Petitioner denied his guilt from the witness stand and recanted his prior statements. (R. 177-1054) There was no physical evidence of his guilt whatsoever. In fact the only evidence of guilt was the recanted statements of petitioner. The jury had serious doubts as to petitioner's guilt, announcing they were deadlocked after several hours of deliberation. (R. 1243). After an Allen charge and additional hours of deliberation (seven hours total) the jury returned late in the evening with a verdict of guilty. (A few days after the verdict, a juror contacted defense counsel and notified him that she and another juror believed in the defendant's innocence and felt pressured into voting for a guilty verdict. (R. 1337-1345)). Notwithstanding the guilty verdict, the jury voted unanimously for a life sentence. (R. 1314)

This was a death-qualified jury with four jurors on the first jury panel who avowedly were pro-death penalty. Any defense counsel would have had them stricken (Jurors Sparti (R. 36, 194); Ziegler (R. 44, 194); Weisgood (R. 51, 112, 194); and Harlan (R. 57, 194)). Had counsel the opportunity to backstrike after noting the composition of the entire panel, these jurors may well have been excused. There is no question but that pro-death penalty jurors are more apt to convict than an ordinary jury. Lockhart v. McCree, No. 84-1865.

The lack of overwhelming evidence acknowledged by the

presence of doubt in the minds of the jurors (even after the verdict) must surely satisfy any prejudice test.

The issue thus evolves to whether a trial judge can arbitrarily thwart the right to challenge peremptorily any juror by merely announcing that the right is terminated solely on whim. Collaterally, the issue is also whether the court can swear in members of the jury panel piecemeal to permanently foreclose backstriking:

> "The right of a prisoner to challenge any juror peremptorily is absolute at any time before the juror is sworn, and ... no circumstances can bring that right within the discretion of the court so long as it is confined to the number of peremptory challenges allowed by law."

O'Connor v. State, 9 Fla. 215, 228-29 (1860) (emphasis added.) Holloway v. State, 413 So.2d 94 (3rd DCA 1982); Blanco v. State, 438 So.2d 404, 405 (4th Cir. 1983) ("It matters not whether the right is exercised by backstriking. We are fully aware that trial judges dislike the practice and we sympathize with them. However, the law is clear.")

It is submitted that the absolute right to exercise a peremptory challenge to a juror cannot be blocked by the arbitrary discretion of the trial judge and that it is a further abuse of discretion to swear in jurors piecemeal in order to permanently deprive the defendant of the right to exercise such challenges. It is an absolute abuse of discretion to arbitrarily terminate the right to backstrike. Jones v. State, supra; Rivers v. State, supra. This court has already once held Judge Coker in error for refusing to allow backstrikes. Jackson v. State, 464 So.2d 1181 (Fla. 1985).

The practice of piecemeal swearing in of jurors, denigrating the right to peremptorily challenge, has been condemned by the courts in Florida. King v. State, 461 So.2d 1370 (4th DCA Fla. 1985); Barrack v. State, 462 So.2d 1196 (4th DCA 1985); Grant v. State, 429 So.2d 758 (4th DCA 1984).

In King, the trial court denied the defense the right to

backstrike jurors and had the jurors sworn in individually. The Fourth District Court of Appeal in reversing the trial court noted that "Appellant has adequately demonstrated that this procedure adopted by the trial court interferred with his rights to exercise peremptory challenges." 461 So.2d at 1371. The issue in the case was whether the court abused its discretion by the swearing of jurors to prevent counsel's right to backstrike.

> The appellate courts of this state have consistently interpreted both Florida Rule of Civil Procedure 1.431 and Florida Rule of Criminal Procedure 3.310 to protect the right of the litigant to backstrike at any time before a juror is sworn. (Citations omitted.) The right to backstrike must be reconciled with the Supreme Court's statement in Mathis v. State, 45 Fla. 46, 34 So. 287 (1903) that the time for swearing of jurors is in the sound discretion of the trial judge.
>
> Notwithstanding the broad discretion the trial judge had in the timing and manner of swearing in a juror, the exercise of that discretion is subject to review.
>
> We said in Grant v. State, ... that
>
> > A lawyer charged with the duty of selecting a jury panel should not be deprived of the opportunity to exercise such peremptory challenges and such challenges for cause which he may have in order to provide him with the greatest opportunity to have a fair and impartial trial by a jury of his peers.
>
> Judge Hurley, in his special concurrence summarizes what appears to be the underlying basis for each of the many appellate decisions which have without hesitation held that a litigant has the right to exercise his peremptory challenges at any time until the jury is sworn.
>
> > The right to the unfettered exercise of peremptory challenges -- which, I believe, includes the right to view the panel as a whole before the jury is sworn -- is an essential component of the right to trial by jury, a right that "is fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149, (1968).
>
> Grant, 429 So.2d at 760-61.
>
> In Grant v. State, we stated, albeit in dicta, "the trial judge erred when he prohibited backstriking and immediately administered the juror's oath for the sole purpose of preventing strikebacks." Id. at

> 760. We recognize that trial judges today face a large volume of cases and that the procedure implemented by the trial judge sub judice may speed the voir dire process. However, we do not believe that expediency should form the basis of a procedure which effectively deprives a litigant from selecting a jury panel as a whole and deprives him of the free exercise of his peremptory challenges.
>
> With the issue now squarely before us, we hold that the procedure adopted by the trial judge unreasonably restricted appellant's right to exercise peremptory challenges as provided in Rule 3.310 and constituted an abuse of discretion which requires reversal. Therefore we reverse and remand this cause for a new trial.

Id. at 371-72.

There is no doubt but that Judge Coker arbitrarily foreclosed the right to back strike and promptly swore in the members of the jury to permanently foreclose that right simply because it was his desire to empanel a jury before the day was out. (R. 154, 193). Such action on the part of the trial court is clearly an abuse of discretion. "The right to the unfettered exercise of peremptory challenges," which includes the right to view the panel as a whole before it is sworn, "is an essential component of the right to trial by jury," a "fundamental" right that cannot be abrogated by the arbitrary discretion of the trial court. Id. at 372.

In Barrack v. State, supra, the court again addressed the practice of swearing in individual jurors to thwart the right to exercise the right to peremptory challenges:

> Since this case is being remanded, we comment on one other matter properly raised by the appellant. A procedure was employed in the course of jury selection below so that the appellant was effectively precluded from exercising backstrike peremptory challenges. We hold that a trial judge is prohibited from restricting parties from backstriking prospective jurors. We also believe that the better procedure, under ordinary circumstances, is to swear the jury as a body, rather than singly, as was done in this case. (citations omitted).

Barrack v. State, 462 So.2d at 1198.

The court in Barrack reversed the trial court. We entreat this

Court to recognize the Sixth, Eighth and Fourteenth amendment rights of petitioner, as well as the rights guaranteed him under Florida law and allow a new appeal. Appellate counsel was ineffective for failing to raise this century old issue.

e. CLAIM VI: Appellate Counsel Failed to Inform this Court that the Jury was Not Sworn

The jury in the instant case was not sworn as a panel at one time; rather, Judge Coker swore them piecemeal. As a result of that procedure it is apparent from the record that one of the jurors, Joy Wicker, was not sworn. (R. 157) The record proper in felony cases must show that the jury was sworn, and an omission in this respect is fatal to a conviction. Zapf v. State, 17 So. 225 (Fla. 1895); Brown v. State, 10 So. 736 (Fla. 1892). In Brown the court, reversing and remanding for a new trial, stated:

> It will not be questioned that it was absolutely essential for a proper conviction of the accused that the jury should have been properly sworn before rendering a verdict against him, and it is also essential that this fact should appear upon the record. We held, and we think correctly, in the case of Gardner v. State, 28 Fla. ___, 9 South. Rep. 835, that where the record shows simply that the jury was sworn it was sufficient. This is true where no exception is taken to the manner in which the jury is sworn, and in such case the record recital that the jury was sworn is evidence sufficient that it was done as provided by law. But the record must show that the jury who tried the accused was sworn.

Brown, 10 So. 736.

In the case at bar a Record of Trial Proceeding entered nunc pro tunc on June 30, 1981, after the trial, lists the juror among the panel members. (R. 1466). The filing, however, cannot make up for the deficiency in the record. Brown v. State, supra. This issue was unreasonably not raised on appeal.

f. CLAIM VII: Appellate Counsel Unreasonably Failed to Inform this Court that the Trial Judge Left the Courtroom During Trial

During voir dire of the jury, Judge Coker left the courtroom. As he was leaving he announced "Mr. Kent? Go ahead and proceed, I will be back in a minute. If there is any

objection, pass to the next question, and I will rule on it." (R. 234-35). Defense counsel stated to the court that his absence would be inappropriate and objected. (R. 235). The Court acknowledged the objection for the record and overruled it. (R. 235). Defense counsel continued with the voir dire, noting again that he was doing so over objection. (R. 235). Counsel proceeded to question two jurors during the judge's absence. (R. 235-240). Judge Coker, after an undetermined period of time, returned to the courtroom. (R. 240).

In Peri v. State, 426 So.2d 1021 (3rd DCA 1983), the only reported case focusing directly on the consequence of a judge leaving the courtroom during voir dire, the court held that a judge's absence was fundamental error rising to the level of a violation of a defendant's constitutional rights, and as such required automatic reversal without requiring the defendant to show prejudice.

Article I, Section 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution secure to one accused of a crime a trial by an impartial jury. The presence of the trial judge is the very core of this constitutional guarantee. Id. at 1023. The prerequisite for a fair trial is that it be conducted before unprejudiced jurors, in the presence and under the direction and supervision of a judge empowered to instruct them on the law and to advise them as to fact. Peri, 426 So.2d at 1023; Capital Traction Co. v. Hof, 174 U.S. 1 (1898); Forese v. United States, 428 F.2d 178 (5th Cir. 1970).

Courts from every reporting jurisdiction have held that it is the duty of the judge at criminal trials to be visibly present at every moment. Peri, 426 so.2d at 1023 (citing State v. Smith, 49 Conn. 376, 383-84 (1881)).

> These same courts have, correspondingly, consistently condemned the act of a trial judge absenting himself during any stage of the trial proceedings. See Moore v. State, 46 Ohio App. 433, 188 N.E. 881 (1933);

> Tunnell v. State, 24 Okla.Cr. 176, 216 P. 951 (1923); Moore v. State, 29 Ga. App. 274, 115 S.E. 25 (1922); Slaughter v. United States, 5 Ind.T. 234, 82 S.W. 732 (1904); State v. Carnagy, 106 Iowa 483, 76 N.W. 805 (1898); Smith v. Sherwood, 95 Wis. 558, 70 N.W. 682 (1897); Palin v. State, 38 Neb. 862, 57 N.W. 743 (1894); Thompson v. People, 144 Ill. 378, 32 N.E. 968 (1893); O'Brien v. People, 17 Colo. 561, 31 P. 230 (1892). See also Heflin v. United States, 125 F.2d 700 (5th Cir. 1942); State v. Smith, supra; Turbeville v. State, 56 Miss. 793 (1879). Neither the stage of the proceeding, the length of or reason for the departure, nor the judge's proximity to the courtroom has been viewed as a factor which mitigates the harm created by the judge's absence. Heflin v. United States, supra (judge in lavatory for two or three minutes during defense counsel's closing argument); Graves v. People, supra (judge in clerk's office adjoining courtroom for five and then ten minutes during prosecutor's opening and closing arguments); State v. Beuerman, supra (judge absent ten minutes during defense counsel's closing argument); Meredeth v. People, 84 Ill. 479, 482 (1877) ("It makes no difference [that] the judge was in another part of the same building. It is no less error than if he had been in another county.")

Peri, 426 So.2d at 1024.

It is axiomatic that the selection of a jury in a criminal case is a critical stage of any trial. Francis v. State, 413 So.2d 1175 (Fla. 1982). See also Frank v. Magnum, 237 U.S. 309, 338, 35 S.Ct. 250, 253, 56 L.Ed. 500, 505 (1912); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Shaw v. State, 422 So.2d 20 (Fla. 2d DCA 1982) (for purposes of an accused's constitutional right to be present at all stages of a trial, the trial runs from the commencement of the selection of the jury through the discharge of the jury). As noted supra, Article I, Section 16 of the Florida Constitution and the Sixth Amendment to the United States Constitution secure to one accused of a crime a trial by an "impartial jury." Imperfect as it may be, the process by which the "impartial jury" is obtained is through the examination of prospective jurors, historically called voir dire. Id. The Peri court concluded that "the presence of the judge is as essential to, and as much a critical part of , the voir dire of prospective jurors as it is of any other stage of the trial."

426 So.2d at 1025. The court held that it was error for the trial judge to have compelled the defendant, over objection, to continue the voir dire process in the judge's absence.

The court then addressed the question whether reversal is required in a case where the defendant can point to no specific prejudical event which occured in the judge's absence. In resolving the issue the court found that a prejudice rule would be totally impracticable, embroiling trial counsel, trial judge and appellate courts' in a ludicrous search for harm, and held that only automatic reversal could serve to protect the constitutional rights of the defendant by detering trial judges from absenting themselves from a trial in progress. A new appeal is mandatory.

g. CLAIM VIII: The Lockhart Claim

This case presents aspects of the constitutional claim presently under active consideration by the United States Supreme Court in Lockhart v. McCree, No. 84-1865. This claim has been briefed and rejected by this Court repeatedly in recent months, most recently in (Daniel) Thomas v. Wainwright, No. 68,526 (Fla. April 7, 1986). Rather than re-present the voluminous arguments, documentation, and appendices supporting this claim, and in the interests of expeditious filing of this petition, Mr. Thomas relies upon and incorporates herein the petition and appendices in the Daniel Thomas case. If this procedure is unacceptable, Petitioner will request leave to present the required appendices.

This case presents the Lockhart claim in two ways. The prosecutor used a peremptory challenge to excuse a death scrupled juror who could have fairly decided guilt. Further, the biasing effects of death qualification as a process predisposed the jury to convict.

This Court and the United States Supreme Court have stayed executions of inmates presenting different aspects of the Lockhart issue. See, e.g., Johnson v. Wainwright, No. 68,319 (Fla. Feb. 17, 1986) (four Lockhart jurors excluded for cause;

claim preserved at trial and arguably on direct appeal and presented to this Court in first habeas petition); James v. Wainwright, No. A-710 (U.S. March 18, 1986) (no Lockhart jurors excused for cause; four excused peremptorily; claim preserved at trial, not raised on direct appeal and presented to this Court in first habeas petition); Adams v. Wainwright, No. A-653 and 85-6545, 54 U.S.L.W. 3597, (U.S. March 6, 1986) (no Lockhart jurors exclused for cause and only one by peremptory challenge; claim not preserved at trial, direct appeal, first habeas petition or first post-conviction proceeding; presented for first time in successive habeas proceeding); Kennedy v. Wainwright, No. A-622, 54 U.S.L.W. 3558 (U.S. Feb. 14, 1986) (one Lockhart juror excluded for cause; claim preserved at trial and on direct appeal and presented to this Court in first habeas petition); Moore v. Blackburn, No. 85-_____, (U.S. Oct. 3, 1985), granting stay in Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985) (apparently no Lockhart jurors excluded for cause; claim not preserved at trial, on direct appeal or in first post-conviction litigation; stay granted in successive habeas proceeding); Celestine v. Blackburn, 106 S.Ct. 31 (1985) (one juror excluded for cause based on death penalty scruples, but unclear whether juror could have fairly decided guilt; claim raised in successive habeas petition); Bowden v. Kemp. 106 S.Ct. 213 (1985), granting stay in Bowden v. Kemp, 774 F.2d 1494 (11th Cir. 1985) (unclear whether jurors were excluded for cause; claim presented for first time in successive habeas petition).

In Harich v. Wainwright, No. A-711 and 85-6547 (U.S. March 18, 1986), the Court, 5 to 4, denied a stay based on Lockhart. But in so doing, the Court for the first time delineated the parameters of the questions presented in Lockhart and therefore the situations in which a stay is appropriate. The Harich case raised the outer limits of the Lockhart issue: No veniremember was excluded, either for cause or peremptorily based on death penalty scruples. Justice Marshall would have granted a stay in

Harich because of the biasing effects of the death qualification process itself, and Justice Brennan would have granted the stay because of the inherent unconstitutionality of the death penalty. Justice Stevens and Justice Blackmun dissented from denial of the stay "because the Court has not yet acted on the petition for a writ of certiorari"--that petition raised only the Lockhart issue. Justice Powell, concurring in denial of the stay, wrote:

> The other capital case in which execution was scheduled for tomorrow is No. A-710, James v. Wainwright. I voted to grant a stay of execution in that case. Both James and Harich profess to present claims similar to that pending before the Court in Lockhart v. McCree, No. 1865.
>
> This case, however, presents an issue different from James and one without merit. In James, the Lockhart issue was at least arguably presented when persons on the venire who expressed reservations as to capital punishment were removed by peremptory challenges. In this case, petitioner "conced[ed] in this petition [before the Supreme Court of Florida] that at this trial 'no veniremen were excluded' during voir dire, either for cause or through peremptory challenge." Opinion of Supreme Court of Florida 2. Similarily, before this Court petitioner makes no allegation that persons on the venire were excluded during voir dire because of any objections to capital punishment.
>
> Accordingly, my vote is to deny the application for a stay of execution.

(emphasis added).

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

This reading of the Harich opinions finds support in the Supreme Court's recent denial of a stay in the Alabama case of Arthur Lee Jones: The Court denied a stay apparently because the juror who was excluded was never asked whether she could have fairly decided guilt:

> At Mr. Jones Trial, venireperson Mrs.

> Summerall was struck for cause from sitting on the jury because she expressed reservations concerning capital punishment and a reluctance to consider the imposition of the death penalty under Witherspoon v. Illinois, 391 U.S. 510 (1968). Mrs. Summerall never stated that her views would preclude her from fairly judging Mr. Jones' guilt or innocence.

Memorandum in Support of a Stay of Execution and Petition for Writ of Certiorari at 3, Jones v. Smith, No. _____ (U.S. March 20, 1986). The Eleventh Circuit noted in Jones that the challenged veniremember "did not indicate that her views would prevent her from fairly judging guilt or innocence." Jones v. State, _____ F.2d _____, No. 86-7194 (11th Cir. March 20, 1986). The Supreme Court denied a stay 5 to 4. The voir dire in Jones (before this Court in Daniel Thomas) demonstrates that the Lockhart questions were never asked in Jones.

The Jones case did not present the Lockhart claim because the veniremembers in Jones simply were not asked the crucial questions. By contrast, in Mr. Thomas' case the right questions were asked and a prospective juror was excluded peremptorily. A stay must issue.

2. The Merits: The Death Qualification in this Case Violates the Sixth and Fourteenth Amendments

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

We do not contend that jurors whose opinions about capital punishment will influence their decisions about the defendant's

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

a. Death Qualified Juries Are Not Impartial

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

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

Id. at 156.

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

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

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

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

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

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

The Eighth Circuit, applying this standard, found that the group of jurors who are excluded by death qualification is distinctive and sizeable; that the representation of such persons on venires is not fair and reasonable; and that they are systematically excluded by the death qualification process.

Grigsby, 758 F.2d at 229.

The representation of a cross section of the community helps to make jury verdicts more reliable, since without such a cross section, the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." Peters v. Kiff, 407 U.S. 493, 503-4 (1972) (plurality opinion). Experimental data on death qualification confirms the relevance of this principle here. Cowan, Thompson and Ellsworth found that juries which included excludable jurors remembered the evidence more accurately than did members of juries which included only death qualified jurors. The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of deliberation, 8 L. & Hum. Behav. at 73. The authors concluded, "[w]e expect that the superiority of mixed juries is also a function of the likelihood that errors of fact are more likely to be corrected when there is a wide range of viewpoints and a higher level of controversy." Id. at 76. An unrepresentative jury cannot reflect "the common sense of the community." Ballew v. Georgia, 435 U.S. at 232. Death qualification impairs the ability of the jury to carry out this vital function and denies the defendant his constitutional right to a representative jury.

The prosecutor in this case was permitted to excuse peremptorily at least one potential juror who could follow the law and serve fairly to determine guilt or innocence, yet who had moral or religious objections to the imposition of the death sentence.

The United States Supreme Court, in granting stays in James and Adams and in the separate opinions in Harich, recognized that the peremptory challenges aspect of death qualification is an issue before the Court in Lockhart. The district court in Lockhart addressed the peremptory issue, basing its findings on a Florida study. See Grigsby, 569 F. Supp. at 1309-11.

Mr. Thomas contends that this group of prospective jurors

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

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

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

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

The State's only interest in a criminal trial is in seeing justice done, not in obtaining a conviction or a particular sentence. Berger v. United States, 295 U.S. 78 (1935). For this reason, the State has no legitimate claim of entitlement to a death qualified jury because it is more favorable to the prosecution than ordinary criminal juries. Yet this is the reasoning which lies behind the contention voiced in the Petitioner's brief in Lockhart, that juries which are not death qualified may be "defendant prone." Discussing this position, the Eighth Circuit observed that this is "the wrong issue".

The issue is not whether non-death-qualified jurors are acquittal prone or death-qualified jurors are conviction-prone. The real issue is whether a death qualified jury is more prone to convict than the juries used in noncapital criminal cases -- juries which include the full spectrum of attitudes and perspectives regarding capital punishment. The fact that the state charges a defendant with a capital crime should not cause it to obtain a jury more prone to convict than if it had charged the defendant with a noncapital offense." Grigsby v. Mabry, 758 F.2d at 2419 n. 31. The only meaningful standard of measurement of jury impartiality is an ordinary criminal trial jury; the evidence shows that compared to such a jury, death qualified juries are biased in favor of the prosecution. Since this kind of bias undermines the reliability of jury verdicts, and creates a risk of erroneous convictions, the State has no interest in obtaining a death qualified jury, unless the administrative advantages of having a single jury panel decide both guilt and penalty is greater than the constitutional deficiencies arising from the demonstrated bias and unreliability of death qualified juries.

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

The first, and perhaps the best, measure of the State's

interest is the statutory scheme which governs jury selection in this State. Florida Statutes Section 913.13 provides that "[a] juror who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." In order to minimize the demonstrated prejudicial effects of death qualification on the jury's perception of the defendant's guilt or innocence, the trial court should identify jurors who must be disqualified under this section in an individual voir dire. See Hovey. This statutory section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will not vote to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death qualification procedure followed in this or any other case.

The only other relevant statutory authority is Fla. Stat. sec. 913.03(10), which authorizes the removal of jurors whose "state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality. . . ." But reliance on this provision to justify the exclusion of jurors who will be fair to both sides in the guilt phase but not in the penalty phase begs the question. The problem of impartiality in the penalty phase arises only if the same jury must decide both guilt or innocence and penalty. See Winick, Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. Rev. 825, 835-40 (1983).

Section 921.141(1) provides, in relevant part:

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

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

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

Nothing in this statute precludes a trial judge from, for example, seating alternate jurors who attended the guilt phase of the trial on the jury during the sentencing phase in place of jurors who would not consider imposing the death penalty. Alternate jurors would also replace any juror who stated that he or she would only consider the death penalty. The substitution of a small number of alternates would be simple, efficient, and fair. We do not suggest that this is the only way to avoid the prejudicial effect of death qualification. This is simply one method which presents advantages of efficiency and economy. The jury would thus be impartial in both the guilt and sentencing phases. Under current practice, the trial jury is not impartial in the critical determination of the defendant's guilt or innocence. Impartiality in the sentencing phase is bought too dearly when the cost is impartiality in the more important determination of guilt or innocence. This is especially true in Florida for two reasons. First, the verdict in the sentencing phase need not be unanimous. Even if the sentencing jury were

less than impartial, it might still reach the same result by a smaller majority. Second, the jury's sentencing verdict is only advisory. We discuss this point in greater detail below. In general, the determination of guilt or innocence is more important because the cost of an erroneous conviction is surely far higher than the social cost of an erroneous sentence of life imprisonment. See 4 W. Blackstone, Commentaries on the Laws of England 358 (better that ten guilty men go free than one innocent person be convicted).

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

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

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

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

In sum, Florida's statutory procedure already provides ample safeguards against "erroneous" failures to impose a death sentence. For this reason, the State's interest in an impartial jury in the sentencing phase is insubstantial by comparison to

the defendant's constitutional right to have an impartial jury decide the question of guilt or innocence.

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

The United States Court of Appeals for the Eleventh Circuit, in Smith v. Balkcom, supra, 660 F.2d at 580, concluded that -- regardless of the strength of the evidence that death qualified juries were predisposed in favor of the prosecution -- death qualification was not constitutional error because "[t]here is a potential benefit to a defendant . . . which would be lost were the jury which found guilt discharged and a new jury empaneled to decide punishment.[1] The members of the jury which heard the evidence in the guilt phase may believe that guilt has been proven to the exclusion of a reasonable doubt, "and yet, some genuine doubt exists. . . . The juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the . . . penalty of death. . . ." Id. This Court has repeatedly held that the sentencing judge should give no weight to jury recommendations based upon such lingering doubts about the defendant's guilt. In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court wrote:

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

Id. at 953. Accord Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985); Sireci v. State, 399 So.2d 964, 972 (Fla. 1981). This holding distinguishes Florida's capital sentencing scheme from the Georgia case discussed in Smith v. Balkcom. It is simply

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[1] Of course, it would not be necessary to empanel a new jury at all since in Florida the judge, not the jury, makes the final sentencing decision, and could give less weight to a jury recommendation influenced by jurors who would never vote to impose a death sentence. Nor would this be necessary if the court simply empaneled additional alternate jurors as substitutes for jurors who were not qualified to serve in the penalty phase.

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. Since none of the reasons which ordinarily support death qualification are applicable to Florida's sentencing process, a defendant's constitutional right to trial by an impartial jury surely must prevail in the balance. The only other justification the state might offer is the administrative and fiscal burden of selecting additional jurors for the sentencing phase. Even if such fiscal considerations could play a proper role in this Court's constitutional analysis, they are insufficient to overcome the defendant's constitutional rights. These expenses are slight by comparison to those incurred by, for example, a change of venue. Furthermore, they would be partially, if not entirely, offset by a reduction in the length of voir dire before trial, and by the increased accuracy of jury verdicts, which would reduce the costs of appellate review of capital cases.

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

"It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" Witherspoon, 391 U.S. at 521. Yet this is precisely what happens when we entrust the determination of guilt or innocence to a death qualified jury. Death qualification undermines the fundamental premise of our jury system: that the fairest trial is one before a group fairly and randomly chosen from the entire community, which mirrors that community in its values and its diversity. Without compelling reasons, the state may not abridge this right. A similar compromise between the state's interest and the right to a trial by a jury representing a fair cross section of the community is presented in challenges to a prosecutor's racially motivated use of peremptory challenges. The Supreme Court has agreed to consider

this issue this Term as well. Batson v. Kentucky, Docket No. 84-6263, cert. granted, 85 L.Ed 476 (1985). Florida's capital sentencing process makes death qualification before trial completely unnecessary.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of his execution scheduled Tuesday, April 15, 1986, and grant the writ so as to allow a new direct appeal. In the alternative, Petitioner requests that his conviction and sentence of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished in the most expeditious manner possible by hand delivery to the Office of the Attorney General, Elliot Building, Tallahassee, Florida, and by Federal Express to Penney Brill, Assistant Attorney General, Palm County Regional Service Center, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 9th day of April, 1986.

_____
Attorney