IN THE SUPREME COURT OF FLORIDA

JOHN EARL BUSH, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, Respondent.	)	Case No. 68617 CAPITAL CASE Execution is Imminent, Scheduled for Tuesday, April 22, 1986, 7:00 A.M.

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

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EHC

INTRODUCTION

This petition raises two claims. The first claim is that Mr. Bush received ineffective assistance of counsel on his direct appeal, because counsel failed to raise a glaring and well-established constitutional violation. The second is that the process of capital jury death qualification resulting in the exclusion of two jurors for cause, violates the sixth, eighth, and fourteenth amendments of the United States Constitution. This is a claim recently considered and which is pending before the United States Supreme Court in Lockhart v. McCree, Docket No. 84-1865.

II. JURISDICTION

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

Claim II. This Court's jurisdiction derives from the Florida Constitution. Article V, Section 3(b)(1), (7), and (9) (1981), and Rule 9.030(a)(3), Fla. R. App. P. See also Rule 9.100, Fla. R. App. P. Relief under Fla. R. Cr. P. 3.850 is not available because the issue presented in this application could have been raised on direct appeal.

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

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

If the United States Supreme Court affirms the Eighth Circuit, it will, in effect be pronouncing Mr. Bush's conviction and sentence unconstitutional. This pronouncement, of course, will have little meaning unless Mr. Bush's execution is stayed. We fully recognize that McCree is not yet "new law". A decision affirming the judgment of the Eighth Circuit, however, would clearly satisfy this court's definition of new law which may be invoked in a collateral challenge to a conviction. Witt v. State, 387 So.2d 922 (Fla. 1980).

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

III. FACTUAL BASIS FOR RELIEF

Claim I. Mr. Bush was compelled to participate in a lineup after his right to counsel attached, but without notice to or the assistance of an attorney. At trial, counsel objected to the crucial identification testimony based upon the lineup on the ground that counsel had not been present. Yet, on direct appeal Mr. Bush's attorney completely overlooked this fundamental constitutional error.

> Q. The normal procedure would be to notify us if a lineup is being conducted?
>
> A. I feel that it has been done before, yes sir. I personally, however, have been involved when representatives of the public defender's office advised that they weren't going to allow it. I have done it over the objection of the public defender based on severity of time and situations and circumstances and felt that it would be necessary to figure things out in a court of law as to whether or not it would stand.
>
> (Deposition of Detective Skip Heckendorn, taken August 23, 1982, at Stuart, Florida - App., Ex. ___ at 40).

Mr. Bush was arrested on May 4, 1982. (R 1311-1312). He was arraigned on May 5, 1982. (R 1313-1314). The Office of the Public Defender for Martin County was unable to represent Mr. Bush due to conflict connected with its representation of other defendants. (R 1334-1336). Anticipating that it would be representing Mr. Bush, however, a letter, dated May 5, 1982, was sent by the Office of the Public Defender to the State Attorney, the Chief of the Ft. Pierce Police Department, the Sheriff of Martin County, Detective Captain Robert L. Crowder of the Office of the Martin County Sheriff, the Administrator of the Martin County Jail, the Chief of the Stuart Police Department, and the Sheriff of St. Lucie County, requesting that no contact be made with Mr. Bush regarding the taking of statements or other criminal investigative procedures without first notifying the Office of the Public Defender. (R 1320, 1322, 1324, 1326, 1328, 1330, 1332). The stated objective of such notice would have been to effectuate the privilege of Mr. Bush against self-incrimination under the Fifth Amendment, as well as his right to

the effective assistance of counsel under the Sixth Amendment. (R 1320, 1322, 1324, 1326, 1328, 1330, 1332).

A private attorney, Richard Schopp, was appointed to represent Mr. Bush on May 6, 1982. (R 1318). On the same day, the appointment of Schopp was rescinded by a Martin County Judge. (R 1315). Mr. Bush was thereafter without counsel until May 18, 1982, at which time Lee Muschott was appointed to represent him by a Circuit Judge C. Pfeiffer Trowbridge. (R 1341).

On May 7, 1982, Mr. Bush made it known to law enforcement authorities that he wished to make a fourth statement. (R 651). At the insistence of the Sheriff of Martin County, Mr. Bush contacted Schopp to inform him that he intended to give another statement. (R 651). Schopp, who apparently was unaware that his appointment had been rescinded, advised Mr. Bush not to speak with the law enforcement officer. (R 655). Against this advise, Mr. Bush gave a statement to the Sheriff. (R 656).

On May 12, 1982, without notifying Schopp, detectives from the Martin County Sheriff's Office placed Mr. Bush in a physical lineup for the purpose of allowing potential witnesses to identify him. (R 363, App., Ex. ___ at 39-40). No attorney representing Mr. Bush was present at the time of the lineup. (R 364).

At the trial, one of the witnesses for the State, Danielle Symons, testified that she was present at the lineup. (R 350). The witness was shown a photograph of the lineup and indicated that she had identified one of the individuals in the photograph as someone whom she had previously seen in connection with the crime. (R 351). The individuals in the photograph were each designated by a letter and a number, and the witness picked "C-2" as the individual (R 351).

The State then called the detective who took the photograph of the lineup and sought to introduce the photograph, which had not yet been seen by the jury, into evidence. (R 364). The defense attorney entered an objection on the grounds that the State had failed to establish as a predicate that the defendant

was represented at the lineup or that he had waived his rights to have an attorney present at the lineup. (R 364). The court overruled the objection on the grounds that the lineup occurred prior to the indictment of the defendant on May 20, 1982, and the photograph was admitted into evidence. (R 365). The detective thereafter proceeded to indentify Mr. Bush as the individual designated "C-2" in the photograph, and testified that he was the same person identified at the lineup by Danielle Symons. (R 366).

The adversary proceedings against Mr. Bush had reached a "critical" stage prior to the time of the physical lineup. He had already been arrested, arraigned, and had had counsel appointed to represent him. The indictment of Mr. Bush came only eight days after the lineup was conducted.

Claim II. On voir dire examination, in connection with the process of death-qualification, one of the prosecutors posed questions to members of the venire concerning their ability to render a fair decision as to the guilt or innocence of the defendant. Such a question was posed to Juror number 46, Thompson:

> MR. MIDELIS: If the State of Florida proves its cases as required by law, would either one of you have any qualms or hesitations about returning a guilty verdict as to each count?...
> MRS. BECKER: No.
> MR. THOMPSON: No.

(R 250).

Subsequently, the prosecutor asked Mr. Thompson about his ability to impose a sentence of death at the penalty phase of the trial:

> MR. MIDELIS: ...Do you have any religious or personal beliefs which would prevent you from rendering an advisory sentence of death?... What about you, Mr. Thompson?
>
> MR. THOMPSON: Well, my beliefs -- I don't think you should take someone's life. It's something you can't give.

(R 251).

The prosecutor quickly proceeded to explain the bifurcated

nature of capital trials. (R 251-252). Thompson was then asked whether his beliefs concerning capital punishment would interfere with his ability to render a guilty verdict. (R 252). Apparently mistakenly thinking that the prosecutor was still talking about the penalty phase of the trial, Thompson indicated that he could not find the defendant guilty, despite his previous answer that he could:

> MR. MIDELIS: Do you think that based on your personal beliefs, sir, that you would be unable to render a verdict of guilty of murder in the first degree, knowing that there is a possibility that the defendant can be sentenced to death?
>
> MR. THOMPSON: Right.
>
> MR. MIDELIS: Is that the way you feel?
>
> MT. THOMPSON: That's the way I feel.
>
> MR. MIDELIS: Okay. You realize it's very important that jurors be able to consider both penalties. Are you telling the court that you are not able to consider the death penalty as one of the alternatives? That you are not able to do that?
>
> MR. THOMPSON: No.

(R 252) (emphasis added).

Subsequently, when it became clear that the prosecutor was again inquiring about the guilt phase of trial, Mr. Thompson indicated that he could fairly determine the guilt or innocence of the defendant by holding the State to its burden of proof:

> MR. MIDELIS: Would you be able to hold the State of Florida to a reasonable doubt standard, applying good old common sense? Would you do that?
>
> What about you, Mr. Thompson? Outside of your beliefs regarding capital punishment, would you be able to do that?
>
> MR. THOMPSON: I think so.

(R 253-254).

Despite the fact that Thompson stated that he could fairly and impartially render a determination as to the guilt or innocence of the defendant, he was excused for cause by the trial court. (R 255).

Juror number 99, Reid, was also excluded for cause, in spite of the fact that she never unequivocally indicated that her

views on capital punishment would prevent her from making a fair and impartial determination as to the guilt or innocence of Mr. Bush. (R 57). When questioned by the prosecutor, Reid merely suggested that her views on the death penalty could possibly interfere with her ability to sit at the guilt phase of the trial:

> MRS. REID: I don't know if I could take the responsibility of committing one to death. I just don't know if I could handle that.
>
> MR. STONE: Let me point two things out to you. First, your sentence is only advisory. The final decision, responsibility and burden lies with His Honor, the Judge...would that in any way cause you to change your opinion as to whether or not you could?
>
> MRS. REID: I just don't think I could handle the responsibility of condemning somebody. I think it's up to God.
>
> MR. STONE [incorrectly identified as Mrs. Reid]: I appreciate that and appreciate you being candid with us. As you sit here right now, do you feel that the fact that you feel that way and knowing that the proceedings here could ultimately end in death being imposed, does that cause you to feel uneasy about weighing the evidence of guilt or innocence in the first state, if you felt ultimately he could be sentenced to death?
>
> MRS. REID: I'd be honest with you, I'm afraid it would.
>
> MR. STONE: And you feel like that would affect you even in the first state, in the determining the guilt or the innocence, knowing if you rendered a verdict of guilty of murder in the first degree that the man could be put to death, you feel that it could affect you?
>
> MRS. REID: I feel it would be a problem for me, myself, in my heart.

(R 50-52) (emphasis added).

Reid was similarly equivocal in the answers which she gave in response to the queries of the defense counsel:

> MR. MUSCHOTT: I understand, of course, sympathy will enter into practically any case ... It'snot anything that is unique to this case or any particular type of case. Do you understand that? How would you feel about it with that in mind?
>
> MRS. REID: I don't know .. It would just be a very difficult thing to do.
>
> MR. MUSCHOTT: Do you think that could do it, put sympathy out of your mind and base your

verdict on the law and the evidence?

MRS. REID: No, I don't think so.

(R 56-57) (emphasis added). At no point in the voir dire examination did Reid unequivocally indicate that she would be unable to render a verdict of guilty if she felt that the evidence supported it. She merely stated that it would be "a very difficult thing to do."

In the case at bar, the jury was selected and prospective jurors Thompson and Reid excused for cause through a process of death-qualification or "Witherspooning", a device by which courts identify and exclude from capital juries those people whose views on the death penalty are considered incompatible with the duties of capital jurors. See Fla. Stat. sec. 913.13. The process involves questioning jurors about their attitudes towards the death penalty, and about the impact which their views might have on their ability to serve as jurors. Such intensive questioning, when coupled with the excusal of jurors who express opposition to the death penalty, leads to an inherent psychological biasing effect on the attitudes of those who remain to serve as jurors.

The elaborate questioning of prospective jurors about their death penalty views strongly suggests to them that the case which they are about to consider is a "death case" and that the defendant is guilty as charged. In this case, the members of the venire were reminded repeatedly that the case could result in the death penalty. The State told the venire that it was seeking the death penalty. (R 31, 153). The State and the defense each explained the bifurcated capital trial system. (R 42, 44, 48, 49, 137, 153, 250, 252). The State spoke at length about the felony murder rule. (R 43, 63, 159, 163). Both the State and the defense questioned various potential jurors intensively about their views on the death penalty. (R 46, 49, 50, 51, 52, 55, 63, 156, 157, 58, 220, 221 251, 258, 274, 277, 294, 309).

At one point during voir dire, the State even suggested that the penalty phase was foregone conclusion:

> MR. STONE: ...Now, will you fulfill your duty, even though you realize that somebody else has the ultimate decision to make? In order words, what I'm saying is will you not go back there and say well, the Judge has the final decision anyway, so I'm going to get this lifted from my shoulders and I'll just advise life, and the Judge can do with him what he wants to? In other words, will you fulfill your duty, even though you know the Judge has the final decision and if you feel that based on the instructions in this case that you should enter an advisory sentence of death, will you do that even though you know the Judge has the final burden?

(R 223). The language of the prosecutor clearly suggested to the jury that there was no question that they would be required to render an advisory sentence, a fact which would only be true if the guilt of Mr. Bush were a foregone conclusion.

By focusing undue attention on those jurors who expressed reservations about imposing the death penalty, the death-qualification process left remaining members of the venire with the impression that opposition to the death penalty is approved neither by the law, nor by the judge. Thompson and Reid, the only two members of the venire who expressed qualms about the death penalty, were extensively interrogated by both the State and the defense, after which each was promptly excused without explanation. No one remaining on the jury would have wanted to suffer the same disapprobation received by Thompson and Reid. Their excusal served as a vivid demonstration that opposition to the death penalty is disfavored by the law.

The psychologically suggestive process of death-qualifying members of the venire thus became inextricably linked with the selection of a conviction-prone jury. For this reason, a stay of execution should be granted, the sentence of death vacated, and the conviction reversed.

IV. RELIEF SOUGHT

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

Claim II. Mr. Bush seeks immediate relief, in the form of a stay of execution, in order to preserve this Court's jurisdiction over his constitutional claims. The issue raised in this application is currently before the United States Supreme Court. Lockhart v. McCree, Docket No. 84-1865. During argument, on January 13, 1986, the Supreme Court Justices specifically inquired into the implications of Lockhart for the State of Florida, presumably because in Florida judges, not juries, have ultimate responsibility for sentencing decisions.

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

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

V. BASIS FOR RELIEF

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

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer . . ." Lucey, 105 S.Ct. at 835 (quoting Strickland v. Washington, 104 S.Ct. 2052 (1984). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae". Anders, 386 U.S. at 744. These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657 , 664 (1984). Counsel is crucial, to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835, n.6. Unless counsel requires the "prosecution's case to survive the crucible of meaningful adversarial testing," Cronic, 80 L.Ed. at 666, this Court cannot easily perform its assigned function, as the leader of Florida's judiciary, to ensure "that the guilty be convicted and the innocent go free." Lucey, 105 S.Ct. 830, 835 (citations omitted). "'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" Cronic, 80 L.Ed. at 657 (citing the quote from Kaufman, Does the Judge Have a Right To Qualified Counsel, 61 ABAJ 569, 569 (1975)).

Effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play

the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S.Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also, Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

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

This Court has long protected the right of indigents to effective appellate representation. In Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation of appeal fell below an acceptable standard." Subsequently, upon Mr. Barclay's new appellate record, briefing, and argument, this Court reversed Barclay's death sentence, and ordered that a life sentence be imposed. More recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome . . ." Harris v. Wainwright, ___ So.2d ___ (Fla. No. 66,523, June 13, 1985, slip at 3).

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

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

A lineup identification procedure is a critical stage of a criminal prosecution. Eyewitness identification is both highly persuasive and extremely unreliable.

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt . . . the post-indictment lineup was a critical stage of the prosecution, at which

> he was "as much entitled to such aid [of counsel] . . . as at the trial itself."

Wade v. United States, 388 U.S. 218, ___ (1967), quoting, Powell v. Alabama, 287 U.S. 45, 57 (1932). Wade has been black letter law since 1967. No reasonable appellate lawyer could have missed this issue, which was properly preserved at trial. While full briefing of this issue would be inappropriate here, it is clear that had appellate counsel raised the constutional issue, Wade would compel reversal.

To prove a violation of Wade, a criminal defendant must show two things: (1) his right to counsel has attached for sixth amendment purposes, and (2) he was compelled to participate in a lineup without the assistance of an attorney.

A. Attachment of the Right to Counsel.

The sixth amendment guarantees a criminal defendant the right to counsel as soon as adversary judicial proceedings have commenced against him. Moran v. Burbine, ___ U.S. ___, 54 U.S.L.W. 4265, 4269 (U.S. March 10, 1986); Michigan v. Jackson, ___ U.S. ___, 54 U.S.L.W. 4334, 4335 (U.S. April 1, 1986). See also Kirby v. Illinois, 406 U.S. 682, 689 (1972) (opinion of Stewart, J.); United States v. Gouveia, 467 U.S. 180, 187 (1984). "[A] person is entitled to the help of a lawyer at or after the time that formal judicial proceedings have been initiated against him--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 398 (1977) (emphasis added). In Michigan v. Jackson, supra, the Supreme Court noted that "in view of the clear language in our decisions about the significance of arraignment, the state's argument [that the right to counsel did not attach at arraignment] is untenable." Michigan v. Jackson, 54 U.S.L.W. note 3 at 4335.

B. Absence of Counsel

Although the Public Defender's office expressly requested notice before the police conducted a lineup or interrogation, and although it was clear that Mr. Bush did have a right to counsel, no lawyer was present during the lineup. Because he had a clear

right to the assistance of counsel, the fact that no counsel was representing Mr. Bush at the time of the lineup is immaterial. Two lawyers had already appeared on behalf of Mr. Bush, and he was not in any way responsible for the gap in representation. It was especially improper for the police to take advantage of this lapse to ensure that a lineup could be conducted without the interference of an attorney representing Mr. Bush.

Brewer and Wade establish a glaring constitutional error in the record, which any competent attorney would have presented to this Court. Mr. Bush should be given an opportunity to do so through new counsel on a new direct appeal.

Claim II. This Court is familiar with the issue presented in Lockhart v. McCree, Docket No. 84-1865, and the claim Mr. Bush presents here. We recognize that this Court has declined to reconsider the position it adopted in Riley v. State, 366 So.2d 19 (Fla. 1978), notwithstanding the pendency of Lockhart. See e.g. Funchess v. Wainwright, 68,412 (Fla. April 17, 1986). As Judge Frank Johnson of the United States Court of Appeals for the Eleventh Circuit observed in his dissenting opinion in Thomas v. Wainwright, Case No. 86-3244 (11th Cir. April 14, 1986):

> if the Supreme Court's action in Grigsby cases is to be our guide, then in all candor, we are at this point, groping in the dark.

Ms. op. at 6 (dissenting opinion). Judge Johnson surveyed and analyzed the United States Supreme Court's decisions on applications for stays of execution since certiorari was granted in Lockhart. He found no consistent pattern. No one can be sure what the decision in Lockhart will say, or how broadly it will sweep. During this period of continuing uncertainty--which is likely to be brief--the prudent course would be for this Court to stay Mr. Bush's execution until the lawfulness of the death qualification procedure used in his case is resolved once and for all. As we show, there are compelling reasons why death qualification needlessly impairs the selection of a fair, impartial and representative jury.

Mr. Bush will not here repeat the social science studies

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

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

a. Death Qualified Juries Are Not Impartial

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

The guarantees of jury trial in the Federal

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

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

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

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

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

In addition to the fundamental requirement that a trial jury be fair and impartial, it must also be representative of the community. "[T]he fair cross-section requirement [is] . . .

fundamental to the jury trial guaranteed by the Sixth Amendment. . . ." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). In Duren v. Missouri, 439 U.S. 357, 364 (1979), the Court explained:

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

The Eighth Circuit applied this standard:

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

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

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

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

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

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

verdicts, and creates a risk of erroneous convictions, the State has no interest in obtaining a death qualified jury, unless the administrative advantages of having a single jury panel decide both guilt and penalty is greater than the constitutional deficiencies arising from the demonstrated bias and unreliability of death qualified juries.

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

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

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

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing pro-

> ceeding 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. (emphasis added)

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

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

This is especially true in Florida for two reasons. First, the verdict in the sentencing phase need not be unanimous. Even if the sentencing jury were less than impartial, it might still reach the same result by a smaller majority. Second, the jury's sentencing verdict is only advisory. We discuss this point in

greater detail below. In general, the determination of guilt or innocence is more important because the cost of an erroneous conviction is surely far higher than the social cost of an erroneous sentence of life imprisonment. See 4 W. Blackstone, Commentaries on the Laws of England 358 (better that ten guilty men go free than one innocent person be convicted).

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

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

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

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

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

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

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

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

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

Of course, it would not be necessary to empanel a new jury at all since in Florida the judge, not the jury, makes the final sentencing decision, and could give less weight to a jury recommendation influenced by jurors who would never vote to

impose a death sentence. Nor would this be necessary if the court simply empaneled additional alternate jurors as substitutes for jurors who were not qualified to serve in the penalty phase. Since none of the reasons which ordinarily support death qualification are applicable to Florida's sentencing process, a defendant's constitutional right to trial by an impartial jury surely must prevail in the balance.

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

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

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

6263, cert. granted, 85 L.Ed 476 (1985). Florida's capital sentencing process makes death qualification before trial completely unnecessary.

CONCLUSION

Obviously, this court cannot search every record on appeal in every capital case for error. Where the points omitted would have, as we have demonstrated, resulted in reversal, appellate counsel's failure reaches the level of constitutionally ineffective assistance of counsel, and Petitioner must be granted a new appeal. A stay of execution should be entered pending the decision in Lockhart, and to allow Mr. Bush to pursue a new appeal in this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Richard Bartmon, Assistant Attorney General, Office of the Attorney General, Elliott Building, Tallahassee, Florida this 21 day of April, 1986.

_____
Attorney