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

RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

COMES NOW Respondent, LOUIE L. WAINWRIGHT, by and through undersigned counsel, and files this its Response in opposition to Petitioner's Application/Request for a stay of execution, and states as follows·

1. On November 22, 1982, Petitioner was adjudicated guilty of first-degree murder, armed robbery and kidnapping, and sentenced to death. On November 29, 1984, this Court affirmed the Petitioner's convictions and sentences. Rehearing was denied on January 31, 1985. Bush v. State, 461 So.2d (Fla. 1984). On February 24, 1986, the United States Supreme Court denied certiorari review. Bush v. Florida, ___ U.S. ___, 89 L.Ed.2d 345 (1986).

On March 20, 1986, the Governor signed a warrant for Petitioner's execution. Said execution is scheduled for April 22, 1986 at 7:00 A.M., and expires April 23, 1986 at 12:00 P.M. On the day before the scheduled execution Petitioner first filed the present petition in this Court. It is also Respondent's understanding that on the same day, Petitioner filed his motion to vacate and judgment and sentence in the trial court. This Court previously scheduled oral argument on any motions or appeals concerning this death warrant, for Wednesday, April 16, at 9:00 A.M., which was

postponed due to the absence of any pleadings or motions, at said time, before this Court.

2. That the late filing of this pleading, is but the latest in a series of such deliberate, dilatory tactics by Petitioner's present counsel, the Office of the Capital Collateral Representative, which this Court has expressed considerable concerns with, in recent decisions. Mann v. State, 11 FLW 47, n. 1 (Fla. February 1, 1986); also, see Harich v. State, 11 FLW 119, 120 (Fla., March 18, 1986) (Ehrlich, J and Barkett, J, dissenting opinion). Petitioner's counsel has failed to advance any explanations for such delay, and should not be granted such a remedy, solely because of strategically, dilatory lack of activity in this case, until his current pleading. Mulligan v. Zant, 531 F.Supp. 458, 460 (M D Ga 1982).

3. There is simply no excuse for first filing the petition one day before Petitioner's scheduled execution. Petitioner's representation by the Office of the Capital Collateral Representative does not present any basis for a stay. This Court has rejected the notion that excessive workload prevents more expeditious filing, in specifically concluding that such protests of lack of time and resources, for allegedly adequate investigation of possible collateral claims, do not provide any basis for a stay:

> It is suggested that the enactment of chapter 85-332, Laws of Florida [§27.7001, Fla. Stat. (1985)], creating the office of Capital Collateral Representative, conferred upon [Petitioner] a right to collateral representation that will be denied without a stay of execution to allow more time to prepare for the filing of collateral challenges to the judgments and sentences. While chapter 85-332 represents a state policy of providing legal assistance for collateral representation on behalf of indigent persons under sentence of death, it did not add anything to the substantive state-law or constitutional rights of such persons [citation omitted].

Troedel v. State, 479 So.2d 736, 737 (Fla. 1985) (emphasis added). Furthermore, Petitioner's counsel could certainly have foreseen the signing of a death warrant for Petitioner, since said counsel is clearly well aware that Petitioner had a clemency proceeding, and was denied certiorari by the United States Supreme Court, back in February, 1986. A stay of proceedings in this case, would only serve to encourage Petitioner's counsel to flout the language of §27.7001, by failing to begin collateral proceedings, for subsequent death row inmates, "in a timely manner," so as to promote the assurance of finality of judgments to the citizens of Florida. §27.7001, supra.

4. That Petitioner, in his current pleadings, has failed to demonstrate any likelihood of success on the merits of his claim that his appellate counsel was ineffective. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Francois v. State, 423 So.2d 357 (Fla. 1983); Douglas v. State, 373 So.2d 895, 897 (Fla. 1979) (England, J, and Sundberg, J, specifically concurring opinion). Petitioner has not demonstrated that his appellate counsel's performance was specifically deficient, or that such specific deficiencies undermined confidence in the outcome of his trial or sentencing proceedings, in any way. Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985); Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984). Petitioner can clearly not maintain success on the merits of his Grigsby[1] claim before this Court, which has consistently rejected this claim, and denied stays, based on it. Funchess v. Wainwright, Case No. 68,412 (Fla., April 17, 1986); Thomas v. Wainwright, 11 FLW 154, 155 (Fla., April 7, 1986); Harich v. Wainwright, 11 FLW 111 (Fla., March 17, 1986); Adams v. Wainwright,

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[1] Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), cert. granted, sub nom Lockhart v. McCree, 106 S.Ct. 59 (1985) (oral argument heard January 13, 1986).

11 FLW 79 (Fla., February 26, 1986); Adams v. State, 11 FLW 94 (Fla., March 3, 1986); Kennedy v. Wainwright, 11 FLW 65 (Fla., February 12, 1986); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978). Moreover, since Grigsby/Lockhart has no application to this case, see Response to Petition for Habeas Corpus, there is no need to grant a stay, pending application for certiorari to the U. S. Supreme Court. Thomas, supra; Harich, supra.

5. That any reliance on the fact of death by execution, in alleging irreparable injury, is unfounded and unsubstantiated, in view of Federal court precedent that such a fact does not necessarily mandate a stay. As noted in Mulligan, supra, Federal courts do not regard this fact as warranting a stay, because the effect of same would make such fact ..."overriding to the exclusion of the first consideration, i.e., a substantial likelihood of success on the merits." Mulligan, at 460 (emphasis added).

Furthermore, the concept of finality of litigation, even in the context of capital punishment, is a legitimate interest of the State of Florida, according to §27.7001, supra, and Federal courts. O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982); Evans v. Bennett, 400 U.S. 1301, 1303 (1979) (Rehnquist, J, granting a stay of execution).

6. Therefore, this Court should not reward Petitioner, for his apparent strategy of undue delay, until the "eleventh hour." Mulligan; §27.7001, supra.

7. Although the Respondent believes that no stay is warranted, Respondent is aware of the option by this Court of granting a twenty-four (24) hour stay to allow this Court the opportunity to deliberate and decide the merits of the issues presented on an expedited basis, with if necessary, both sides having the opportunity to file simultaneous briefs and present oral argument. If this procedure is followed, there would be no reason for this Court to enter a further

stay of execution. See, e.g., Francois, supra (England C., J and Sunberg, J, concurring specially); Proffitt v. State, 372 So.2d 1111 (Fla. 1979); Spinkellink v. State, 372 So.2d 65 (Fla. 1979). See also Barefoot v. Estelle, 463 U.S. 880 (1983); Mulligan v. Zant, 531 F.Supp. 458 (M D Ga. 1982).

WHEREFORE, Respondent respectfully requests that Petitioner's application for stay be DENIED.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Application for Stay of Execution has been mailed to STEVEN MALONE, ESQUIRE, Office of the Capital Collateral Representative, 216 Coquina Hall, University of South Florida - Bayboro, 140 5th Avenue South, St. Petersburg, Florida 33701, this 21st day of April, 1986.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

JOHN EARL BUSH, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND/OR OTHER EXTRAORDINARY RELIEF

COMES NOW Respondent, LOUIE L. WAINWRIGHT, by and through undersigned counsel, and files this, his Response, in opposition, to Petitioner's Petition for Writ of Habeas Corpus, Request for Stay of Execution, and/or other extraordinary relief, and states as follows:

INTRODUCTION

On March 20, 1986, Governor Bob Graham of Florida signed a death warrant, authorizing the Superintendent of the Florida State prison, to carry out Petitioner's execution between noon on April 16, 1986, and noon on April 23, 1986. Petitioner's execution has been scheduled for Tuesday, April 22, 1986, at 7 A.M. Respondent would point to the dilatory nature of this pleading, with no apparent justification for such late filing other than strategic, and in view thereof reserves the right to more fully respond to the allegations in Petitioner's present pleadings, at oral argument, or in a subsequent responsive pleading, if necessary.

In this pleading, "R" will refer to the trial and sentencing Record.

JURISDICTION

The nature of Petitioner's claims are that he did not receive effective assistance of appellate counsel, Martha Warner, Esquire (nom Judge Warner), on his direct appeal of his conviction and sentence, before this Court. As such, this Court's jurisdiction has been appropriately invoked under Article V, Section 3(b)(9) of the Florida Constitution (1980), and/or under Rule 9.030(a)(3), F.R.A.P. (1984), but Respondent obviously continues to maintain that Petitioner is not entitled to any relief.

PROCEDURAL HISTORY

On May 20, 1982, Petitioner was indicted for the first-degree murder, armed robbery and kidnapping of Frances Julia Slater on April 27th, 1982. (R, 1360-1361). After jury trial, Petitioner was found guilty on all counts (R, 1640-1642). At the conclusion of the sentencing phase, the jury advised, by a 7-5 vote, that Petitioner be given the death penalty. (R, 1295-1298).

On November 22, 1982, the trial court made specific factual findings, and imposed the death penalty upon Petitioner. (R, 1300-1308). The trial court referred to the existence of evidence to support three (3) aggravating circumstances: that the murder occurred during the commission, facilitation and/or escape from the felonies of kidnapping and/or robbery; that Petitioner had been convicted of a prior violent felony (in 1974, robbery and sexual battery); and that the murder was committed in a "cold, calculated and premeditated" manner, without pretence of moral or legal justification. (R, 1300-1304). The trial court judge indicated he had reviewed all evidence and argument presented (both statutory and non-statutory) as to mitigating circumstances, but had concluded not to give weight or affirmative finding on any mitigating circumstances. (R,

1304-1308).

On direct appeal, Ms. Warner raised eleven (11) issues. See Initial Brief of Appellant, Bush v. State, Case No. 62,947. Petitioner's challenges to his conviction, were as follows:

1. The trial court erred in failing to find that a police officer's different testimony at trial, from his pre-trial deposition, was a discovery violation, and constituted grounds for mistrial;

2. That the admission of Petitioner's pre-trial statements to police, was erroneous, because said statements were coerced by the promise by police of benefits, and were in part obtained without proper Miranda warnings;

3. That the admission of gruesome photographs, depicting the head and face of the victim, and her wounds, was irrelevant and prejudicial to Petitioner;

4. That the exclusion of one of the venirepersons, during voir dire, because of her attitudes towards the death penalty, and their effect on her ability to be an impartial juror, was improper;

5. That the State should have been compelled to proceed to trial by choosing one of the alternate theories of murder (premeditated or felony) to be proved;

6. That the trial court should have instructed the jury, as to third-degree murder, based on the evidence presented.

Petitioner's challenges to his death sentence, were as follows:

7. That the Florida death penalty statute was Unconstitutional on its face, and as applied, on a variety of grounds;

8. That the trial court's instructions to the jury, concerning the status and effect of a "majority" recommendation, were reversibly erroneous;

9. That the trial court should have given the jury an Enmund instruction, for the jury to consider whether Petitioner's alleged limited participation should have Constitutionally prevented the imposition of the death penalty.

10. a) That there was insufficient evidence to support the trial court's finding, as to the aggravating circumstance of the "cold, calculated and premeditated" manner, in which the killing occurred; and that the nature of the murder allegedly created an "automatic" aggravating circumstance of felony-murder, in violation of the Eighth Amendment and due process concerns;

b) that the scope of the State's cross-examination of Petitioner during the sentencing phase, and the nature of the prosecutorial comments made during argument, were improper and prejudicial;

c) that the trial court failed to consider non-statutory mitigating circumstances, and/or give weight to any mitigating circumstances.

11. That Petitioner's sentence, on both the murder charges and the felony charges of robbery and kidnapping, violated Petitioner's double jeopardy rights.

This Court rejected all arguments, including a specific finding that, on the evidence, Petitioner's participation in, and facilitation of the murder by his actions, was "active" and major. Bush v. State, 461 So.2d 936, 941 (Fla. 1984). This Court subsequently denied rehearing on January 31, 1986.

Petitioner subsequently filed a petition with the U.S. Supreme Court seeking certiorari review, on April 1, 1985. The Supreme Court denied certiorari review, on February 24, 1986. Bush v. Florida, ___U.S.___, 89 L.Ed.2d 345 (1986). Executive clemency was denied by the Governor and Cabinet in 1986.

in any other state or Federal court.

FACTS

In this pleading, Petitioner's presentation of facts is self-serving, and highly selective, and is wholly rejected by Respondent, who will address said factual allegations, and the relevant facts not discussed by Petitioner, in his Arguments, on the issues.

PETITIONER'S LEGAL CLAIMS

The Petitioner raises two grounds in his present petition, one, that he did not receive effective assistance of appellate counsel on his direct appeal, and two, the "Lockhart claim." In support of the first ground, Petitioner alleges that appellate counsel was ineffective for failing to raise the issue of counsel's absence at a line up.

ARGUMENT

I. Ineffective Assistance of Appellate Counsel

In the present habeas corpus petition, Petitioner alleges that his appellate counsel rendered ineffective assistance by not raising various issues on his direct appeal. As with a claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Johnson v. Wainwright, 463 So.2d 207,209 (Fla. 1985).

In Strickland v. Washington, supra, the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as

> to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> 80 L.Ed.2d at 693.

In explaining the appropriate test for proving prejudice the Court held that [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 80 L.Ed.2d at 698.

In reviewing the Strickland standard as it applies to ineffectiveness of counsel on appeal, this Court has held that a Petitioner in a habeas corpus proceeding must show:

> . . . first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.
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> Johnson v. Wainwright, supra, 463 So.2d at 209.

See also Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

Specifically, in reviewing claims of ineffective assistance of appellate counsel, it is recognized that a habeas corpus petitioner's allegations of ineffective assistance of counsel should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Steinhorst v. Wainwright, 477 So. 2d 537, 539 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246, 1247 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). See also Smith v. State, 457 So.2d 1380, 1383 (Fla. 1984). Appellate counsel is not required to press every conceivable claim upon appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The Supreme Court recognized that experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one control issue if possible, or at most on a few key issues..."

A brief that raises every colorable issue runs the risk of burying good arguments...in a verbal mound made up of strong and weak contentions." 77 L.Ed.2d at 994. Thus, the Court held that "for judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders."[2/] 77 L.Ed.2d at 995. See also Johnson v. Wainwright, supra; Cave v. State, 476 So.2d 180, 183 n. 1 (Fla. 1985).

Counsel is also not required to raise issues which are not properly preserved by trial counsel for appellate review, Jackson v. State, 452 So.2d 533, 538 (Fla. 1984), or raise issues reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984). Because of the presumption of competence and the required deference to counsel's strategic choices, where appellate counsel's failure to raise certain issues on direct appeal could have been a tactical choice based on the need to concentrate the arguments on those issues likely to achieve success, counsel's performance will not be deemed ineffective. See Smith v. State, supra; McCrae v. Wainwright, supra; Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

Respondent asserts Petitioner has failed to sustain his burden of demonstrating that his appellate counsel's performance was defective and even if defective, clearly has not shown that but for the defective performance, the outcome of the appeal would have been different. Respondent further asserts that Petitioner cannot show that his counsel was ineffective in failing to raise the line-up claim as the issue was not properly preserved below.

[2/] Anders v. California, 386 U.S. 738 (1967).

Below, no pre-trial motion to suppress the line-up indentification was filed. Further, at trial, the witness Danielle Symons, testified without objection to viewing the line-up from which she identified Petitioner (R.350-352); she further identified a photograph of that line-up in open court, without objection from trial counsel (R.350). The only objection having anything to do with the line-up, was when the state sought to introduce into evidence a photograph of the line-up (R.364). Defense counsel asserted that the state was required to, and had failed to establish the defendant's representation or rights waiver at the time of the line-up as a predicate to admission of the photo into evidence. Clearly, this objection is insufficient to preserve the issue of whether Petitioner was deprived of his right to counsel at a preindictment line-up. Thus, the issue not being preserved for appellate review, appellate counsel clearly was not deficient for failing to raise the instant claim.

Additionally, Respondent asserts that Petitioner's appellate counsel was not ineffective for raising a claim regarding the line-up, as is clear he could not have prevailed on the merits of this claim.

Responsdent acknowledges that it is well established that a person's right to counsel attaches only after advesary judicial proceedings have been initiated against him. Powell v. Alabama, 287 U.S. 45, 53 S.Ct 55, 77 L.Ed. 158 (1932). In Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), the Supreme Court held that a pre-indictment line-up is not a "critical stage" for purposes of the Sixth Amendment right to counsel. Recently in Michigan v. Jackson, ___U.S. ___, 39 CRL 3001 (April 1, 1986), Moran v. Burbine, ___U.S.___, 38 CRL 3182 (March 10, 1986), and United States v. Gouveia, 487 U.S. 180, 104 S.Ct.___, 81 L.Ed.2d 146 (1984), the United States Supreme Court reaffirmed its holding in Kirby v. Illinois, 406 U.S. 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), that the right to counsel does not attach until the initiation of adversary

judicial proceedings against the defendant. Gouveia, supra at 154. Kirby, supra, held that a pre-indictment line-up is not a "critical stage" for purposes of the Sixth Amendment right to counsel. Here the Petitioner participated in a line-up (on May 12, 1982, R.363), conducted prior to the time he was informed against, i.e. May 20, 1982 (R.1360). Inasmuch as the holdings in Jackson, supra, Burbine, supra, and Gouveia, supra, specifically reaffirm Kirby, supra, it is clear appellate counsel could not have prevailed on this issue. Further, Florida courts have repeatedly held that the Sixth Amendment right to counsel does not apply to preindictment situations. Perkins v. State, 228 So.2d 382 (Fla. 1969), Robinson v. State, 237 So.2d 268 (Fla. 4th DCA 1970), Robinson v. State, 351 So.2d 1101 (Fla. 3rd DCA 1977), cert.den. 435 U.S. 975. The state asserts the Florida courts have never held that a defendant was entitled to counsel prior to being arraigned. Even if this claim was cognizable, in light of the overwhelming evidence of Petitioner's guilt, it is clear the raising of this issue would not have affected the outcome of the appellate proceedings; thus Petitioner has not and can not meet the prejudice prong of Strickland, supra.

Appellate counsel was not required to raise every conceivable challenge imaginable to the judgment and sentence, so as to avoid the risk of being held accountable as ineffective at some subsequent juncture of the proceedings. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983). In fact, this Court has clearly indicated that such an approach was definitely not favored, and is a disservice to the client, and to professional legal assistance in general. Cave, supra, at 183, n. 1. Furthermore, Petitioner was not entitled to perfect, errorless assistance. Meeks v. State, 382 So.2d 673 (Fla. 1980). On this Record, it appears that Petitioner had the benefit of reasonably effective assistance on appeal.

2. THE LOCKHART CLAIM

As with many petitions for habeas relief that have come before this Court, in an "eleventh-hour" attempt to gain a stay of execution for death row defendants, Petitioner has made a "bootstrap by association" claim to this Court, hoping to benefit by the pending nature of a United States Supreme Court case. Adams v. Wainwright, 11 FLW 79 (Fla., February 26, 1986). Specifically, Petitioner has maintained that the voir dire process, which resulted in the exclusion of two jurors, for cause, based on their express inability to impartially deliberate the question of Petitioner's guilt or innocence, resulted in the denial of his Constitutional rights to a jury comprised of a fair cross-examination of the community, and/or due process. Petitioner has thus desperately tried to extrapolate and apply the narrow holding of Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), now pending review before the U.S. Supreme Court, Lockhart v. McCree, 106 S.Ct. 59 (Case No. 84-1865), to his case. As in other cases where capital defendants have improperly invoked the so-called "Grigsby-Lockhart" issue, when said issue has no application to their case, this Court should reject Petitioner's claim.

Any claims relating to the excusal of any of the jurors, at trial, for cause, are barred by Petitioner's failure to raise or challenge the voir dire process, on the grounds that such process "death-qualified" the jury, or rendered them "conviction-prone," in violation of Petitioner's Sixth Amendment rights to an impartial jury. Funchess v. Wainwright, Case No. 68,412 Fla. April 17, 1982); Thomas v. Wainwright, 11 Flw 154 (Fla. April 7, 1986); Harich v. Wainwright, 11 FLW 111 (Fla. March 17, 1986); Steinhorst v. Wainwright, 477 So.2d 337 (Fla. 1985). Petitioner's argument and objections on appeal, to the excusal of juror Reid, did not amount

to sufficient preservation of the argument and issue that Petitioner now urges. Bush v. State, 431 So.2d 936, 940 (Fla. 1984). Furthermore, no such claim, or proffer of evidentiary support for such claim, was made at trial. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968); Grigsby, supra, at 232; Kennedy v. Wainwright, 11 FLW 65 (Fla. February 21, 1986).[1/]

Furthermore, as to the merits of the Grigsby-Lockhart claim, this Court has consistently rejected said claim, with regard to the exercise of both peremptory and for cause challenges, for approximately eight years, from the decision in Riley v. State, 366 So.2d 19 (Fla. 1978), to its most recent pronouncement in Thomas, supra, on April 7, 1985. Thomas, supra, James v. Wainwright, 11 FLW 111 (Fla., March 14, 1986); Harich, supra; Adams v. Wainwright, 11 FLW 79 (Fla., February 26, 1986); Kennedy v. Wainwright, 11 FLW 65 (Fla., February 12, 1986); Dougan v. State, 470 So.2d 697 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Maggard v. State, 399 So.2d 973 (Fla. 1981); Riley, supra. It should also be noted that, with the exception of the Eighth Circuit in Grigsby, supra,[2/] all other Federal appeals courts that have considered the question, have rejected Grigsby/Lockhart. Kennedy, supra, at 66; Martin v. Wainwright, 770 F.2d 918, 938 (11th Cir. 19850: McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985); Jenkins v. Wainwright, 763 F.2d 1390 (11th Cir. 1985); Hutchins v. Woodard, 730 F.2d 953 (4th Cir. 1984), application for vacation of stay granted, ___ U.S. ___, ___ S.Ct. ___, 78. L.Ed.2d 977 (1984); Barfield v. Harris, 719 F.2d

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[1/] As such Petitioner failed to establish a prima facie violation of the Sixth Amendment requirement that juries in criminal cases be drawn from a fair cross-section of the community. See Duran v. Missouri, 439 U.S. 357, 364 (1979).

[2/] Even Grigsby rejected the claim as it applied to peremptory challenges. 758 F.2d at 230.

58 (4th Cir. 1983); Spenkellink v. Wainwright, 578 F.2d 582, 591-599 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

Most significantly, however, is the unequivocal factual distinctions between Grigsby/Lockhart, and the present case, such that the limited Grigsby holding, has no application whatsoever herein. Said holding is limited in scope, by the express language in the Grigsby opinion to those potential jurors who are excluded from a capital jury, based on their attitudes against the death penalty, despite the fact that such jurors might nevertheless be capable of impartially determining a defendant's guilt or innocence, at the trial phase. Grigsby, at 232. This is unequivocally substantiated, by the Grigsby court's reference to, and definition of, the subject class of potential capital jurors, as those who could not vote for or consider the death penalty. Grigsby, at 228, n. 2; 231, n. 8; 232. The Grigsby majority directly conceded that, under different factual circumstances than those in Grigsby, it was "undisputed" that a state could properly exclude jurors for cause who "will not abide by their oath," or who could not "decide guilt-innocence on the basis of the law and evidence presented." Grigsby, at 239, n. 27. This Court has clearly noted such distinctions, and the limits of Grigsby based on these factual differences. Funchess, supra; Thomas, supra; Harich, supra.

The United States Supreme Court, and this Court, have stated that exclusion of a juror for cause, based on attitudes against the death penalty, is appropriate, when such views have been found to "prevent or substantially impair" such juror's impartiality, in discharging his or her duties as a juror, based on their oath, the law, and the court's instructions. Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Cave v. State,

476 So.2d 180, 183-185, n. 2 (Fla. 1985). The Record demonstrates that juror Reid initially stated she could not accept the responsiblity of condemning a person to death, and that this made her "uneasy" about weighing Petitioner's guilt or innocence. (R, 51, 52). She openly acknowledged that this could create a "problem" for her, and that such feelings would "override" in her consideration of the case. (R, 53). Finally, Reid unequivocally and flatly stated she could not set aside said feelings, could not "live" with sending someone to the electric chair, and that as a result she could not put sympathy for Petitioner out of her mind and follow the law as charged. (R, 55-57) (emphasis added). Juror Thompson similarly flatly stated that, with the possibility of the death penalty, he could not find Petitioner guilty, regardless of the evidence. (R, 252). This clear inability to impartially determine Petitioner's guilt or innocence, cannot possibly be equated with the factual context of Grigsby, and thus the pending Lockhart case could have no possible application or effect herein. Funchess, supra; Thomas, supra. In effect, Petitioner is re-arguing the merits of the propriety of the trial court's excusals for cause under the Witt standard, on different grounds, in his habeas action, which this Court has repeatedly declined to entertain as a de facto second direct appeal. Thomas; Steinhorst; Johnson. It should be noted that Petitioner's counsel did in fact challenge Reid's excusal, by the trial court, on appeal, on the appropriate legal theory and case law, actually applicable to the facts. Bush, supra, at 940; Steinhorst; Ruffin; see also Kennedy v. Wainwright, supra.

Petitioner's efforts to hitch his wagon to the train of death penalty defendants who have sought to utilize Lockhart to stall the state's execution of a lawfully imposed punishment should be rejected. Petitioner

received a fair trial from jurors carefully selected by both the prosecutor and defense counsel because of their stated desire and ability to render judgment on guilt and penalty solely upon the circumstances of the case as presented through the evidence and the law as explained to them by the judge. Petitioner had no objections to the process of the jury selection for the intervening years before Lockhart. His efforts to now magically transform a factually incomparable case to fit the Lockhart umbrella should be rejected as an eleventh hour grasping at straws.

CONCLUSION

Based on the foregoing Respondent respectfully requests that this Court DENY Petitioner's Petition for Writ of Habeas Corpus, Request for Stay of Execution, and the Petition for any and other extraordinary relief.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Habeas Corpus, Request for Stay of Execution, and/or Other Extraordinary Relief has been mailed to STEVEN MALONE, ESQUIRE, Office of the Capital Collateral Representative, 216 Coquina Hall, University of South Florida - Bayboro, 140 5th Avenue South, St. Petersburg, Florida 33701, this 21st day of April, 1986.

Richard G. Bartmon
Of Counsel