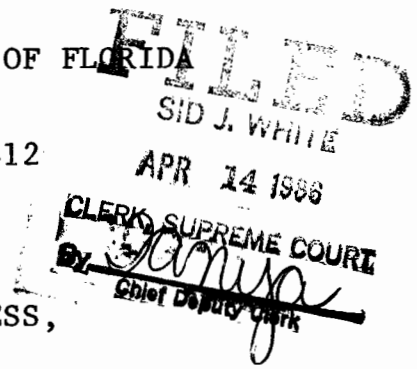
IN THE SUPREME COURT OF FLORIDA



CASE NO. 68,412

DAVID L. FUNCHESS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, et al.,

Respondents.

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RESPONSE IN OPPOSITION TO APPLICATION FOR EXTRAORDINARY RELIEF, FOR WRIT OF HABEAS CORPUS AND STAY OF EXECUTION

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I

INTRODUCTION

The Petitioner, DAVID L. FUNCHESS, is a death-sentenced inmate in the custody of the Florida Department of Corrections and, more specifically, the Florida State Prison in Starke, Florida. The Respondents, Mr. Wainwright and Mr. Dugger, are the Secretary of the Department and Warden of the prison, respectively. In this response the terms Petitioner and Respondents will designate the parties.

Petition has filed this Second Petition for Writ of Habeas Corpus and attendant pleadings after losing the last of his collateral battles in the federal courts. Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985) rehearing denied; certiorari denied, ___U.S.____, 106 S.Ct.____ (February 24, 1986). This court's denial of Petitioner's first petition for habeas corpus is outlined in Funchess v. State, 449 So.2d 1283 (Fla. 1984).

It is the positon of Respondents that Petitioner is in their custody, as representatives of their respective state agencies, pursuant to lawful and valid judgment and sentence rendered by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida. In support of their position that all relief should be denied Respondents assert the following:

II

JURISDICTION

II

RELEVANT FACTS

To save the court time in reviewing the claim

Respondents provides the following are the crucial facts:

> MR. AUSTIN: . . .if Judge Duncan instructs you that if the State proves its case beyond and to the exclusion of every reasonable doubt, that you have a duty to convict, would you be able to vote for a conviction, knowing that you are subjecting the defendant to the death penalty?
>
> A PROSPECTIVE JUROR: No.
>
> MR. AUSTIN: Are you telling me, sir, that under no circumstance could you vote to convict, no matter how strongly the State convinced you of the defendant's guilt, you still could not vote for guilty if you knew he might be put to death by electrocution?
>
> A PROSPECTIVE JUROR: No, I could not vote for the death penalty. It's not within my province to vote to take a man's life.
>
> MR. AUSTIN: So, you would vote against the death penalty if you knew he might get death by electrocution?
>
> A PROSPECTIVE JUROR: Yes, sir.
>
> MR. ROHAN: If I might inquire, Your Honor?
>
> THE COURT: Yes, sir.
>
> BY MR. ROHAN: Mr. Stevens, and correct me if I am wrong. If the State were to convince you beyond every reasonable doubt that Mr. Funchess was guilty of first degree murder, you would either vote for second degree or not guilty or some other charge, other than first degree.
>
> MR. STEVENS: I would have to vote

possibility that I would be a vehicle and bring a man to death.

MR. ROHAN: That's all the questions I have.
MR. AUSTIN: Your Honor, I believe that the law from what the law is, this juror should be excused for cause.

THE COURT: Are there any objections?

MR. ROHAN: No, Your Honor.

THE COURT: All right. The Court will excuse the juror for cause. You are Mr. Stevens' is that right?

MR. STEVENS: Yes, sir.

THE COURT: Step down, Mr. Stevens, and return to the Bailiff and the juror is excused.

* * *

MR. AUSTIN: Do any of you others have -- I have received one answer when one gentleman raised his hand when I asked that question before and I am not going to repeat it but do any of you upon further reflection have any problem with the question I asked? You will be able to return a verdict of guilty if the State proves its case beyond and to the exclusion of every reasonable doubt as the Judge will instruct you that you have a duty to, even though it may subject this defendant to the death penalty? You would all be able to do that? Would you, ma'am?

A PROSPECTIVE JUROR: Yes, sir.

MR. AUSTIN: Your Honor, the State will respectfully excuse Miss Dennis.

(App. I, P. 111-2, 114).

IV

REASONS FOR DENYING FUNCHESS' MOTION FOR STAY OF EXECUTION AND ATTENDING PLEADINGS AND MEMORANDUM OF LAW IN SUPPORT

Funchess has never raised a complaint of this nature in the twelve years since he went on trial in Duval County. As most recently noted in Kennedy v. Wainwright, ___So.2d___ (Fla. Case No. 68,264)[11 F.L.W. 65]: "The time to present evidence in support of a challenge to trial court procedure in support of a challenge to trial court procedure is when a case is before the trial court." Funchess waived this objection at trial. (App. 12). The non-fundamental nature of the claim places it squarely within contemporaneous objection rule that bars appellate review even for constitutional claims.[1] Thomas v. Wainwright, ___So.2d___(Fla. No. 68,526).

Funchess could of and should have raised the claim on direct appeal or by collateral attack on his prior counsel. Foster v. State, 400 So.2d 1 (Fla. 1981); Christopher v. State, 416 So.2d 450 (Fla. 1982); Adams v. State, __So.2d___ (Fla. Case No. 68,351)[11 F.L.W. 79], cert. denied, 106 S. Ct.____(Case No. 85-6448, March 31, 1986).[2] Funchess has not explained his failure to proceed in the above-described manner and should not be rewarded for this manner of case presentation. On this point Adams is unmistakeably clear:

[1]The "Grigsby" issue is concedely a matter of legal evolution predicated on the language utilized by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510 (1968). Funchess concedes as much in Point V of his petition.

[2]This Honorable Court should also be aware that in the previous month, the United States Supreme Court has allowed the States of Texas and Alabama to proceed with executions by denying stays of execution predicated upon the Grigsby

> We find the issue improperly raised in this case for two reasons. First, the argument was raised neither on direct appeal nor in proceedings for post-conviction relief. We have long held that a petition for habeas corpus is not to be used as a vehicle for obtaining a second appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).
>
> Id. at p. 65.

B. THE RECORD DOES NOT PROVIDE A FACTUAL FOUNDATION TO SUPPORT A GRIGSBY CLAIM

During the selection of the jury on May 12, 1975, the parties were allowed ten (10) preemptory challenges each (App. I, p.).[3] Except for the "for cause" challenge to Mr. Stevens (App. I, p. 110-112), the prosecution excused only one other prospective juror, a Miss Dennis. (App. I, p. 114). Thus, Mr. Stevens was subject to preemptory challenge regardless of the "death-qualifying" exclusion of the prosecutor. In such a situation no viable Grigsby claim exists. As this court noted in Adams, supra.

> Second, and more fundamentally, we find the issue completely unsupported by any factual foundation in the case. An examination of the voir dire transcript reveals that no juror was excluded for cause based upon his or her objections to the death penalty. Petitioner, therefore, is inherently unable to establish even the most basic element of a Grigsby claim-that the exclusion of veniremen opposed to the death penalty has resulted in an impermissibly prosecution-prone jury. It is sufficient for purposes of this issue, petitioner contends, that the state used its peremptory challenges towards this end.

> First, again, no factual foundation exists for such a contention. Second, no authority exists allowing us to stretch the Grigsby holding to include peremptory challenges. It is clear that the Grigsby court itself declined to go so far, explicitly limiting its holding to the exclusion of jurors for cause.
>
> > We agree the state may exercise peremptory challenges as it deems necessary. No stated reason is necessary in exercising peremptory challenges. To establish a rule that jurors cannot be stricken by peremptory challenges on certain grounds seeks the impossible and limits the right of a party to eliminate jurors who appear to be biased.
>
> Grisby, 758 F.2d at 230 (citations omitted).

This view has gained obvious support in the United States Supreme Court as evidenced in the concurring opinion of Mr. Justice Powell in the order denying a stay in the case of Ray Harich v. Wainwright, Docket No. 85-6547 (A-711), filed March 18, 1986:

> 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 Marich profess to present claims similar to that pending before the Court in Lockhart v. McCree, No. 84-1865.
>
> 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

> voir dire, either for cause or through peremptory challenge." Opinion of Supreme Court of Florida 2. Similarly, 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.

The State had nine remaining preemptory challenges by which it could have removed Mr. Stevens. Thus, as was the case in Adams, the petition has no merit in regard to the question of prospective juror exclusion for constitutionally improper reasons.

Third, and equally compelling is the factual basis for the challenge to juror Stevens. When asked if he could vote to convict the defendant if the evidence supported that verdict, Mr. Stevens told both the prosecutor and defense attorney he could not and would not do so:

> MR. STEVENS: I would have to vote in order that there would be no possibility that I would be a vehicle and bring a man to death. (App. I, p. 112).

On this identical issue, this court's dicta in Thomas v. Wainwright, ___So.2d___(Fla. Case No. 68,526 opinion filed April 7, 1986) controls:

> Although we do not reach the merits of petitioner's argument, we note that the one prospective juror referred to in the petition that was excused for cause stated that his feelings concerning capital

> Therefore even if petitioner's suggestion that jurors unalterably opposed to the death penalty should be allowed to sit on the guilt phase of capital trials should have legal merit, the correctness of the exclusion for cause of the veniremen in question would not be affected. He was excused for cause on grounds so clearly shown by his answers that defense counsel abandoned his rehabilitative efforts and acquiesced in the court's ruling. If the merits of the argument were properly before us, we would find no error. Wainwright v. Witt, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968).

Accord, Kennedy v. Wainwright, ___So.2d____(Fla. Case No. 68,264)[11 F.L.W. 65] and cases cited therein.

In this supplemental pleadings filed April 11, 1986, Funchess concedes again the futility of his position in this court but refines his argument on the reasons for this court to stay his execution by reference to recent votes and dissenting opinions from the United States Supreme Court. (Amended Petition, pages 1-13). Respondent has two points regarding this argument. First, the Stay of Execution in the Adams case (A-653) was vacated and certiorari denied by a vote of 7-2 on March 31, 1986. (The sole ground for dissent by Justices Brennan and Marshall was their "stock" response). See, 39 Criminal Law Reporter 4004:

> 85-6448 ADAMS, AUBREY D. V. WAINWRIGHT, SEC. FLORIDA DOC
>
> The application for stay of execution of the sentence of death presented to Justice Powell and by him referred to the Court is

Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we would grant the application for stay, the petition for writ of certiorari and vacate the death sentence in this case.

Second, the transcript of the preemptory challenge to Miss Dennis conclusively refutes any indication she was excused because of anti-death penalty scruples. Thus, the only remaining exclusion was the challenge of Mr. Stevens. Thus, as noted infra the pleadings do not sustain a claim when it is clear that Stevens was excused because he would not follow the law in the guilt/innocence phase of trial.

Rather than needlessly reiterate the arguments made by the Attorney General's Office on the merits of the Grigsby issue, undersigned counsel would merely request the court to take note of its prior rulings in Adams, Thomas, Kennedy and Harich and adhere to the course taken in them, to wit, rejection of all relief and denial of a stay of execution.

V

CONCLUSION

Respondents prays the court deny any and all relief sought by petitioner in this cause.

Respectfully submitted,

JIM SMITH
Attorney General

RICHARD E. DORAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO APPLICATION FOR EXTRAORDINARY RELIEF, FOR WRIT OF HABEAS CORPUS AND STAY OF EXECUTION was furnished by mail to ANDREW A. GRAHAM, Counsel for Petitioner, Reinman, Harrell, Silberhorn, Moule & Graham, P.A. 1825 South Riverview Drive, Melbourne, Florida 32901 and LARRY HELM SPALDING, Capital Collateral Representative, Independent Life Building, 225 West Jefferson Street, Tallahassee, Florida 32301, on this 11th day of April, 1986.

RICHARD E. DORAN
Assistant Attorney General

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