Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link

> In the midst of them, the hangman,
> ever busy and ever worse than useless,
> was in constant requisition.
> —Charles Dickens[1]

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INTRODUCTION

A death penalty trial is a unique feature of American criminal justice. Based upon the ideas expressed in a trilogy of Supreme Court decisions,[2] the arbitrary and discriminatory application of capital punishment in the United States, condemned by the Court a few years earlier,[3] is avoidable through a combination of substantive and procedural controls designed to guide and limit the discretion of those who decide whether a person should die for committing a crime.[4] A salient component of the capital case in states retaining the option of executing murderers,[5] which has survived the Supreme Court's scrutiny, is the use of a "death qualified" jury to decide the guilt or innocence of the accused. This morbid, but apt, phrase describes jury selection procedures which allow prosecutors to remove for cause[6] jurors

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1. C. DICKENS, A TALE OF TWO CITIES 3 (Oxford 1967) (1st ed. London 1859).

2. Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

3. Furman v. Georgia, 408 U.S. 238 (1972).

4. For general discussions of the nature and effectiveness of these controls see Zimring & Hawkins, *Capital Punishment and the Eighth Amendment:* Furman *and* Gregg *in Restrospect,* 18 U.C. DAVIS L. REV. 927 (1985); Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing,* 18 U.C. DAVIS L. REV. 1037 (1985); Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment,* 18 U.C. DAVIS L. REV. 1113 (1985); Gillers, *Deciding Who Dies,* 129 U. PA. L. REV. 1 (1980).

5. Since the Court declared the death penalty unconstitutional for the crime of rape, Coker v. Georgia, 433 U.S. 584 (1977), the thirty-seven states which allow for capital punishment have restricted its use to the crime of murder. For a listing of the death penalty states and the death row populations in each, see NAACP Legal Defense and Educational Fund, Inc., DEATH ROW, U.S.A., Oct. 1, 1986 [hereinafter DEATH ROW].

6. A challenge for cause generally is based upon the prospective juror's inability to act fairly or impartially. *See generally* 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.3(c) (1984). The number of challenges for cause is unlimited. Each side also is given a specific number of peremptory challenges which may be exercised without specific reason. *Id.* at §

who are qualified to sit in criminal trials, but whose personal attitudes toward capital punishment would "prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and oath."[7]

Local prosecutors control the process by which capital cases are initiated and in most jurisdictions there is no formal check upon a prosecutor's discretion to charge persons with capital crimes and thereby to gain for the state the distinct advantages that complement that choice.[8] This problem has come more clearly into focus after the Supreme Court's recent action in *Lockhart v. McCree,*[9] upholding the practice of death qualifying juries before the guilt or innocence phase of a capital trial.

I will argue that a person charged with a capital crime is denied a con-

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21.3(d). *But see* Batson v. Kentucky, 106 S. Ct. 1712 (1986), forbiding prosecutors to exercise peremptory challenges solely on the basis of race.

7. Wainwright v. Witt, 469 U.S. 412, 424 (1985). This most recent formulation of the standard for the exclusion of opponents of capital punishment from death penalty trial juries expands the range of prosecutorial challenges beyond that which had been thought permissible under Witherspoon v. Illinois, 391 U.S. 510 (1968). *Witherspoon* vacated a sentence of death imposed by a jury from which any person with "conscientious scruples against capital punishment" had been excluded for cause upon the state's motion (including those who "might hesitate to return a verdict inflicting [death]"). *Id.* at 512-13. The process allowed the state to produce "a jury uncommonly willing to condemn a man to die." *Id.* at 521. The Court in *Witherspoon* did recognize that a state choosing to retain the death penalty had a legitimate interest in trying such cases before jurors who were at least willing to consider the imposition of any punishment authorized by law. *Id.* at 522 n.21. In the same footnote the Court articulated what it thought to be the legitimate basis for the exclusion of jurors because of their strong anti-capital punishment feelings:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made uumistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*

Id. (emphasis in the original).

Relegating this language to the status of dicta after finding more congenial dicta in Adams v. Texas, 448 U.S. 38, 45 (1980), Justice Rehnquist found the language quoted in the text accompanying this footnote to contain the proper constitutional standard for the exclusion of jurors in capital trials. *Witt*, 469 U.S. at 420, 424. According to *Witt*, no magic words need be uttered either by the juror or the questioner on voir dire to lay a foundation for the state's cause challenge. The trial judge may sustain the challenge when "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426. When reviewing claims on appeal asserting the improper exclusion of a scrupled juror, "deference must be paid to the trial judge who sees and hears the juror." *Id.* Given the broadening of the bases upon which prosecutors could challenge death penalty opponents in *Witt,* those whose lives were dependent upon the Court's willingness to declare the death qualification process unconstitutional were betting against long odds.

8. Not only does a prosecutor get the advantage of a death qualified jury in a capital case, the threat of a death sentence provides a strong hand for plea negotiations. In eases involving multiple defendants, the prosecutor can trade a death charge against one of the accused for testimony against the others. Also, the greater publicity that will surround a death penalty ease is likely to favor the state.

9. 106 S. Ct. 1758 (1986).

stitutional right to due process of law when a prosecutor invokes statutory death penalty procedures without first obtaining, from a neutral fact finder,[10] a determination of probable cause to believe that (1) the accused has committed a crime for which the accused can be sentenced to death, and (2) there is evidence to support a finding of an aggravating circumstance making the accused eligible[11] for a death sentence.[12]

The hopes of many of the 1741[13] men and women waiting on the death rows of America were dashed near the end of the Supreme Court's 1985-86 term when, writing for the majority, Justice William Rehnquist explained in *McCree* why, in consequence of the death qualifying process, they were not denied their rights to trials before impartial juries representing fair cross sections of their communities.[14] The Court held that a prosecutor, having

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10. The state may choose either a grand jury or a judicial officer for this purpose. *See infra* text accompanying notes 171-76.

11. The phrase "death eligible" has become a term of art in the literature to describe those murderers whose crimes qualify for a death sentence. *See, e.g.*, Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts,* 15 STETSON L. REV. 133, 135 (1986).

12. When *McCree* was decided I had pending before the Court a petition for a writ of certiorari which, inter alia, raised this issue. Two weeks after *McCree,* the Court denied the petition. Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984), *cert. denied,* 106 S. Ct. 2245 (1986). See *infra* text accompanying notes 86-104 where the details of this case are discussed.

There is a cause to believe that the issue is not foreclosed. The Court will hear this term a case that raises a challenge to prosecutorial misuse of death qualified juries. In Buchanan v. Commonwealth, 691 S.W.2d 210 (Ky. 1985), *cert. granted sub. nom.,* Buchanan v. Kentucky, 106 S. Ct. 2245 (1986), a defendant who was not charged with a capital crime was tried jointly with a co-defendant against whom the state was seeking the death penalty. Buchanan moved to sever his case from that of the co-defendant on the ground that he would be prejudiced by having his non-capital case determined by a death qualified jury. The state court rejected his arguments which were premised upon a claim that a death qualified jury tended to favor the prosecution. 691 S.W.2d at 212.

The Supreme Court seems to be concerned about prosecutorial misuse of the death qualified jury. *Buchanan* raises the issue more acutely than *Rowan* since a resolution of the issue in *Buchanan* involves no factual inquiry as to whether the state had legitimate grounds to try the petitioner as a capital defendant.

13. These persons were on dcath rows when *McCree* was decided. NAACP Legal Defense and Educational Fund, Inc., DEATH ROW, U.S.A. 1, May 1, 1986. The number has grown to 1788. DEATH ROW, U.S.A, *supra* note 5, at 1.

Not all dcath row inmates would have been entitled to relief had the Supreme Court affirmed the Eighth Circuit in *McCree.* Those who had pleaded guilty to the predicate offense or those who had elected to be tried by a judge would not have had their cases affected. Death row inmates who had not preserved an objection to the death qualification of their trial juries apparently are barred from raising the claim in federal habcas corpus proceedings. Wainwright v. Sykes, 433 U.S. 72 (1977); *see also McCree,* 106 S. Ct. at 1762 n.2. *See generally* Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception,* 18 U.C. DAVIS L. REV. 1177 (1985).

The number of preserved challenges to the death qualifieation process in the various states was significant. If the Court had ruled in favor of the respondents, doubt would have been cast upon the validity of the states' fact-finding processes. Such a ruling is likely to have been retroactive. *See generally* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 49-58 (6th ed. 1986). The prospect of the states having to retry hundreds of cases may well have been one of the factors that influenced the Court to uphold the death qualification process.

14. 106 S. Ct. at 1765-70.

charged a person with a capital crime, is entitled to present the issue of that person's guilt to a jury made up entirely of persons who, before hearing any evidence of the crime itself, have expressed a willingness to impose (or at least recommend) a death sentence.[15]

It is not my purpose to critique the Court's rejection of the social science data that supported the Eighth Circuit's conclusion that the practice of death qualifying capital trial jurors produces a group that is both "conviction prone" and non-representative of distinctive attitudes held by persons in a given community.[16] Justice Rehnquist's treatment of the empirical record that anchored the challenge to the use of death qualified juries in the guilt or innocence phase of capital trials surely will provoke a veritable paper wave of response from social scientists, legal scholars and lawyers involved in death penalty litigation. Judged by the weight of academic sentiment expressed in anticipation of *McCree,*[17] the bulk of these responses will not treat kindly the Court's rejection of the products of so much scholarly labor.[18]

Significantly, there is in *McCree* no temporizing about the persuasive effect of social science research similar to that which appeared eighteen years earlier in *Witherspoon v. Illinois.*[19] The *Witherspoon* Court vacated a sentence of death imposed by a jury from which all persons with "conscientious scruples" against capital punishment had, upon the state's motion, been removed for cause.[20] Such a jury was, in the Court's view, "uncommonly willing to

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15. In some jurisdictions the jury is given final sentencing authority, but in others (notably Florida and Indiana) the jury makes a recommendation to the judge as to whether the accused should be executed. Elsewhere the jury plays no role in the sentencing process once the accused is found guilty of a predicate offense. State laws are summarized in Gillers, *supra* note 4, at 102-19. In states where the jury plays no role in sentencing, death qualification is permitted to disqualify jurors who may be unable to judge fairly the guilt or innocence of the accused.

For an analysis of the impact of death qualification in a jurisdiction in which the judge has power to override the jury's recommendation of imprisonment, 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 (1983). The Supreme Court has upheld state laws which permit a judge to override a jury's recommendation of mercy. Spaziano v. Florida, 468 U.S. 447 (1984).

16. The court of appeals was sharply divided on this issue. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.,* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

17. *See, e.g.,* Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination,* 65 NEB. L. REV. 21 (1986). The empirical studies relied upon by the Eighth Circuit are listed in *McCree,* 106 S. Ct. at 1762-63 nn.4-6. For legal analyses of the issue see White, *Death Qualified Juries: The "Prosecution-Proneness" Argument Reexamined,* 41 U. PITT. L. REV. 353 (1980); Winick, *supra* note 15.

18. In his dissenting opinion Justice Marshall pulled no punches in expressing his view of the majority's treatment of the record generated in the courts below:

> With a glib nonchalance ill-suited to the gravity of the issue presented and the power of the respondent's claims, the Court upholds a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments the most severe.

106 S. Ct. at 1771.

19. 391 U.S. 510.

20. *Id.* at 512.

condemn a man to die;"[21] it was a "hanging jury" whose decision to impose the death penalty could not be squared with the due process clause of the fourteenth amendment. The Court refused, however, to grant Witherspoon a new trial on the ground that the same "hanging jury" deprived him of a fair trial on the issue of his guilt or innocence of the underlying crime of murder. The data offered in support of this proposition were found to be "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt."[22] This conclusion, however, was based upon "presently available information"[23] and the Court implied that if the empirical record demonstrating the bias of death qualified juries were in the future to be strengthened, there would be grounds for a *per se* constitutional rule inhibiting the state's use of such juries to determine the guilt of the accused.[24]

In contrast to the *Witherspoon* Court's openness to further evidence, Justice Rehnquist in *McCree,* after taking a few swings at the methodological integrity of the empirical studies conducted in the wake of *Witherspoon,*[25] declared social science to be beside the point:

> [W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction prone" than "non death qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from death qualifying juries in capital cases.[26]

The state, in other words, is entitled to a "leg up" in a capital trial. To support this counter-intuitive[27] proposition the Court observed that death qualification "is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."[28]

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21. *Id.* at 521.
22. *Id.* at 517.
23. *Id.* at 518.
24. *Id.*
25. 106 S. Ct. at 1762-64.
26. *Id.* at 1764.
27. *Gregg, Proffitt,* and *Jurek* stand for the proposition that, given the nature of the penalty, the accused must be given special protections. This idea is captured in the famous "death is different" language of Woodson v. North Carolina, 428 U.S. 280, 305 (1976):

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

28. *McCree,* 106 S. Ct. at 1766.
29. The Court did not explore whether the process of death qualification was "carefully designed" to protect the accused's right to a fair determination of his guilt, as well as the state's interests in the efficiency of a single jury deciding the questions of his guilt and sentence. The Court did not explore the possibility of alternatives to single juries such as seating extra

The assumptions underlying this declaration and the reasons given to justify the Court's endorsement of a process tilted in favor of a state's interest in convictions are tempting targets for critical analysis.[29] For the purpose of this Article, however, the Court's conclusions are assumed to be defensible. In any event, it is certain that death qualified juries will remain a feature of the criminal process and it is important to explore what limitations should be placed upon their use.

The basic premise in *McCree* is that the prosecution is entitled to a jury willing to impose any penalty provided by law, and which will not frustrate or nullify that law because of the personal opposition of some jurors to capital punishment.[30] This, however, leads to a negative conclusion. According to the Court's hypothesis, if the state can demonstrate no *legitimate* interest in asking for the death penalty in any given case, its use (or threatened use)[31] of a death qualified jury should be foreclosed or, at least, inhibited through procedural controls.

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alternates who could take the places of jurors excludable at the sentencing phase, or of accepting non-unanimous verdicts at the sentencing phase.

The Court did not make clear who "conceded" the legitimacy of the state's interest in the use of a single jury. The respondent made no such concession. His argument was to the contrary. Brief for Respondent at 74-79, Lockhart v. McCree, 106 S. Ct. 1758 (1986) (No. 84-1865).

The Court offers two reasons to support the claim of legitimate state interest in the death qualification of jurors before trial. First, the state of Arkansas had decided that the same jurors who decide guilt should decide punishment, and in *Gregg*, 428 U.S. at 153, 158, 160, 163, the Court upheld the right of a state to make that choice. Second, the use of the same jury in the guilt and sentencing phases of the trial is (if he would only admit it!) an *advantage* to a defendant facing a death sentence. "Residual doubts" of jurors hanging over from the guilt phase of the trial might "bend them to decide against the death penalty." 106 S. Ct. at 1769 (quoting Grigsby v. Mabry, 758 F.2d 226, 247-48 (8th Cir. 1985) (Gibson, J., dissenting), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986)). This point is examined in Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida,* 18 U.C. DAVIS L. REV. 1409, 1427-30 (1985).

As to the first reason, it would seem to be appropriate to "balance" the state's interest in efficiency against the admitted disadvantage to the accused in a trial at which his guilt or innocence is to be determined. There are a variety of ways in which the state could guarantee the continuity of the trial and the sentencing jury. Any added expense that would attend the seating of additional jurors in those few trials in which a death penalty is at issue would not be significant. *See generally* Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty,* 18 U.C. DAVIS L. REV. 1221 (1985).

As to the Court's second point, I would be willing to put the issue of whether the death qualification of the trial jury is an "advantage" to the accused to a vote of death penalty defendants and their lawyers, and abide by the results. My guess is they would favor a normally constituted jury for the first phases of their trials over any purported "residual doubts" of death qualified jurors in the sentencing phase. The "advantage" disappears if the state permits the judge to override the sentencing jury's recommendation of mercy. Radelet, *supra,* at 1427-30.

30. *See* 106 S. Ct. at 1766, 1768.

31. The prosecutor's ability to dismiss a death penalty count in exchange for a guilty plea is a powerful bargaining chip. *See* Brady v. United States, 397 U.S. 742 (1970). The threat of a death sentence also is an effective recruiter of state witnesses. *Id.*

I. CURRENT STATUS OF INDEPENDENT REVIEW OF PROSECUTORIAL CHARGING DECISIONS IN CAPITAL CASES

A. State Practices

In the several jurisdictions which have enacted death penalty statutes since *Furman v. Georgia*,[32] legislative controls upon a prosecutor's discretion to file death penalty charges reflect a broad range of choice. Indiana, Arkansas and Washington impose no procedural restraint upon a prosecutor's power to charge a predicate offense and to request a death penalty. Beyond the constitutionally mandated *ex parte* review of the existence of probable cause for the arrest of the defendant,[33] there is no prerequisite grand jury or judicial review of the evidentiary support for either the charge of murder or the existence of an aggravating circumstance that would support the imposition of a death sentence.[34] At least in Indiana, there is no prescribed procedure whereby an accused can challenge the prosecutor's election to try him as a capital offender.[35]

Only eight capital punishment states make formal provision for pretrial determinations of probable cause as to the existence of at least one of the aggravating circumstances that will support a death sentence. Within these states, there are substantive and procedural variations relating to the focus of the inquiry and the manner in which it is conducted. In Connecticut,[36]

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32. 408 U.S. 238 (1972).

33. Gerstein v. Pugh, 420 U.S. 103 (1975).

34. IND. CODE §§ 35-34-1-1(a), (b); 35-33-7-2; 35-33-7-3; 35-33-2-1 (1982 & Supp. 1986); ARK. CONST. amend. XXI; ARK. STAT. ANN. §§ 43-409; 43-601 (1977); WASH. CONST. art. I, § 25; WASH. REV. CODE § 10.37.010 (1980).

35. Absence of probable cause to support a criminal charge is not a basis for dismissing an information or indictment. IND. CODE § 35-34-1-4(a) (1982). Once an accused is lawfully in custody by virtue of an arrest warrant premised upon a finding of probable cause to believe *some* offense has been committed, the prosecutor is free to file any charge by information without further judicial screening. Gilliam v. State, 383 N.E.2d 297 (Ind. 1978); State v. Palmer, 496 N.E.2d 1337 (Ind. App. 1986).

But see IND. CONST. art. I, § 17: "Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." This provision provides a means of attacking a murder information through an application for bail coupled with a claim that the state's proof supporting the murder charge is not "evident" or "the presumption strong." The burden of establishing such a claim is upon the defendant. Caudill v. State, 262 Ind. 40, 311 N.E.2d 429 (1974). Because of the burden of proof, and the absence of an opportunity to attack the validity of an aggravating circumstance alleged in a death penalty information, the availability of a bail hearing in a capital case is not adequate procedural protection against a prosecutor's misuse of capital charges. The bail hearing, however, can be a useful and efficient defense discovery device. The defendant is entitled to call all of the known prosecution witnesses in his effort to sustain the burden of proving that the murder charge is not sustainable. A defendant availed himself of this opportunity in a recent death penalty case. Spranger v. State, 498 N.E.2d 931 (Ind. 1986).

36. CONN. GEN. STAT. ANN. § 53a-54b (West 1985).

Mississippi,[37] Texas,[38] Utah,[39] and Virginia,[40] aggravating factors which elevate murder to a capital offense are included in the statutory definitions of the crime.[41] Any pretrial determination of probable cause to believe the offense has been committed necessarily will encompass inquiry into the existence of the facts which would render the accused eligible for a death sentence. In the remaining three jurisdictions, California,[42] New Hampshire[43] and Ohio,[44] aggravating circumstances are incorporated into the sentencing statute rather than into the definition of the offense, but must be alleged in the charging indictment or information.[45]

Five of the above-mentioned states require prosecution of capital cases by indictment.[46] The determination of probable cause to proceed with a capital trial will hence be made by a grand jury. In the other three, the prosecutor can initiate the process by filing an information, but the case cannot proceed until a determination of probable cause has been made by a judicial officer after an adversarial preliminary hearing.[47]

In the remaining twenty-six states, a person accused of a capital or non-capital felony is entitled to a preliminary hearing or a grand jury indictment (or a combination of both).[48] The screening in death penalty cases in these states is directed to the predicate offense and does not involve inquiry into whether there is sufficient evidence of an aggravating circumstance to support a death sentence.[49]

While grand jury hearings are non-adversarial and uninhibited by rules

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37. MISS. CONST. art. III, § 27 (1890, amended 1978); MISS. CODE ANN. § 99-17-20 (Supp. 1986).

38. TEX. CODE CRIM. PROC. ANN. art. 1.141 (Vernon 1977).

39. UTAH CONST. art. I, § 13 (1895, amended 1948).

40. VA. CODE ANN. §§ 19.2-217, 19.2-218 (1983).

41. Washington also incorporates the aggravating circumstances in its definition of the capital offense, but, as noted in *supra* text accompanying note 34, it imposes no pretrial screening between the prosecutor and the accused.

42. CAL. PENAL CODE § 190.1-190.4 (West Supp. 1986).

43. N.H. REV. STAT. ANN. §§ 601:1, 601:6 (1974).

44. OHIO REV. CODE ANN. § 2941.14 (Page 1982).

45. The legislature's choice to incorporate the aggravating circumstances in the sentencing statute rather than in the definition of the crime has a significant impact upon the defendant's right to trial by jury. Spaziano v. Florida, 468 U.S. 447 (1984); Comment, *The Death Penalty Cases: Shaping Substantive Criminal Law,* 58 IND. L.J. 187 (1982).

46. Mississippi, New Hampshire, Ohio, Texas and Virginia.

47. California, Connecticut and Utah.

48. Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, and Wyoming. *See generally* 2 W. LAFAVE & J. ISRAEL, *supra* note 6, at 236-76; C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES & CONCEPTS 502-09 (1986).

49. All jurisdictions retaining the death penalty require separate trials on the issues of guilt and sentencing. The variations in state law are charted in Gillers, *supra* note 4, at 101-19. For a discussion of the variations in state death penalty schemes and the powers of judges and juries with respect to the sentencing decision, see Winick, *supra* note 15, at 826-31.

of evidence,[50] preliminary hearings, in states other than Arkansas, Indiana and Washington, are adversarial. They usually involve the opportunity of the accused (1) to be represented by counsel, (2) to hear (in some fashion) the evidence upon which the state seeks to base its charges, (3) to cross-examine witnesses presented by the state, and (4) to challenge the sufficiency of evidence upon which the state seeks to force the accused to stand trial on a particular charge.[51]

The process in Arkansas, Indiana and Washington, allowing prosecutors to force a person to stand trial for his or her life merely by filing an information charging that person with a capital offense, and a perfunctory showing to a magistrate of probable cause to believe *some* crime has been committed, cannot withstand constitutional scrutiny in light of *McCree*. Before proceeding with an examination of the few occasions on which the Court has been requested to consider whether due process of law requires some neutral screening of prosecutorial charging decisions, it will be helpful to examine data and cases that underscore the need for courts and legislatures to address the problem in the discrete context of death penalty proceedings.

B. Bases for Independent Pretrial Review of Capital Charges

1. The Chosen Few

In *Furman* the Supreme Court voided all extant death sentences and state death penalty statutes. The Court found that even if the death penalty was not *per se* a cruel and unusual punishment as measured by "evolving standards of decency,"[52] the administration of the penalty throughout the United States was so freakish, haphazard, and arbitrary that it was cruel and certainly unusual. The most damning features of the death penalty processes identifed in *Furman* were: (1) the small number of death sentences handed out in comparison to the number of potentially capital crimes, (2) the lack of statutory restrictions upon the sentencing discretion of state judges and juries, and (3) perceived sentencing disparities premised upon the economic class and race of the offenders.[53]

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50. *See generally* 1 W. LAFAVE & J. ISRAEL, *supra* note 6, at 618-44, 668-73; 2 W. LAFAVE & J. ISRAEL, *id.* at 300-20; Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980).

51. In some jurisdictions the preliminary hearing is much like a "mini trial" complete with adherence to rules of evidence and the opportunity of the accused to present affirmative defenses. In others the rules of evidence are relaxed to permit the use of hearsay as well as evidence that might be subject to exclusionary rules at trial. *See* 2 W. LAFAVE & J. ISRAEL, *supra* note 6, at 263-76; *see also* Arenella, *supra* note 50, at 541-58; Allred, *Confrontation Rights and Preliminary Hearings*, 1986 UTAH L. REV. 75.

52. 408 U.S. at 242 (Douglas, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86 (1958)).

53. *Id. passim*. The five concurring Justices in the plurality expressed some or all of these concerns in their opinions.

The Court subsequently upheld a series of state statutes which imposed controls upon death sentencing discretion through combinations of (1) more precise definitions of capital crimes, (2) requirements of proof of aggravating circumstances with allowance for mitigating circumstances, (3) the separation of procedures for determining guilt from those dealing with the penalty issue, and (4) provisions for careful judicial review of death sentences.[54] The Court concluded that these additional substantive and procedural safeguards were necessary (and, at present, sufficient) to avoid the evils identified in *Furman*.

The Court did not in these cases endorse capital punishment, but acknowledged merely that the death sentencing schemes enacted by the state legislatures in Georgia, Florida and Texas were not *prima facie* unconstitutional.[55] The Court thus held in *Gregg v. Georgia*[56] that a prosecutor's power to select those who will face death charges does not, by itself, render a capital sentencing scheme unconstitutional.[57] The Court did not declare, however, that a prosecutor is free of any external restraint when deciding who will be visited with the ordeal of a capital trial.

So long as a prosecutor can choose (and choose not) to file death charges

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54. *See supra* notes 2, 4.

55. Prosecutors sometimes lose sight of the limited nature of the Supreme Court's death penalty holdings and suggest to juries that the Court has *endorsed* capital punishment. The prosecutor closing in State v. Resnover & Smith, No. CR80-442A (Marion Super. Ct., Crim. Div. One, *aff'd*, 465 N.E.2d 1105 (Ind. 1984), made the following argument (without objection from defense counsel) which is transcribed in 13 Record of Proceedings 2460-61:

> When we participate in a government we say there will be public justice, they will come before a jury and if one of these people does something to me I'll file a criminal charge and ask the prosecutor's office to let a jury decide. And a judge decides what the punishment will be. And that is an important concept, because the [*Gregg*] case[,] a U.S. Supreme Court case on the death penalty, says that the reason for the death penalty means retribution. And retribution means we will punish you for evildoing. Retribution means deserved punishment. And if we get to a situation where as an organized society doing public justice we will not give deserved punishment for evil done, then are we not back . . . to private justice[?] As the U.S. Supreme Court in the [*Gregg*] case has said, When a people begin to believe that an organized society is unable or unwilling to impose on the criminal offenders the punishment they deserve, then are [sown] the seeds of anarchy, of self-help, vigilante justice and lynch law. Why go through this detailed analysis of the death penalty if the facts so reasonably fit? Because the stakes here are real high. Two men's lives and justice. And if we reach, as a society, the conclusion that we will not produce punishment, consistent with the evil done, then according to the U.S. Supreme Court, we plant the seeds of self-help and vigilante justice.

The language used by the prosecutor does appear in *Gregg*, but is quoted by Justice Stewart from his concurring opinion in Furman v. Georgia, 408 U.S. at 308 (1972). Gregg v. Georgia 428 U.S. 153, 183 (1976). It is incorrect to suggest this to be the holding in *Gregg*, or even to suggest that a majority of the Court has endorsed this sentiment. Only two other Justices (Powell and Stevens) joined with Stewart in *Gregg*. The Supreme Court is, however, tolerant of prosecutorial misconduct in closing arguments in death penalty cases. Darden v. Wainwright, 106 S. Ct. 2464, 2473 (1986). *See also id.* at 2476-82 (Blackmun, J., dissenting). For further discussion in the *Resnover & Smith* case see *infra* text accompanying notes 105-15.

56. 428 U.S. 153.

57. *Id.* at 199.

in accordance with the prosecutor's own inclinations, the Court's assumption that arbitrary and excessive death sentences can be controlled through the formal requirements of trials and appeals will remain vulnerable to challenge. Recently published data disclose what appears to be a steady increase in the nation's death row population of some 200 to 300 persons per year,[58] but the data show also that the number of persons sentenced to death remains relatively small when compared to those who could be tried and convicted as capital offenders.[59] The authors of the study conclude: "The principal reason for these low death sentencing rates among death eligible defendants is no mystery. Through their extensive control of the process, both before and after the guilt trial, prosecutors exclude the majority of death eligible defendants from the group which actually undergoes a penalty trial."[60]

The dimension of the problem relevant to this Article is a concern that prosecutors, aware of the advantages of a trial before a death qualified jury and the leverage that death charges provide in plea bargaining, will initiate capital cases without sufficient factual or legal support. The Court skirted this issue in *McCree*.[61] In dissent Justice Marshall expressed concern that the "sweep of the Court's opinion"[62] would foreclose examination of the problem of prosecutorial abuse. He assumed "in any particular case, a defendant will never be able to demonstrate with any certainty that the prosecution's decision to seek the death penalty was merely a tactical ruse . . . ."[63] As dissenters are wont to do, Justice Marshall overstates his point. The following description of three Indiana cases discloses how the sometimes excessive zeal of prosecutors, seeking either to "make their bones" on death row or to obtain a tactical advantage, ought to be held in check through effective pretrial screening procedures. Three cases do not an empirical study make, but based upon my experience in each,[64] and my conversations with

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58. Baldus, Pulaski & Woodworth, *supra* note 11, at 135.

59. *Id.* at 146-54.

60. *Id.* at 147.

61. The respondent in *McCree* attempted to focus the Court's attention on this problem, but lacked the requisite "standing" because the prosecutor had not waived the death sentence hearing in his case. 106 S. Ct. at 1766 n.16. The original habeas corpus petitioner, James Grigsby, had preserved the issue in the district court. After the jury found him guilty of murder, the state chose not to proceed with a death sentence hearing. Grigsby v. Mabry, 483 F. Supp. 1372, 1376 (E.D. Ark. 1980) (*Grigsby I*), *modified and aff'd*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.*, Lockhart v. McCree, 106 S. Ct. 1758 (1986). Grigsby died during the proceedings and his case became moot.

62. 106 S. Ct. 1772 n.4.

63. *Id.* In view of this sentiment, I find puzzling the failure of Justice Marshall to dissent from the Court's denial of certiorari in Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 2245 (1986), in which a prosecutor was allowed to proceed to trial before a death qualified jury without a prior showing of sufficient evidence to believe that a capital offense had been committed. Earlier, Justice Marshall dissented from a denial of certiorari in a case challenging the charging discretion of a prosecutor. Gacy v. Illinois, 105 S. Ct. 1410 (1985).

64. In State v. Kirkley, No. S85-S32 (Morgan Super. Ct., Morgan Cty., Ind.), I conferred with defense counsel on the issue of the legal sufficiency of the death penalty charges, and upon the constitutionality of the Indiana pretrial process in death penalty cases. *See infra* text

lawyers throughout the state, I conclude that the prosecutorial practices described below are not atypical.[65]

2. Playing Prosecutor's Choice

The kinds of murders that excite a community's fervor for the death penalty are, relatively speaking, rare occurences. An elected prosecutor's choice to initiate a capital case cannot be divorced from the prosecutor's desire for reelection. Absent the tempering influence of a neutral fact-finder, a prosecutor may be motivated to respond more to a sense of the community's fear and its demands for vengeance than to a rational evaluation of the available evidence, and other relevant factors[66] which should inform such a critical decision. Even in larger communities where murders occur more frequently, the greater publicity given to certain kinds of cases will bear heavily upon the prosecutor's choice to seek the death penalty.

Indiana places the least permissible restraint upon a prosecutor's initiation of murder charges and imposes no formal restraint upon initiation of the death penalty process.[67] If an accused is arrested upon a warrant issued by a judicial officer after an *ex parte* determination of probable cause to believe the accused has committed a crime,[68] no further screening of the charging decision is required. If the arrest is without a warrant, the screening process

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accompanying notes 71-85. In *Rowan,* 758 F.2d 1186, I served as defense counsel through trial and subsequent appeals in state and federal courts. I represented the petitioner Tommie Smith in Smith v. State, No. CR80-442A (Marion Super. Ct., Crim. Div. One, Marion Cty., Ind.), *aff'd,* 465 N.E.2d 1105 (Ind. 1984), on his Petition for Post Conviction Relief, but the petition was denied September 29, 1986. Appellate procedures have been initiated. *See also* Resnover v. State, 460 N.E.2d 922 (Ind.) (connected case), *cert. denied,* 469 U.S. 873 (1984).

65. According to data supplied by the Indiana Public Defender Council, since 1979 there have been fifty-five cases from twenty-eight counties in which death penalty charges were filed, but which resulted in non-death penalty dispositions. Data are not available as to the outcomes of these cases. The figures represent only cases known to the Indiana Public Defender Council. The total number of cases falling into this category is probably somewhat higher.

66. Consideration should be given to factors such as the age of the accused, age of the victim, relationship of accused to the victim, past criminal history and mental condition of the accused, the circumstances of the homicide, and whether the circumstances of the crime are similar to those in other capital cases in the same county or in other counties in the state. The Supreme Court has ruled that a "proportionality" review is not required. Pulley v. Harris, 104 S. Ct. 871 (1984). *See* Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review,* 18 U.C. DAVIS L. REV. 1433 (1985).

These considerations are typically employed by prosecutors making charging decisions in anticipation of successful prosecution. In a case that excites popular demand for capital punishment, however, these legitimate considerations may be suppressed in favor of making a forceful statement by filing capital charges.

67. IND. CODE § 35-50-2-9(a) (1982).

68. IND. CODE § 35-33-2-1(b) (1982). The usual method by which the facts supporting the determination of probable cause is submitted is the filing of an affidavit of an investigating officer containing, in the main, hearsay. As an alternative, sworn oral testimony may be given before a judicial officer.

is the same except the *ex parte* finding of probable cause occurs after the accused is in custody.[69] Whether the arrest is with or without a warrant, the judicial inquiry is limited to the question of probable cause for an arrest.[70]

a. Openly Lying in Wait

Millicent Kirkley sat with a friend on a picnic table outside her estranged husband's Martinsville, Indiana, workplace in the mid-afternoon sunlight of April 16, 1985.[71] She had concealed in her purse a loaded .22 calibre revolver which she had taken from her father's dresser drawer. She and her husband, Mark, the father of her children, had separated but continued to quarrel over his relationships with other women. She talked to her friend about the pain she was feeling. Mark had been married three times, said Millie, and added that "he would not be married again."

Mark came out of the plant gate and walked north on an adjacent street. Millie walked toward him. As they met she took the gun from her purse and fired four shots at point blank range. Mark ran a short distance before collapsing in a parking lot. Millie followed, then knelt and hugged Mark saying, "Mark, I love you. What have I done? Oh, I shot you!" Mark died of his wounds. Millie dropped the gun and stood nearby until the police arrived and took her into custody.

The following day Millie's father delivered to the prosecutor a notebook in which she had recorded thoughts about killing Mark in a "letter" headed "Dear Family." The following portion was quoted in the probable cause affidavit: "I was so lost and thought I couldn't go on without him. So I wanted to leave this world. But then I realized that my boys would end up with a low lifed scum of the earth that they loved but was to [sic] young to understand what he was. So I lived on trying to cover for all the hurt and the pain. But this night has made up my mind that someone like him doesn't deserve to live and he will pay for what he has done to me."

Two days after the shooting the prosecutor filed an information charging Millicent Kirkley with the murder of her husband. Included, on a separate sheet as required by state law,[72] was a death penalty information which alleged as the necessary aggravating circumstance that the murder was committed "by lying in wait."[73]

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69. IND. CODE § 35-33-7-2 (1982).

70. *Id.*; *see supra* note 35.

71. The facts are taken from the probable cause affidavit signed by the investigating police officer and submitted to the trial court by the prosecutor to support her request for an arrest warrant charging the defendant with murder. The defendant was in custody at the time of the proceedings.

72. IND. CODE § 35-50-2-9(a) (1982).

73. IND. CODE § 35-50-2-9(b)(3) (1982).

The affidavit submitted in support of the arrest warrant provided a factual basis for the murder charge.[74] However, the familiar tragedy of a jealous wife killing her husband seems not the kind of homicide for which she should be strapped in an electric chair that previously had accommodated a callous kidnap-rapist killer of a young mother and her three children,[75] and a ghoulish murderer for hire who, after repeatedly stabbing and beating his father-in-law, dismembered his corpse in the presence, and with the aid, of other members of his family.[76]

Defense counsel moved to dismiss the death penalty information, arguing that the facts alleged in the probable cause affidavit could not support the state's theory of "lying in wait."[77] There was no statutory definition of the phrase in Indiana nor any prior case setting forth the evidentiary components of "lying in wait." Other jurisdictions uniformly require proof of concealment in addition to waiting and watching for the victim.[78] The trial court denied the motion finding "that the *statutes governing this case do not allow the Court to determine whether or not probable cause exists as to [the death penalty information].*"[79]

A week later the Indiana Supreme Court ruled in another death penalty case that "the common law definition does apply in Indiana and the elements necessary to constitute 'lying in wait' are watching, waiting, and concealment from the person killed with the intent to kill or inflict bodily injury upon that person."[80]

By its own allegations in the probable cause affidavit the state had foreclosed a showing of "concealment" in the case of Millicent Kirkley. She

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74. There are no "degrees" of murder in Indiana. IND. CODE § 35-42-1-1 (1982): " A person who: (1) knowingly or intentionally kills another human being; . . . commits murder, a felony."

75. Judy v. State, 275 Ind. 145, 416 N.E.2d 95 (1981).

76. Vandiver v. State, 480 N.E.2d 910 (Ind. 1985). In *Judy* and *Vandiver* the defendants chose not to contest their death sentences and submitted "voluntarily" to electrocutions. Indiana is the only mid-western state that has carried out executions. *See* DEATH ROW, *supra* note 5, at 4.

77. Motion to Dismiss, State v. Kirkley, No. S85-S32, (Morgan Super. Ct., Morgan Cty., Ind. 1985).

78. *See, e.g.*, State v. Miller, 110 Ariz. 489, 520 P.2d 1113 (1974); People v. Merkouris, 46 Cal. 2d 540, 297 P.2d 999 (1956); State v. Cross, 68 Iowa 180, 26 N.W. 62 (1885); Moser v. State, 91 Nev. 809, 544 P.2d 424 (1975).

79. Entry and Order, State v. Kirkley, No. S85-S32 (Morgan Super Ct., Morgan Cty., Ind. 1985) (emphasis added); *see supra* note 35.

80. Davis v. State, 477 N.E.2d 889, 896 (Ind. 1985), *cert. denied*, 106 S. Ct. 546 (1985). Davis was charged with the sexual molestation and murders of two boys on different occasions. In one instance, the court found the evidence sufficient to support a finding of "lying in wait" because the defendant lurked in the dark on the side of the road and ambushed his victim. In the second instance, the court found the evidence to be lacking even though the killer concealed himself near a campsite waiting until the campers were asleep. He then went "openly" to the victim's tent, woke him and forced the boy to a deserted area where the sexual assault and the murder were committed. His death sentence for the second murder was upheld because a second aggravating circumstance of intentional killing during the course of the felony of child molesting had been established. *Id.* at 900-01.

waited in the open, and in broad daylight. Within the view of her victim husband, and of several others, she approached and shot him.[81] Even so, the prosecutor refused to withdraw the death penalty information until a few days before the trial was to begin.[82]

Given the nature of the offense and the prosecutor's delay in acknowledging that she had no legal basis upon which to seek the death penalty, it can be inferred that she sought the advantage of a death qualified jury for two illegitimate reasons: first, to increase her chances of a murder conviction given the tendency of the less conviction prone non-death qualified jury to return voluntary manslaughter verdicts (if not outright aquittals) in such cases;[83] second, to maintain leverage for a guilty plea.[84]

Millicent Kirkley stood trial for the murder of her husband and was convicted by a non-death qualified jury of voluntary manslaughter.[85]

b. Hanging by a Fingerprint

The body of a 72-year old woman was discovered in the living room of her home in Rockport, Indiana, in the late afternoon of January 7, 1979.[86] She was nude from the waist down and her crumpled clothing was piled on her abdomen. She had been dead for about twenty-four hours. The back door to her house had been forced open and items of personal property, including her wallet and car keys, were missing. An autopsy conducted the following day revealed that she had suffered facial injuries that probably resulted from blows, but that she had died of a cerebral hemhorrage caused by a traumatic injury to the back of her head at the base of the skull. The post-mortem examination disclosed also a small tear in the skin adjacent to her sex organ. Subsequent tests for semen and foreign pubic hairs were negative.

Investigation at the crime scene produced few clues as to the identity of the intruder(s). A red pocket comb carrying advertising for a local business

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81. The apparent rationale for classifying murders committed by "lying in wait" as capital crimes is that waiting and watching for the victim evince premeditation, and concealment of the killer until the moment of attack gives the intended victim no chance of escape.

82. There is nothing in Indiana law which would have required this action on the part of the state. In light of the trial court's announced lack of authority to review the prosecutor's decision to file the death charges, she could have insisted upon a trial before a death qualified jury and even proceeded to the death sentencing phase had she succeeded in obtaining a murder conviction. *See supra* note 35.

83. IND. CODE § 35-42-1-3 (1982): "(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter."

84. According to defense counsel, the prosecutor was willing to recommend a 40 year prison term if the defendant would plead guilty to murder.

85. *See supra* note 64.

86. The facts are taken from the trial transcript with which I am intimately familiar, having tried the case for the defense and having handled all subsequent appeals. For judicial reporting of the facts, see Rowan v. State, 431 N.E.2d 805 (Ind. 1982); Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 2245 (1986).

college was found near the body. A single, partial hair (less than one-half inch in length) was discovered on an inside panel of the back door which had been forced open. In the victim's bedroom the police found the top of her dresser in disarray. A Band-Aid container was laying on its side and Band-Aids were scattered on the floor.

The detective in charge of the investigation sent the metal Band-Aid can to the state police laboratory for fingerprint analysis. He also sent the fingerprint card of a local man, Tyreese Rowan, who was on probation after having been convicted of burglarizing another woman's home in the same town. About six weeks later the lab technicians reported that a fingerprint had been discovered on the lid of the Band-Aid can and that it matched the right little finger of the suspect Rowan.

Without further inquiry as to Rowan's whereabouts at the time of the crimes, or whether he might have had innocent access to the Band-Aid container, the prosecutor, within two days of receiving the fingerprint report, filed an information charging him with murder,[87] criminal deviate conduct,[88] and burglary.[89] The prosecutor also filed a two count death penalty information charging as the required aggravating circumstance that Rowan had killed the victim "intentionally" while committing burglary and criminal deviate conduct.[90] Under Indiana law such a charge requires proof that the homicidal act be performed with the "conscious objective" of causing the victim's death.[91]

In a probable cause affidavit submitted to a local judge in support of an application for an arrest warrant, the investigating detective detailed the circumstances surrounding the discovery of the body and summarized the contents of the autopsy report. The only statement in the affidavit linking Rowan to the crime scene was the report that his fingerprint was found on a Band-Aid can recovered from the victim's home. The judge issued a warrant for Rowan's arrest for murder, burglary and criminal deviate conduct. No finding of probable cause to support the separate death penalty charges was made.

In his pretrial motions, Rowan sought dismissal of the death penalty informations on the ground that the affidavit submitted by the state in support of the application for an arrest warrant failed to establish probable cause to believe he had killed the victim intentionally. The remedy he requested was an adversarial preliminary hearing limited to the death penalty counts. He maintained that the state ought not to be permitted to try him before a death qualified jury without first establishing probable cause to

87. IND. CODE § 35-42-1-1(1) (1982).

88. IND. CODE § 35-42-4-2 (1982). This charge was based on the theory that Rowan intentionally or knowingly penetrated the sex organ of the victim with some object.

89. IND. CODE § 35-43-2-1 (1982).

90. IND. CODE § 35-50-2-9(b)(1) (1982).

91. IND. CODE §§ 35-41-2-1(a), 35-41-2-2(a) (1982).

believe that he was eligible for a death sentence. He also argued that no rational person could infer that he had killed the victim intentionally from the fact that his fingerprint was found on a moveable object discovered in the victim's home.[92]

The trial court denied both requests and the state was permitted to death qualify the jury from which thirteen otherwise qualified jurors were excluded for cause solely because of their opposition to capital punishment.[93]

By the time of trial, the state had some additional circumstantial evidence to support its charges.[94] In addition to the fingerprint identification,[95] a state police hair analyst testified that the hair found on the victim's back door and samples taken from Rowan were similar in five characteristics and

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92. While the presence of his fingerprint on an object in the house is relevant to whether he was at some time present in the house, it is irrational, without more evidence, to infer from that single fact that he (1) engaged in conduct that caused the death of the victim, and (2) did so with the conscious objective of causing her death. *See* United States v. Van Fossen, 460 F.2d 38, 41 (4th Cir. 1972); United States v. Corso, 439 F.2d 956 (4th Cir. 1971); People v. Van Zant, 405 N.E.2d 881 (Ill. App. 1980), *rev'd*, 422 N.E.2d 605 (Ill. App. 1981). *See generally* Annotation, *Fingerprints, Palm Prints, or Bare Footprints As Evidence*, 28 A.L.R.2d 1115, 1150-38 (1953), and later supplements.

Similar to *Rowan*, is Jaramillo v. State, 417 So. 2d 257 (Fla. 1982). Defendant's fingerprints, and those of others, were found at the scene of execution-style murders. The state sought the death penalty against Jaramillo, and a death qualified jury found him guilty of first degree murder. The trial court rejected the jury's recommendation of life imprisonment and sentenced him to death. *Id.* The Florida Supreme Court not only vacated the death sentence, but ordered the *acquittal* of the defendant because the fingerprint evidence was insufficient "to establish that Jaramillo's fingerprints could have been placed on the items only at the time the murder was committed." *Id. See* discussion of *Jaramillo* in Radelet, *supra* note 29, at 1428-30.

93. The trial judge also denied the defendant's request for individual voir dire. Prospective jurors were questioned in groups of six to eight. The process lasted a week before a jury of twelve and two alternates was seated. Each side exercised 16 of the 20 peremptory challenges that were permitted. During this process I got the feeling, on more than one occasion, that when prospective jurors learned they could be excused due to opposition to the death penalty, there were some sudden conversions to the abolitionist cause. *See infra* notes 149-51 and accompanying text.

94. Because of Indiana's liberal pretrial discovery rules the additional evidence produced by the state was known to the defense in advance of trial.

95. While Rowan did not deny the fingerprint was his, one of the major issues explored at trial was whether the print could have been placed on the object at some earlier time outside the victim's home. It was established through a price tag on the can that it had been offered for sale at a local self-service drugstore, but there was no evidence as to when it was sold or to whom. The state could prove no chain of custody of this item from the uncertain time it left the drug store shelf and the time it was discovered in the victim's bedroom. *See generally* P. GIANELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE 201-29 (1986). It was established at trial that there is no reliable way of determining the age of a fingerprint found on a metal object such as the Band-Aid can. *See Jaramillo*, 407 So. 2d at 258; P. GIANNELLI & E. IMWINKELRIED, *supra* at 545-46; A. MOENSSENS, FINGERPRINTS AND THE LAW 26, 121-22 (1969); Barnett & Berger, *The Effects of Temperature and Humidity on the Permanency of Latent Fingerprints*, 16 J. FORENSIC SCI. SOC'Y 249, 254 (1977). To sustain its theory the state had to convince the jury that Rowan could have placed his fingerprint on the object at no time other than the night of the crime. Rowan did not claim to have been in the victim's home at any relevant time prior to her death. He denied any involvement in the crime, and had no explanation for the presence of his fingerprint other than a claim that he must have come in contact with the object at some earlier time outside the victim's home. One possibility, but not the only one, is that he touched the can while it was still on the self-service shelf in the drugstore.

therefore *could* have been of common origin.[96] An acquaintance of Rowan's testifed that about *three months* prior to the crimes he had seen Rowan with a red pocket comb that resembled the comb found near the victim's body (he could not remember whether the comb had advertising on it). Forty-nine days after the crimes, and three days after Rowan's arrest, the victim's car keys were found in the yard across the street from Rowan's home. Two witnesses, who came forward after his arrest, testified that they saw Rowan within two blocks of the victim's house on the evening of the crime.[97]

On the murder charge the jury found Rowan guilty of the lesser included offense of voluntary manslaughter thus obviating any question of a death sentence;[98] he was convicted also of burglary and criminal deviate conduct.[99]

In his appeal to the Indiana Supreme Court, and in subsequent federal habeas corpus proceedings, Rowan raised the issue of the state's improper use of a death qualified jury to determine his guilt. He argued that he was denied due process by the trial court's refusal to dismiss the death penalty informations because of the absence of any showing by the state of probable cause to believe that the case would progress to a death sentence hearing. He argued also that the trial court's failure to address this issue in the pretrial stages of the case could not have been cured by the trial itself because, even with the additional circumstantial evidence presented against him at trial, there was insufficient support for the state's charge that he had

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96. Hair comparisons are effective to exclude suspects or to include a suspect within a class of persons from whom the hair could have come. Rowan is black and there is less variation in hair characteristics among blacks than among whites. *See, e.g.*, Gaudette, *Probabilities and Human Pubic Hair Comparisons*, 21 J. FORENSIC SCI. 514, 517 (1976); Imwinkelried, *Forensic Hair Analysis: The Case Against Underemployment of Scientific Evidence*, 39 WASH. & LEE L. REV. 41, 49-50, 52, 61-62 (1982).

97. The proximity to the victim's house was not surprising because Rowan's house was not far distant from the victim's.

98. This aberrational result requires explanation. The state chose not to invoke the felony murder rule, IND. CODE § 35-42-1-1(2) (1982). The choices open to the jury on the homicide charge were (1) to find the defendant guilty of murder on the basis of his having intentionally or knowingly killed the victim, (2) not guilty, or (3) guilty of a lesser included offense. The *mens rea* element of the crime of voluntary manslaughter is the same as murder, but the offense is mitigated by proof of a killing in a "sudden heat." IND. CODE § 35-42-1-3 (1982). There was no claim or proof in the record of a killing in "sudden heat." The only witness produced by the state to support its theory of the sequence of events leading to the death of the victim was the pathologist who performed the autopsy. He admitted that while the victim may have suffered her fatal injury as a result of a direct blow, she may also have fallen back against a protruding fireplace mantel in the living room after having been pushed or struck with moderate force.

Given the ambiguity of the medical evidence upon which the state relied for proof of an intentional or knowing homicide, it seems plausible to assume that the jury meant to find the defendant guilty of involuntary manslaughter or reckless homicide. This would have been consistent with the backward fall hypothesis. At the time, Indiana permitted instructions in murder cases embracing all lesser included homicide offenses, whether or not supported in the record. The defendant requested the voluntary manslaughter instruction (along with other lesser included offense instructions), and was not in a position to object when the jury returned a verdict that obviated any further consideration of the death penalty.

99. Rowan was sentenced to consecutive terms for these crimes aggregating 90 years.

struck the victim with the conscious objective of causing her death.[100]

The Indiana Supreme Court dealt with the issue summarily and treated Rowan's argument concerning the improper use of the death qualified jury as a challenge to the death qualification of juries in general.[101] He fared little better in the United States Court of Appeals after the district court's denial of his federal habeas corpus petition. Judge Richard Posner disposed of the claim in a sentence:

> [Rowan] has failed to show that the prosecutor acted either unreasonably or in bad faith in screening the jury; for there was a fair chance that the prosecution would be able to prove Rowan guilty beyond a reasonable doubt of 'intentionally killing the victim while committing or attempting to commit . . . burglary . . . [or] criminal deviate conduct,' . . . which is a capital offense.[102]

Judge Posner did not elaborate on how the matter stated in the probable cause affidavit, or the additional evidence produced at trial, would have supported this conclusion. Implicit in the observation, however, is a recognition that Rowan might have been entitled to a pretrial determination of

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100. As to the appropriate standard of proof for the pretrial evaluation of the sufficiency of evidence to support capital charges see *infra* notes 173-75 and accompanying text.

101. Rowan v. State, 431 N.E.2d at 818-19.

102. Rowan v. Owens, 752 F.2d at 1191. Judge Posner earlier in his opinion rejected Rowan's claim that the evidence supporting his conviction for voluntary manslaughter was insufficient under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). 752 F.2d at 1188-90. He reasoned that the combination of the pieces of circumstantial evidence, i.e., the fingerprint, hair, red comb and car keys, supported the jury's conclusion that he had "knowingly" killed the victim.

While the combination of circumstances might support an inference that Rowan was present at the time of the crimes, to conclude that the state could have established in death penalty sentencing proceedings that he acted with the necessary "conscious objective" of causing a death would require two levels of inference based upon that already conditional fact. This may be illustrated as follows:

If
(conditional fact 1)
Rowan was present at the time and place
of the victim's fatal injury,
then
(inference 1)
he probably engaged in some
conduct that caused her death.
If
(conditional fact 2)
he engaged in conduct that caused her death,
then
(inference 2)
he probably engaged in that conduct
with the conscious objective (i.e., the intent)
to cause her death.
Therefore
(conclusion)
he killed the victim intentionally.

See generally R. EGGLESTON, EVIDENCE, PROOF AND PROBABILITY 35, 39-40, 237-40, 261 (2d ed. 1983); 1A J. WIGMORE, EVIDENCE § 41, 1106-38 (Tillers rev. 1983); J. WIGMORE, THE SCIENCE

probable cause to support the capital charges, but that failure to do so in this instance was harmless error.[103] The United States Supreme Court, two weeks after its ruling in *McCree,* denied Rowan's petition for a writ of certiorari to review the issue.[104]

c. A Quick Call

"It was a death penalty case when Jack hit the concrete," confided a prosecutor during an informal discussion of the killing of Indianapolis Police Sgt. Jack Ohrberg, and of the subsequent death sentences imposed upon Tommie Smith and Gregory Resnover for his murder.

Ohrberg and several other police officers, in the pre-dawn hours of December 11, 1980, approached a duplex residence on the northeast side of Indianapolis to serve an arrest warrant for Tommie Smith on charges of armed robbery and felony murder.[105] Ohrberg, dressed in street clothes, but flanked by two uniformed officers and another detective, knocked on the windowless front door and called out "Police!" He received no response. After knocking and calling out "Police!" a second time he and other officers went to the other half of the duplex and woke the woman tenant to ask if she had seen or heard her neighbors. She told them that new tenants recently had moved in and that she had heard movement in the other half of the duplex before she had gone to bed for the night.

Sgt. Ohrberg returned to the first door; he knocked and called "Police!" once more. Still there was no answer. The front windows were covered and the police could not see inside. Ohrberg, with his service revolver in hand, lowered his shoulder to break through the door. On his first attempt the door opened a few inches, but seemed to be blocked by something inside. He hit the door again and succeeded in opening it wide enough to carry his body partially into the house. At that point, the other officers heard gunshots inside the house. One officer reported seeing muzzle flashes from two different

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OF JUDICIAL PROOF 14 (3d ed. 1937); Schum & Martin, *Formal and Empirical Research on Cascaded Inference in Jurisprudence,* 17 LAW & SOC. REV. 105 (1982).

103. There is an alarming trend in appellate court reliance upon the doctrine of harmless error, As noted by Francis A. Allen:

> One of the strongest impressions to be gained from reading a large number of modern criminal appellate opinions, . . . is that courts of review are placing extraordinary reliance on the doctrine of "harmless error" in affirming criminal convictions. In 1970 Tom Clark, who as a retired member of the United States Supreme Court was sitting on a federal court of appeals, observed that " '[h]armless error' is swarming around the 7th Circuit like bees." The drone of the bees has not abated in the intervening years.

Allen, *A Serendipitous Trek Through the Advance Sheet Jungle: Criminal Justice in the Courts of Review,* 70 IOWA L. REV. 311, 329 (1985) (footnotes omitted).

104. *Rowan,* 106 S. Ct. at 2245.

105. *See* Resnover v. State, 460 N.E.2d 922 (Ind. 1984), *cert. denied,* 469 U.S. 873 (1984); Smith v. State, 465 N.E.2d 1105 (Ind. 1984). Both cases are being litigated in post-conviction proceedings in the state courts. The facts stated are taken from the trial record.

locations in the dark room. Ohrberg stepped back and announced to the other officers that he had been hit. He slumped to the concrete porch. As the shooting from inside continued, the other officers sought cover on either side of the porch. They all agreed that Ohrberg remained on the porch laying either on his stomach or his left side with his head toward the house and his feet toward the street. His body, when viewed from the street, was to the left of the front doorway.

The detective who had gone to the right off the porch and had flattened himself against the brick wall of the house, testified that he then saw the back of a person with a "medium afro" lean out the front door and, at a range of about 12 to 18 inches, fire two shots from a rifle into the downed body of Sgt. Ohrberg. He fired two shots from his .38 calibre service revolver but missed as the figure ducked back into the house.

The two officers who had gone to the left off the porch when the shooting started did not see a figure fire shots into the body of the downed officer. One said he saw a figure come on to the porch from inside the house holding a rifle at the "hip position" and fire right and left outward toward the street. He returned fire with a single shot from his .357 Magnum revolver. The second officer, who also had a full view of the porch from a short distance away, stated that he did not see anyone either come out on the porch or lean out of the doorway to fire additional shots.[106]

The shooting lasted but a few seconds. Other officers arrived at the scene and within a few minutes of the shooting a man inside called out, "Let's talk." Negotiations proceeded with Ohrberg still laying on the porch. Soon two men tossed weapons onto the porch (two AR15 semi-automatic rifles and a handgun), and surrendered to the police. They were identified as Gregory Resnover and his brother Earl Resnover. Two women who had been spending the night with the Resnovers also came out of the house and were arrested with the brothers. One of the men told police that a third man (Smith) was wounded and was still inside.

Smith had been shot by Ohrberg as he forced his way into the house.[107] Unaware that Smith was unconscious, the police waited several minutes until a SWAT team fired tear gas inside, then entered and secured the house. Ohrberg was removed to the hospital where he was dead on arrival. Smith,

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106. The statements from the three officers who witnessed the shooting were taken by investigators between 11:00 a.m. and 1:00 p.m. on the day of the shooting. Their testimony during the trial and in the post-conviction proceedings remained consistent with their original statements. The significance of these statements is explored *infra* note 167.

107. Lawyers representing Smith and Gregory Resnover at their joint trial did not attempt to explore the issue of who, Ohrberg, Smith or Resnover, had fired the first shot. During the hearing on Smith's petition for post-conviction relief (attacking, *inter alia,* the competence of his trial and appellate counsel), the police witnesses admitted that they could not, under the terrifying circumstances, differentiate the sound of the shots coming from Ohrberg's .357 Magnum or the AR15 rifles that were being fired from inside.

who was thought to be dead when he was discovered, recovered from his wounds.

The prosecutor and one of his deputies arrived at the scene shortly after the arrests and after Ohrberg's body had been removed. They observed the subsequent crime scene investigation which included a meticulous, and warrantless, eight hour search of the interior of the house by an evidence technician. The search resulted in the discovery of several spent shell casings and a variety of weapons and related paraphernalia.[108]

The violent killing of a police officer naturally raises a stir in any community and a strong desire for revenge on the part of fellow police officers. Under the influence of these factors, the prosecutor announced before day's end his intention to seek the death penalty for Tommie Smith and the two

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108. Despite the presence of two experienced prosecutors, no one thought to get a search warrant. The Supreme Court had ruled in Mincey v. Arizona, 437 U.S. 385 (1978), and later reaffirmed in Thompson v. Louisiana, 469 U.S. 17 (1984), that there is no "murder scene" exception to the general constitutional rule requiring warrants for extended searches of private homes. By the time the evidence technician began his careful search of the house, it had been fully "secured" by the SWAT team and no exigent circumstances were present. Forty-five items seized from the house were introduced at trial without objection (on fourth amendment grounds) from either Smith's lawyer or Resnover's. These items (and related testimony) included the empty shell casings which were used to prove how many shots had been fired by the rifles belonging to Smith and to Gregory Resnover. Other weapons, not involved in the shooting, were introduced to support the state's additional charge that Smith and the Resnovers had for weeks, or even months, prior to the morning of the shooting been conspiring to kill Ohrberg to interdict his investigations of them. Smith's lawyer filed a perfunctory pretrial motion to suppress evidence seized from the house, but never requested an evidentiary hearing on the motion. He failed to object to the admission of the evidence. Smith's new lawyer on appeal attempted to argue the fourth amendment issue, but had no record upon which to premise his claim. The Indiana Supreme Court declared that Smith lacked standing to raise a fourth amendment objection to the admission of the evidence. Smith v. State, 465 N.E.2d 1105, 1122-23 (Ind. 1984).

At his post-conviction hearing Smith showed that he had been living in the house and had moved all his personal belongings into the house, including furniture and appliances. He had a key and could come and go as he pleased. The inventory of items seized from the house is several pages in length. Practically all of the property belonged to Smith. Had counsel raised the issue at trial, Smith could have established standing to challenge the legality of the search and the admission of the 45 state exhibits. Rakas v. Illinois, 439 U.S. 128 (1978). Without the evidence the state's case would have been weakened considerably—particularly as to the conspiracy charge.

During the last term the Supreme Court held that a habeas corpus petitioner is not barred, by Stone v. Powell, 428 U.S. 465 (1976), from raising a sixth amendment claim of ineffective assistance of counsel based upon counsel's failure to assert a valid fourth amendment challenge to illegally seized evidence in the state courts. *See* Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Such an error warrants reversal of a conviction only if the defendant can "prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Id.* at 2583.

It was established that Smith had been wounded in his right thigh by a fragment of a bullet fired from Ohrberg's pistol which had pierced, from front to back, the ammunition clip of an AR15 rifle found next to the unconscious Smith. This suggests that Ohrberg either fired his gun as he entered the house, or at the same time as shots were being fired at him from the inside.

Resnovers.[109] Murder charges and death penalty informations were filed the following day. The aggravating circumstance alleged in the death penalty informations was that the victim of the murder was a law enforcement officer acting in the course of duty.[110] In addition to the murder charges, the state filed against the three men and the two women who had been in the house with them charges of conspiracy to murder Sgt. Ohrberg.[111]

An *ex parte* probable cause hearing was conducted orally before a local judge. No transcript of the hearing was preserved.[112] The only evidence of "conspiracy" available to the state at the time was that: (1) the five defendants were spending the night together; (2) several weapons, amounts of ammunition and assorted paraphernalia were found in the house; (3) shots had been fired toward the police from two sources within the house; and (4) one of Sgt. Ohrberg's printed business cards was found in the wallet of one of the suspects, Earl Resnover, after his arrest. Hand printed on the back of the card was the name of Ohrberg's wife and his home telephone number.[113]

The two women, whose only connection with the shooting had been their misfortune to sleep that night with the Resnovers, were kept in jail for several months. The prosecutors interrogated the women for information that they hoped would support their theory that Smith and the Resnovers had, over a period of time, plotted to kill Ohrberg to stop his investigations of them; that they had amassed the weapons in the house for that purpose; and were on the fatal morning calmly waiting to be surrounded by police so as to carry out their conspiratorial objective. One of the women eventually told the prosecutors that, at some time on the night before the shooting, Gregory Resnover had remarked that if "he [Ohrberg] didn't come by soon he [Resnover] was going to go home." She and the other woman were then released and the conspiracy charges against them were dropped. At trial the witness testified that she had lied about this statement to avoid being sent to prison.[114]

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109. Indianapolis Star, December 12, 1980, at 1, col. 3 (to make this morning edition the announcement must have been made on December 11, 1980).

110. IND. CODE § 35-50-2-9(b)(6) (1982).

111. IND. CODE § 35-41-5-2 (1982). Conspiracy to commit murder is a Class A felony for which the minimum prison term is 20 years and the maximum is 50 years. IND. CODE § 35-50-2-4 (1982).

112. Defense counsel did not request a transcript of the tape recorded hearing. The tape has been erased, and no record of the probable cause hearing is available.

113. The state attached a sinister significance to the possession of the business card and the notation on the back. The prosecutors claimed that the conspiracy included a plan to harm Ohrberg's wife. It turned out that Ohrberg had given his card to a Resnover family member during earlier investigations with a request that Earl Resnover get in touch with him if he had information he wanted to provide concerning an earlier bank robbery in which his brother Aaron had been shot and killed by a bank guard. Ohrberg's home telephone number was listed under his wife's name in the local directory.

114. The only other evidence of the "long term" conspiracy to murder Ohrberg presented by the state at trial was a statement of Smith made in a telephone conversation with an inmate

Shortly before trial Earl Resnover's case was severed from that of his brother and Smith. Gregory Resnover and Smith were tried jointly. They were convicted of murder and conspiracy to commit murder and were sentenced to death.[115]

The support which the three cases discussed above provide for my proposal for constitutionally mandated preliminary screening proeedures in death penalty cases will be explored after an examination of the current status of the law.

C. *Constitutional Doctrine Applicable to Pre-Trial Screening of Death Penalty Charges*

The Supreme Court has on few occasions reviewed the question whether considerations of due process require states to provide some neutral buffer between the decision of the prosecutor to file charges and the trial of an accused.[116] On two of these occasions the petitioners had been sentenced to death in state courts.

In *Hurtado v. California,*[117] the Court addressed, for the first time, an issue which was to become a cornerstone of its criminal process jurisprudence in the 1960's and 1970's. That issue is to what extent, if at all, are the specific procedural protections accorded to the accused by the fourth, fifth, sixth and eighth amendments to the Constitution of the United States, applicable to the states through the due process clause of the fourteenth amendment.[118]

Hurtado challenged the constitutionality of his murder conviction and death sentence, claiming that he had been denied his fourteenth amendment right to due process of law in California because he had been tried upon a prosecutor's information rather than an indictment by a grand jury. He argued that the grand jury indictment, which was required by a specific provision of the fifth amendment, was a part of the fundamental law of

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in the local jail, and which took place two or three days prior to Ohrberg's death. The inmate was one of Smith's alleged accomplices in an earlier robbery. They discussed Ohrberg's investigation of the robbery. Smith expressed doubts that Ohrberg had any solid evidence to implieate him in the crime. Smith, according to the witness (who was able to obtain a favorable deal on his own charges in exchange for his testimony against Smith), then said: "[B]ut don't worry about that, 'cause if the dude keep on goin' at it . . . he's gonna come up missin'." Record of Proceedings at 1854-55, State v. Resnover and Smith, CR80-442A (Marion Super. Ct., Crim. Div. One).

115. They each were given an additional 50-year prison term on the conspiracy count.

116. Gerstein v. Pugh, 420 U.S. 103 (1975); Beck v. Washington, 369 U.S. 541, 545 (1962); Ocampo v. United States, 234 U.S. 9 (1914); Lem Woon v. Oregon 229 U.S. 586 (1913); Hurtado v. California, 110 U.S. 516 (1884).

117. 110 U.S. 516.

118. For a survey of the cases examining "incorporationist" doctrine see Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 13, at 39-49.

the land which, by virtue of the due process clause of the fourteenth amendment, could not be discarded by the states.[119]

With one dissent[120] the Court, for whose members the adoption of the fourteenth amendment was then a living memory, rejected the claim. The decision was premised upon historical analysis extending to the text of Magna Charta.[121] The Court found within this historical record proof that prosecution by information was permitted in England at the time of the independence of the American colonies.[122] Even assuming, however, the venerable tradition of the grand jury and its general use both in England and the United States, all jurisdictions were not locked into a single form for initiating criminal prosecutions:

> It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.[123]

Returning to the text of the Constitution, the Court reasoned that the drafters of the fifth amendment, when incorporating a general guarantee of due process of law, did not mean to include within that term the more specific guarantees, including the right to grand jury indictment, that were listed in the amendment. "Due process" was intended as a reference to the "law of the land" as enacted by Congress and as "interpreted according to the principles of the common law."[124] The use of the identical phrase in the fourteenth amendment required the same interpretation with respect to the legislative powers of the states "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."[125]

When "[t]ried by these principles," the Court was "unable to say" that

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119. *Hurtado,* 110 U.S. at 521.
120. *Id.* at 530 (Harlan, J., dissenting). Justice Field did not participate in the decision.
121. *Id.* at 522-32.
122. *Id.* at 538.
123. *Id.* at 530. The Court later observed:

> There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

Id. at 531.
124. *Id.* at 535.
125. *Id.*

the prosecution of a murder by information *"after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."*[126]

The Court did not return to the subject of due process in state pretrial proceedings until almost thirty years later in the case of *Lem Woon v. Oregon.*[127] Lem Woon had been tried and sentenced to death for murder, having been first charged in a prosecutor's information. He challenged the constitutionality of the state law which permitted this process without any form of preliminary examination by a magistrate. In contrast to the scholarly opinions in *Hurtado,* the Court's response in *Lem Woon* was curt and conclusive:

> But since, as this court has so often held, the "due process of law" clause does not require the State to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney, is obligatory upon the States.[128]

The Court did not examine *Hurtado* closely before freeing state prosecutors of any restraints in the charging process. The Court's laborious examination of the historical use of the grand jury was, in *Hurtado,* premised upon a recognition of the need for some neutral intervention between the accused and the state. It recognized an accused prisoner's "substantial interest"[129] in preliminary screening of some kind, but the *form* of the process by which that interest is protected may vary from state to state so long as "principles of liberty and justice"[130] are preserved. The Court's toleration of California's dispensation of the grand jury was based upon that state's having provided an adequate substitute for grand jury screening by way of a judicially conducted adversarial preliminary hearing. While it may be that a state could have satisfied the demands of due process by providing less than all of the incidents of the adversarial preliminary hearing adopted in California, the failure of the *Lem Woon* Court to see in *Hurtado* a constitutional basis for *some* form of insulation from prosecutorial fervor is, I submit, symptomatic of a severe case of judicial myopia.

In the period between the Court's death penalty rulings in *Furman* and *Gregg,* the Court ruled in *Gerstein v. Pugh*[131] that the fourth amendment, via the fourteenth, required a showing of probable cause before any arrestee could be held in custody pending trial upon a prosecutor's information and

126. *Id.* at 538 (emphasis added).
127. 229 U.S. 586.
128. *Id.* at 590.
129. 110 U.S. at 538.
130. *Id.* at 537.
131. 420 U.S. 103.

that such a showing must be made to a judicial officer.[132] Since the interest of the accused to be protected is freedom from unlawful detention, the procedures and standards that governed the issuance of an arrest warrant were sufficient to satisfy the requirements of due process. Thus, an *ex parte* determination of probable cause made before or after an arrest was all that the fourth amendment required.

The Court rejected the district court's holding that a proper protection of an arrestee's interest in pretrial freedom required a post-arrest adversarial preliminary hearing at which the accused would be entitled to be represented by counsel, to cross-examine state witnesses, to employ compulsory process to summon witnesses on the accused's behalf, and to a transcript of the proceedings if requested.[133] While recognizing that these procedures were typical of those used in several states to determine whether a person charged by information should be compelled to stand trial or, at least, have his or her case presented to a grand jury, the Court found them not to be essential to the probable cause determination required by the fourth amendment. "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest."[134]

The Court concluded that the use of this informal procedure was justified for two reasons: (1) all that is at issue at such an early stage of the process is the state's authority to continue the custody of the accused pending trial at which all of the accused's rights will be protected through the adversarial process; and (2) the decision to authorize detention pending further proceedings "does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt."[135]

An inference to be drawn from this rationale is that as the consequences of the exercise of a prosecutor's charging decision increase so must the procedural protections against the abuse of that power. In *Pugh* the Court found that the determination of probable cause for arrest is not a "critical stage" of the criminal process requiring the assistance of counsel, and that the availability of confrontation and cross-examination of state witnesses would have too slight an impact upon the outcome of the determination to support the imposition of such procedures as a constitutional requirement.[136]

Pugh was a civil rights action brought under 42 U.S.C. § 1983 and

132. *Id.* at 114.

133. *Gerstein,* 420 U.S. at 108 (citing Pugh v. Rainwater, 336 F. Supp. 490 (S.D. Fla. 1972), *modified,* 483 F.2d 778 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom.,* Gerstein v. Pugh, 420 U.S. 103 (1975)).

134. *Gerstein,* 420 U.S. at 120 (reasonable grounds (probability) to believe an offense has been committed by the accused).

135. *Id.* at 121.

136. *Id.* at 121-22.

involved no prisoner charged with a capital crime. Indeed, Florida, whose pretrial procedures were under attack, permitted capital cases to be charged only by grand jury indictment.[137] The majority nonetheless felt compelled to breathe new life into *Lem Woon,* stating: "we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. . . . [W]e adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information."[138]

Characterizing the preceding statements as dicta, Justice Stewart, joined by three others,[139] argued that the Court ought not, "in the abstract, attempt to specify those procedural protections that constitutionally need *not* be accorded incarcerated suspects awaiting trial."[140] Perhaps anticipating in some general sense the kind of problem presented by the state's unreviewed access to death qualified juries, the four concurring Justices refused to join "the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention."[141]

It seems timely for the Court to reexamine its dicta in *Pugh* and to overrule *Lem Woon* to the extent that it permits prosecutors to file death penalty charges by information without any form of judicial or grand jury intervention. Since the Court in *McCree* has acknowledged that trial of one's guilt or innocence by a death qualified jury increases a defendant's chances of conviction, the consequences of the prosecutor's choice to invoke death penalty procedures are of sufficient magnitude to justify a constitutionally based requirement that states adopt procedures adequate to assure that prosecutors have a legitimate basis for seeking a jury composed only of persons who tolerate capital punishment. If a prosecutor cannot be trusted to order the arrest of a person merely upon that prosecutor's sworn statement that the accused has committed an offense,[142] surely a prosecutor should not be allowed to dictate, by the mere act of filing a capital charge, that a "somewhat more conviction prone" jury will determine the guilt or innocence of the accused.

The state's ability to stack the jury against the accused through the death qualification process is even greater than the majority in *McCree* was willing

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137. FLA. CONST. art. 1, § 15. A requirement of proseeution by indictment is not alone a sufficient protection against prosecutorial abuse of death penalty proceedings. *See* Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

138. *Gerstein,* 420 U.S. at 119 (citations omitted).

139. Justices Douglas, Brennan and Marshall. *Id.* at 126.

140. *Id.* at 126 (emphasis in original).

141. *Id.* at 127. Justice Stewart perceived irony in the Court's gratuitous statement that:

> [T]he Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601; the custody of a refrigerator, *Mitchell v. W.T. Grant Co.,* 416 U.S. 600; the temporary suspension of a public school student, *Goss v. Lopez,* 419 U.S. 565; or the suspension of a driver's license, *Bell v. Burson,* 402 U.S. 535.

Id.

142. *Id.* at 117.

to acknowledge. For example, in Indiana each side is accorded twenty peremptory challenges in a death penalty case, as opposed to ten in a noncapital case.[143] The prosecutor will challenge peremptorily prospective jurors whose doubts about the death penalty are not sufficiently strong to justify exclusion by way of the *Witherspoon/Witt*[144] criteria, thereby increasing the jury's tilt toward the state.[145] Since the percentage of persons disfavoring capital punishment is decreasing, and the remaining "scrupled" population is likely to include, proportionately, more women, blacks, hispanics and economically underprivileged persons,[146] the state will not only be able to exclude most of the "soft" jurors, but also to distort the representativeness of the jury.[147] The defendant, on the other hand, is likely soon to run out of his or her equal number of peremptory challenges if the defendant exercises them to exclude people who favor the death penalty. The defendant will, in the end, be able to exclude only the most avid capital punishment devotees.[148]

An important study[149] mentioned in Justice Rehnquist's opinion in *McCree* revealed a "process effect" of death qualification. Voir dire examination,

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143. IND. CODE §§ 35-37-1-3, 35-37-1-4 (1982).

144. *See supra* note 7.

145. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis,* 81 MICH. L. REV. 1 (1982).

146. The national opinion poll figures in the ten year period 1972-1982 show a dramatic increase in the percentage of persons who favor capital punishment. In 1972, 53 percent of the sample population favored the death penalty for murder (39 percent were opposed, 8 percent undecided). By 1982, 74 percent favored the death penalty (20 percent were opposed and 6 percent were undecided). In 1972, 35 percent of the white population sample opposed capital punishment while 62 percent of blacks and other racial minorities were opposed (a 27 percent difference between races). By 1982, those opposed had decreased to 18 percent whites and 42 percent blacks and other races (a 24 percent difference). Likewise, the number of female opponents in 1972 was 10 percent higher than male opponents (44 percent and 34 percent respectively). By 1982, the gap between the sexes in death penalty opposition had decreased to 8 percent. More significantly, the total percentage of death penalty opponents had in the ten-year period dropped to 16 percent among males and to 24 percent among females. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 242-43 (1984). The figures show also that opposition to capital punishment is inversely related to economic status. *Id.*

Recently reported results of a Media General-Associated Press Poll showed that 86% of the respondents supported the death penalty for some crimes. One-third of the blacks polled felt there should be no death penalty, whereas only 9% of the white respondents were totally opposed to capital punishment. Indianapolis Star, Jan 12, 1987, at 4, col. 1.

147. This result is likely to blunt the effect of Batson v. Kentucky, 106 S. Ct. 1712 (1986), which prohibits prosecutors from exercising a peremptory challenge solely on the basis of race. An adept voir dire examination of a prospective black juror is likely to reveal at least some ambivalence toward the death penalty and thereby provide a less overtly racial reason for a peremptory challenge.

148. The defendant may exclude for cause a juror who admits that he would vote automatically *for* the death penalty without regard to the evidence. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 63-69, 616 P.2d 1301, 1343-46, 168 Cal. Rptr. 128, 170-74 (1984). The number of persons subject to such a defense challenge is quite small. Kadane, *After* Hovey: *A Note on Taking Account of the Automatic Death Penalty Jurors,* 8 LAW & HUM. BEHAV. 115 (1984).

149. Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process,* 8 LAW & HUM. BEHAV. 121 (1984); Haney, *Examining Death Qualification: Further Analysis of the Process Effect,* 8 LAW & HUM. BEHAV. 133 (1984).

concentrating as it must upon issues surrounding jurors' attitudes toward the death penalty, has its own biasing impact. The message the jurors are likely to receive through this process is that the real issue in the case is not the guilt or innocence of the accused, but whether, once convicted, the offender should be put to death. Hence, jurors who have been subjected to the process of death qualification will have a greater tendency to convict the accused than will similar jurors who have not had that experience.[150] This concern persuaded the California Supreme Court to require individual voir dire of prospective jurors in capital cases to reduce the biasing effect of the constant repetition of questions about the death penalty, and the effect of witnessing the exclusion of jurors found to be unqualified because of their opposition to capital punishment.[151]

The combination of these factors which may influence a capital jury to favor convicting the accused should not be tolerated unless the state can demonstrate to a neutral decision-maker that its legitimate interests in seeking the death penalty outweigh the interests of a defendant seeking a fair trial. This leaves for consideration the kind of preliminary proceeding that will satisfy the minimum standards of due process of law, and the appropriate evidentiary standard by which the state's right to a death qualified jury must be measured. In conducting this examination we will return to the three Indiana cases discussed above to determine whether the imposition of procedural restraints upon prosecutorial discretion could have made a difference either in the outcomes of any of the cases or, at least, in the acceptability of the results.

II. Suggestions of Form and Content of Death Penalty Screening Procedures

A. Would Preliminary Screening Make a Difference?

The function of a preliminary inquiry in a capital case should be to test both the factual support for the state's death penalty request and the validity of the legal theory upon which the state seeks to proceed. The three cases discussed above[152] demonstrate in different ways how preliminary screening proceedings can serve to inhibit prosecutors' misuse of the death penalty processes.

In *Kirkley* a simple comparison of the probable cause affidavit with the aggravating circumstance alleged in the death penalty information would

150. *See* Haney, *supra* note 149, at 131-32.

151. *Hovey*, 28 Cal. 3d at 69-81, 616 P.2d at 1347-55, 168 Cal. Rptr. at 174-82. Professor Haney, in a post-*Hovey* article, expresses doubts about the effectiveness of this attempt to cure the process effect. *See* Haney, *supra* note 149, at 147-51.

152. *See supra* text accompanying notes 64-115.

have revealed that the state lacked factual grounds to seek a death penalty. In *Rowan* the probable cause affidavit, linking the suspect to the crime by a single fingerprint on a portable object, also fell short of establishing reasonable grounds to believe the victim had been killed intentionally (as opposed to "recklessly" or even "knowingly"),[153] during the course of the alleged felonies of burglary and criminal deviate conduct. The state should certainly be free to allege additional facts which would render the accused eligible for a death sentence. The state should not, however, be allowed to try an accused before a death qualified jury without making a showing of reasonable cause to expect that the jury impanelled to determine the guilt or innocence of the accused will later be called upon to consider the death sentence.

The state in *Rowan* did not produce at trial sufficient evidence of an intentional killing.[154] Rowan's case illustrates a situation in which the state may well have been able to obtain a conviction based upon equivocal circumstantial evidence because of the nature of the jury before which Rowan was tried.[155]

The *Smith and Resnover* case presents different issues in the context of preliminary screening. First, while the death penalty informations in *Kirkley* and *Rowan* were facially valid in that each contained an allegation of a valid statutory aggravating circumstance, the informations filed against Smith and Resnover were vulnerable to a legal challenge which should have been resolved unambiguously in preliminary proceedings. The aggravating circumstance alleged in *Smith and Resnover* was that the murder victim was a police officer acting in the "course of his duty" at the time of his death. The statute attaches no "*scienter*" element to this aggravator, i.e., there is

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153. IND. CODE § 35-41-2-2 (1982 & Supp. 1986):

> (a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.
>
> (b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.
>
> (c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

154. *See supra* note 102.

155. *See* Finch & Ferraro, *supra* note 17, at 60:

> [t]he empirical evidence seems too consistent to deny that death qualification will *ex propio vigore* alter the outcome in at least some capital cases. Furthermore, what might be a relatively small proportion of cases may constitute a numerically significant number of capital defendants whose convictions are the incidental product of a jury selection process.

The authors speculate that the greatest effect of death qualification will be in cases where the question of guilt or innocence is close. "In such cases, the ambiguity of proof may be such that juror traits can influence verdict choices, and the probability that death qualification will destroy an acquittal minority is greatest." *Id. Cf.* Jaramillo v. State, 417 So. 2d 257 (Fla. 1982). *See also* Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611 (1985).

no requirement that the state prove that a defendant *knew or had reason to know* that the victim was a police officer.

There are legitimate bases for a judicially imposed *scienter* element when the presence of an aggravating circumstance depends upon the identity and status of the victim. There are two reasons for imposing the death penalty for the murder of an on-duty police officer. The first is to protect public servants whose jobs expose them to homicidal risks by increasing the deterrent effect of the threatened penalty. If the accused is not aware, however, that the victim is a police officer, it is hard to understand how the additional deterrent could become operative. If a person kills another during an armed robbery[156] who happens to be an on-duty officer in plain clothes responding to the robbery call, but the accused is unaware of the victim's status, the killing cannot be distinguished from that of any other person who may have been killed during the robbery.[157] The crime is reprehensible and deserves severe punishment, but capital punishment for the killing of the police officer, without an element of *scienter,* would make the death penalty depend upon happenstance.

A second reason supporting such an aggravating circumstance is that the murder of a police officer merits death as a punishment because of the greater culpability of a killer who is impervious to established order. This rationale also can apply only to one who kills an officer knowing his identity.[158]

The Indiana Supreme Court has so far avoided a definitive ruling upon the need for the state to establish *scienter* when asserting the murder of an on-duty police officer as an aggravating circumstance. In the cases to date, the court simply has observed that *if* guilty knowledge were a required element of proof, it had been established in the case under consideration.[159] This kind of fact finding by an appellate court is inconsistent with the rationale of the United States Supreme Court's death penalty cases,[160] which

156. This would fall under the felony-murder rule without regard to whether the killing was intentional, knowing, reckless or even "accidental." IND. CODE § 35-42-1-I(2) (1982).

157. This is not to say that the death penalty may not be sought for a murder committed during a robbery. However, it must be established that such a killing was "intentional" and not merely a product of the felony. IND. CODE § 35-50-2-9(b)(I) (1982).

158. A defendant, who is aware his potential victim is a police officer, need not be aware that the officer is in fact performing his duty. This seems a risk that the killers of policy may have imposed upon them.

159. Moore v. State, 479 N.E.2d 1264, 1276 (Ind. 1985), *cert. denied,* 106 S. Ct. 583 (1985); Averhart v. State, 470 N.E.2d 666, 695 (Ind. 1984), *cert. denied,* 105 S. Ct. 2051 (1985); *Resnover,* 460 N.E.2d at 930. *But see* State v. Compton, 38 Crim. L. Rep. 2455 (N.M. 1986). In *Compton* the court's reliance upon United States v. Feola, 420 U.S. 671 (1975), to justify the lack of a *scienter* requirement in a death penalty case is misplaced. The charge in *Feola* was conspiracy to assault a federal officer. The Court held that defendant's knowledge of the officer's status was not an element of the crime. However, in *Feola* the status of the officer was a federal jurisdictional issue rather than a culpability issue. *Feola* cannot be read as an authorization to dispense with the *scienter* element in death penalty cases where eligibility for capital punishment is determined by the status of the victim.

160. *See supra* notes 2, 4.

emphasizes the need for careful fact finding at the trial level. A death penalty defendant is entitled to know going into trial what the state must prove, what the content of the jury instructions defining the aggravating circumstance will be, and what findings of fact will be necessary to sustain a death sentence.[161]

Smith and Resnover involved a second question concerning the legal sufficiency of the charged aggravating circumstance of murdering a police officer "in the course of his duty," which also should have been resolved in preliminary proceedings. While Sgt. Ohrberg had knocked and announced "Police!" before breaking into Smith's house, he did not, as required by statute,[162] announce his purpose for demanding entry. Since there were no demonstrable exigent circumstances that would have excused the failure of the police to announce they had a warrant for Smith's arrest before breaking down his door, the forcible entry was in violation of the statute.[163] The important legal question raised by these facts is whether the aggravating circumstance of murdering a police officer in the course of his duty may be applied in a case in which the officer precipitates a violent response by his own unlawful behavior. In short, may an officer be deemed to be acting in the course of his duty when he is engaged in a causally related unlawful act at the time of his death?[164] This issue was not raised during the trial or

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161. In *Smith and Resnover* these issues were hopelessly confused. When ruling on the content of preliminary instructions the trial judge found that knowledge of the identity of the victim as a police officer was a necessary element of the aggravating circumstance. One of the preliminary instructions contained that element as did one of the final instructions. However, several other final instructions on the same subject did not include a *scienter* element. None of the verdict forms submitted to the jury contained a finding of *scienter.* The trial judge's oral and written findings of fact, which are the bases upon which the death sentence is imposed, did not contain a finding that the defendants knew their victim was a police officer. While the state had produced evidence to support such a finding, there was conflicting evidence on that issue in the record.

162. IND. CODE § 35-33-2-3(b) (1982).

163. See People v. Rosales, 68 Cal. 2d 299, 437 P.2d 489, 66 Cal. Rptr. 1 (Cal. 1968); Cannon v. State, 414 N.E.2d 578 (Ind. App. 1980); Harrison v. State, 424 N.E.2d 1065 (Ind. App. 1981).

164. The Indiana Supreme Court seems recently to have answered the question in the negative. In Spranger v. State, 498 N.E.2d 931 (Ind. 1986), the court before upholding a death sentence imposed upon an 18-year-old male for having murdered a police officer acting in the course of his duty, found it necessary first to determine whether the victim (a town marshall) was within the geographical limits of his arresting jurisdiction. If the murder of a police officer who is technically outside his arresting jurisdiction does not qualify his killer for a death sentence because such an officer cannot be regarded as acting within the scope of his duty, surely an officer who is killed while violating a statute enacted both for his own protection and to preserve the rights of the person subject to arrest cannot be found to be acting within "the lawful course of [his] duty." *Id.* at 942.

A reason for the requirement of announcement of both authority and purpose before forcible entry is to preclude violent response from an occupant who may perceive his person, family, and home to be under attack. *See, e.g.,* Moreno v. State, 277 So. 2d 81 (Fla. App. 1973); State v. Bishop, 288 Or. 349, 605 P.2d 642 (1980); State v. Olson, 34 Or. App. 571, 579 P.2d 277 (1978), *rev'd on other grounds,* 287 Or. 157, 598 P.2d 670 (1979). *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE 397, 400 (1978).

on direct appeal. Nonetheless, it is the type of issue that competent counsel should be able to present in the pretrial stages of a death penalty case, and which could obviate the death penalty procedures.

Finally, a requirement of preliminary screening of death penalty charges will prevent the unseemly haste with which the prosecutorial decision was made in *Smith and Resnover*.[165] Having committed himself so early to the execution of the suspects, the prosecutor would have found it difficult to back off even when subsequent investigation might have revealed his initial instincts to have been questionable. After his "quick call" and a public announcement, his incentive was to build a case against the accused and not to conduct an objective investigation.[166] A requirement of independent preliminary review will provide, if nothing else, a cooling period during which the charging decision can be considered carefully.[167] The level of public

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165. *See supra* text at notes 110-14. Another factual issue arising in capital cases and which is well-suited for preliminary screening is that recognized in Enmund v. Florida, 458 U.S. 782 (1982). In *Enmund* the Court ruled that the eighth amendment forbids the imposition of the death penalty on "one who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797; *see also* Cabana v. Bullock, 106 S. Ct. 689 (1986). A state has no legitimate interest in trying before a death qualified jury an accused for whom probable cause as to the *Enmund* factors is lacking.

166. The conspiracy charges based upon the state's theory of a long term plan to kill Sgt. Ohrberg to stop his investigation appear to have been highly contrived. Under this theory, however, the state was able to include in the record certain hearsay statements of alleged co-conspirators, and the weapons and ammunition found in the house, but which were not used in the shooting. *Smith*, 465 N.E.2d at 1121, 1124-25. Unfortunately, the issue of the sufficiency of the evidence of "long term" conspiracy was never properly presented to the Indiana Supreme Court. In affirming the conspiracy conviction, the court seems to have relied upon a "spontaneous conspiracy" theory which is at odds with the state's claims during all phases of the trial. *Id.* at 1121 ("there is at least circumstantial evidence of the existence of a conspiracy when two men who are aware that a policeman is entering the building suddenly and without warning open coordinated gunfire on the police officer.").

167. The media coverage that attended the shooting heavily emphasized the claim that one of the defendants, assumed to be Smith, deliberately shot the victim twice at close range after he had fallen to the porch. *See supra* text accompanying notes 106-08. However, only one of the eyewitnesses claimed to have seen this happen. *Id.* All of the officers were quite clear that when he fell, Sgt. Ohrberg lay on his *left* side or abdomen with his head toward the house. This would have presented his *right* side to the doorway from which the two other shots were fired. The two wounds supposedly inflicted while Ohrberg lay helpless on the porch were on his *left* side. Those wounds could *not* have been inflicted in the manner presented (indeed emphasized) by the state at trial.

Defense counsel apparently did not read the autopsy report carefully nor compare the photographs and descriptions of the wounds with the police officers' testimony. They did not cross-examine the pathologist presented by the state who after describing the three wounds, stated his opinion that the cause of death was "multiple gunshot wounds." 9 Record of Proceedings at 1731. The state made no attempt to demonstrate the consistency of the two side wounds with the testimony of the officers. *Id.* at 1727-41. The theory of the state as to the source of the two side wounds was unchallenged at trial and led to the following unchallenged closing argument by the prosecutor:

> Now, what about Tommie. Tommie sigued his name for us and we owe Tommie a debt of gratitude. Because Tommie couldn't be satisfied with tearing Jack's guts apart [with] that first shot. Oh, no. He's got to play *super-fly* and come

acceptability of the decision also will increase because of the perceived objectivity of neutral review.

The advantages of screening out cases that do not legally or factually justify a death sentencing proceeding and, hence, a death qualified jury, flow not only to the accused, but to the public. Death penalty trials are very expensive.[168] Jury selection procedures take longer because of the death qualification process. The trial is likely to consume more time and resources because of the nature of the penalty. In most cases, the jurors (including alternates) will be sequestered to keep them free of the taint of the heavy publicity that surrounds such trials. Most death penalty defendants are indigent and will require the services of public defenders who, because of the high stakes, are likely to expend more time and resources than in ordinary trials. The number of pretrial motions will be greater and defense counsel will seek more outside assistance through court appointed experts. Courts are more likely to grant such requests to avoid being reversed on appeal.[169] Post-trial appeals will be lengthy and expensive.[170]

B. Suggested Procedural Reforms

Since a person charged with a capital crime receives a different kind of trial than any other criminal defendant, and one which affords the state a special advantage in the composition of the jury, there is sufficient reason to impose procedural restraints upon prosecutors who may be tempted to exploit the advantage. In information states, the accused should be entitled to a full adversarial preliminary hearing; the right to counsel; the right to confront and cross-examine state witnesses; the right to compulsory process; and the right to require the recording and transcription of the proceedings. This hearing should focus upon the evidence which the state claims will support its decision to seek the death penalty and may be limited to an examination of the existence of a predicate offense and a statutorily prescribed aggravating circumstance.[171]

In indictment states, the accused should have a right to a transcript of

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out here and blow holes in a man who is lying dying on the sidewalk.

13 Record of Proceedings at 2257, State v. Resnover and State v. Smith, No. Cr 80-442A (Marion Super. Ct., Crim. Civ. One) (emphasis supplied). Smith is black. The jurors all were white as were the prosecutors, defense counsel and the judge. "Super Fly" is an unsavory character from a film of the late 1960's or early 1970's. The reference to Smith is pejorative and overtly racial. *See generally* GERSHMAN, PROSECUTORIAL MISCONDUCT, § 10.2(d). *See also* Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

168. *See* Comment, *supra* note 29.

169. *Id.* at 1244-55. *See* Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

170. *See* Comment, *supra* note 29, at 1262-66.

171. The examination will also give the state and the court an opportunity to consider whether a death sentence is "proportionate" even though a valid aggravating circumstance may be present.

the grand jury proceedings and the power to challenge in court the sufficiency of the evidence that purports to sustain capital charges.[172]

Since the issue goes beyond the question of custody pending trial, and involves the fairness of the trial itself, the standard for determining whether there are reasonable grounds to believe that a jury will be called upon to consider a death penalty should be more stringent than the "probable cause for arrest" standard approved in *Gerstein v. Pugh.*[173] The appropriate question is whether the evidence, when viewed in a light most favorable to the state, could lead any rational juror to conclude, beyond a reasonable doubt, that the accused is a murderer and that an aggravating circumstance justifying the death penalty is present in the case.[174] Because at issue is the *kind* of trial the accused is to be given, and whether there is a reasonable expectation that death penalty procedures will be necessary *after* conviction, only evidence that would be admissible at trial should be considered by the preliminary factfinder.[175]

The state should be free, within the confines of the fair notice requirements, to request death penalty charges at a time later than the filing of the initial indictment or information charging the predicate offense, so long as the requisite evidentiary showing is made. This will enable the state to conduct a thorough investigation of the grounds upon which a death penalty may be warranted. The prosecutor, whose initial request for death charges may have been rejected for lack of sufficient evidentiary support, should be free to seek subsequent judicial approval of the capital charges if additional evidence is discovered.

Similarly, a defendant for whom death penalty charges may have been approved in an earlier screening procedure should be free to file subsequent pretrial challenges to the death qualification of the trial jury in light of changed evidentiary circumstances. For example, the factual support for the state's death penalty charges may disappear with the granting of the defend-

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172. This is contrary to current federal law which does not permit a pretrial challenge to an indictment "valid on its face." *See* Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339, 350 (1958); United States v. Blue, 384 U.S. 251 (1966). *Cf.* United States v. Calandra, 414 U.S. 338 (1974). The Court assumed in all of these cases that any evidentiary insufficiency would be cured in a subsequent trial or through other pretrial procedures such as motions to suppress evidence and motions *in limine*. None of these cases involved a death penalty charge. Obviously a state's misuse of a death qualified jury by means of an improperly obtained indictment cannot be cured by a trial before that same jury. It follows that a defendant must be allowed a means of challenging the evidentiary basis upon which the state seeks to invoke the extraordinary death penalty procedure. For some additional suggestions, see Arenella, *supra* note 50. For a case indicating the need for such a procedure in an indictment state see Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

173. 420 U.S. at 103.

174. The standard is the same as that used to test constitutionally the sufficiency of evidence supporting a conviction in habeas corpus proceedings. Jackson v. Virginia, 443 U.S. 307 (1979). For similar suggestions see Arenella, *supra* note 50, at 476-81, 500-07, 529-34.

175. Arenella, *supra* note 50, at 531, 562-70.

ant's pretrial motion to suppress evidence illegally seized or a confession unlawfully obtained.

Due to the detail and complexity of these suggested procedures, it is recommended that both indictment and information states enact legislation designed to monitor the potential of prosecutorial misuse of death qualified juries in the wake of *McCree*.[176]

CONCLUSION

We are inured to executions. What a few years ago was cause for media-orchestrated drama and literary exploration is today relegated to the inside pages and local newscasts.[177] Dickens' hangman, if not in constant requisition, is in frequent demand. With public attention unfocused upon the charging decisions of prosecutors, the temptation is strong to over-use what must still be regarded as an extra-ordinary societal response to criminal homicides.

With the imprimatur of the Supreme Court of the United States upon a process that improves the state's chances of obtaining convictions in "high profile" crimes, the incentive to employ the death penalty process as a prosecutorial tool has been increased. Neutral screening of a prosecutor's capital crime charging decisions will not keep deserving cases from the judgments of death qualified jurors. In most instances the grounds for seeking the death penalty will be apparent and may be established with no great difficulty, cost or inconvenience to the state. The crimes are horrible and the evidence most often is strong. There are some cases, however, of the kind illustrated in this Article, in which the death penalty processes are not properly invoked. It is in these few cases, statistically small, perhaps, but humanly and numerically significant,[178] that prosecutorial zeal must be tempered by independent judgments upon the facts and the law.

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176. *See, e.g.*, CONN. GEN. STAT. §54-46a (1985).

177. The subject inspired Truman Capote to create a literary form with *In Cold Blood*, followed by Norman Mailer's *Executioner's Song*. For a lawyer's view see Streib, *Executions Under the Post-*Furman *Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight,"* 15 RUTGERS L.J. 443 (1984).

178. Finch & Ferraro, *supra* note 17.