IN THE SUPREME COURT OF FLORIDA

LEONARD SPENCER

-VS-

STATE OF FLORIDA

Supreme Court No. 69,883

Circuit Court No. 86-5921 CF A02

Record on Appeal Consolidated with
Vernon Amos -vs- State of Florida
Supreme Court No. 69,929
Circuit Court No. 86-5921 CF B02

BRIEF OF APPELLANT

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STATEMENT OF FACTS

This is a direct appeal (5643-5644) from convictions for two counts of first degree murder, four counts of armed robbery, and one count each of attempted murder and aggravated assault with a firearm. (5530, 5536-5539) For both first-degree-murder convictions the jury recommended and the court imposed sentences of death. (5595, 5600, 5604, 5618-5627)

Leonard Spencer and a co-defendant, Vernon Amos, were tried together. Their appeals to this Court are filed separate, but the record on appeal is consolidated. (5663-5664)

* * *

Palm Beach County has two "jury districts" that geographically divide the county in half east and west. By local administrative order, every criminal case automatically is set for trial in the eastern district. However, if the crime is alleged to have occurred in the western district, then at the defendant's option and only if he requests it, trial may be had in the western jury district. In whichever jury district a case ends up going to trial, for that trial jurors are drawn only from within that jury district. (5247-5248)

Leonard Spencer's crimes were alleged to have occurred in the eastern half of the county, and his trial was set to take place in the eastern district. However, Mr. Spencer lives in the western half of the county. (5246) He also happens to be Black. (763, 5246) Before his trial on two capital offenses and other

felonies, he moved for an order requiring the clerk of court to draw a jury pool from Palm Beach County at large, for selecting petit jurors to try his case. (5245-5265)

In that motion Spencer challenged the constitutionality of the "jury district" system used in Palm Beach County. He objected to drawing prospective jurors for his trial only from the eastern half of the county, primarily on grounds of a racial bias built into the system. For a trial like his, it would mean drawing prospective jurors only from the eastern half of the county where the population from which jurors are drawn is less than 10 % Black, and it would mean drawing none at all from the western half of the county where the population from which jurors are drawn is over 50 % Black. (5249-5258)

He also maintained that the system denies defendants tried for crimes in the eastern jury districts equal protection of the laws (5264-5265). He also made other challenges to its validity (5258-5263).

Without holding a hearing on the motion as Spencer sought (99), and without even requiring a response from the state (99), the trial court entered a written order denying the motion (99, 5139, 5269).

Later, pursuant to local administrative order allowing persons accused with crimes in the western district to request trial in that district (and even though the crimes Spencer stood charged with were alleged to have occurred in the eastern district),

Spencer asked that his case be transferred to the Glades Jury District for trial, claiming it would be a denial of equal protection to refuse his request (5299-5302, 99-100). The court also denied that motion (100-101).

At the hearing at which the court denied the latter motion, the judge noted that in Palm Beach County Grand Jurors (unlike petit jurors) are not drawn from "jury districts," but are drawn county-wide, and that, in weeks when a county-wide jury pool already is drawn for selecting a new Grand Jury, the same county-wide pool also is used to select petit jurors. (100, line 25-101, line 3) On hearing this, Spencer renewed his motion for a county-wide jury venire, asking that the Court simply re-set his trial to a week when a Grand Jury was scheduled to be drawn. (101-102) The Court denied that motion, too. (101-102)

On day of trial Spencer renewed his motion for a county-wide jury pool. (345-349) After several days of voir dire, when the jury to try his case finally were selected and about to be sworn, Spencer again renewed his motion for a county-wide jury, as well as his motion for trial in the Glades Jury District. (1348) When the entire jury including alternates were accepted, it was noted by counsel, agreed by the court that the jury-district question was preserved, i.e., that it was not waived by Spencer's acceptance of this jury. (1757) After trial, Spencer raised the issue again in his motion for new trial (5542-5543), which the court also denied (5551).

* * *

When this case did come up for trial, of the original sixty people called to the courtroom for the jury selection process, only five of the sixty were Blacks, as pointed out by defense counsel for both defendants, though the trial judge was unwilling to acknowledge specifically how many were Blacks except to say that it was, clearly, less than ten. (761-762) In any event, of the original twelve prospective jurors called into the jury box for voir dire, four of those were Blacks. (552-553, 762)

During the second day of jury voir dire, the prosecutor asked one of those Black prospective jurors, along with other questions, whether she would have any health difficulties sitting on this trial. She said she had had a heart attack, though she did not indicate how long ago, and said she now has a pacemaker. She also said she had not told her doctor she was coming in for jury duty, and had not asked him whether she was strong enough to do it, but, "I think I am, you know, so far." (462) The prosecutor warned her it may be a five-week long trial and asked if that would cause her any problems. She answered that she has to see her doctor periodically, but not too often, and, other than that, she "feels pretty good." (462)

That was the extent of the prosecutor's inquiry during voir dire about this Black potential juror's medical ability or inability to serve.

Later that day the Court recessed the jurors for lunch with instructions to return to the Jury Assembly Room downstairs at 1:30 p.m., and not to come to the courtroom, or even to the fourth floor of the courthouse where it is located, until sent up as a group by the Jury Assembly Room. (748)

After the panel left the courtroom (748), the court heard further matters. The prosecutor challenged this Black potential juror, for cause, on grounds of her heart condition and the stress this trial would put on her. (749)

Spencer objected strenuously to that challenge, because, he said, this potential juror was one of precious few Black potential jurors in the case, and because, when asked about it, she had not said she had any physical problems prohibiting her from sitting on this case. (749-750)

The judge indicated he automatically was squeamish about anyone with a pacemaker. (750).

Spencer pointed out she had not indicated any problem when asked, and the court was obliged to honor her answers. If the State, Spencer contended, wanted to pursue a challenge for cause on that basis, it should have asked further questions of her, to establish directly the basic assumption the State now was trying to get the court to make by implication. (752)

Over Spencer's strenuous objections, the court said it would grant the State's challenge of this prospective juror, for cause

(753) -- meaning this juror would be excused when the venire panel returned from lunch recess.

Defense counsel then requested a readback of her earlier voir dire, which the court denied. (754) Spencer then requested the court at least allow the parties further voir dire of this prospective juror on the matter before the court excused her, which the court also denied. (754)

Spencer suggested that the court was disqualifying her **per se** because she has a pacemaker, and challenged the legal propriety of such a broad criteria for disqualifying any whole class of jurors. (755)

In response, the judge acknowledged he may be disqualifying her simply "because I am squeamish," and that it may be because of his lack of knowledge regarding pacemakers, but, the judge said, the pacemaker aspect of it concerns him, and he just doesn't see any reasons for "putting somebody like that through it." (756) So the court would deny, he said, the defense requests for further inquiry and for reconsideration, and still would grant the State's challenge for cause. (756)

After the lunch recess, first thing when court resumed, the judge advised the parties that three members of the panel had been seen by the bailiff during the lunch recess on the fourth floor of the courthouse . (776) And then, without making any inquiry of counsel first, the judge inquired of the three jurors who had been on the fourth floor.

One juror said he came up at 1:27 p.m., in other words, three minutes early. The other two said they had been on the floor only five minutes early. All three acknowledged this was before the Jury Assembly Room advised them to return to the courtroom or to the fourth floor. (776-778)

Without making any inquiry of counsel first, the judge announced he was excusing those three potential jurors and immediately ordered them returned to the Jury Assembly Room. (779)

Throughout all this, counsel for both defendants on trial were trying to get the court's attention, and the court failed to acknowledge them. (780)

After the three jurors were excused, and once counsel got the court's attention, defense counsel for both defendants objected strenuously: First, because excusing those particular three jurors further destroyed the accuseds' ability to maintain a fair racial balance in the jury selection process, since two of the three excused jurors were Blacks [one was the same Black potential juror excused for cause during the recess]; and, second, because there was no legal basis for such excusals. Counsel pointed out that during the recess the three jurors had only been in the hallway outside the courtroom, not inside the courtroom itself, and they had had no contact with counsel, nor had anything occurred while they were out there that in any way affected their ability to sit on trial of this case. (780)

The trial judge responded by admonishing counsel not to take up any more of the court's time with it, and said what the court should have done was hold the three panel members in contempt. (780-781) The judge also said he was not addressing it from the standpoint of race, but from his own viewpoint that anybody who cannot comply with the instructions of this court now, cannot be expected to follow the instructions on the law later. (782)

[It may be relevant that, later, the judge apologized to counsel for his attitude throughout the proceedings. The judge said he would settle down and get back to normal in a little bit, and explained he was in a bad mood because he recently had been advised, by the chief judge of the circuit, of his pending transfer to another division of court, which, clearly, he was not the least bit happy about. (827-829)]

After a jury of twelve were selected, they were sworn and recessed for the evening. The next morning voir dire would continue for selection of alternate jurors.

The next morning before court started, two members of the remaining panel from which alternates were to be selected came into the courtroom early (1374-1375), and still others came early up onto the fourth floor (1375). The judge announced to counsel he was going to follow the same procedure as before. (1375)

Spencer cautioned the court about saying anything or doing anything that would scare or intimidate the balance of the jurors. (1375-1377) The judge said, "I certainly hope that is

exactly what we accomplish, intimidating them to the point that they follow the Court's instructions," and said counsel's objections were noted, and, "I don't care to discuss it further." (1377)

When the prospective jurors returned (1387), the court excused the two who had been in the courtroom, plus two more who had been outside the courtroom on the fourth floor. (1390)

Later, following a another recess, but while the selection process still was going on for alternate jurors, members of the regular jury panel already selected and sworn to try this case did the same thing. Contrary to the Courts instructions, after an overnight recess they came to the courtroom in the morning rather than reporting downstairs to the Jury Assembly Room. They actually came into the courtroom, not just to the fourth floor. (1489, 1491)

This time, however, when court reconvened the court did nothing, not even caution the jurors. The judge said absolutely nothing to them about it. (1491-1492)

At commencement of trial the court gave the standard jury instruction to the jurors about not visiting the places described during testimony while they were sitting on the jury hearing the case. (1766)

Several days into trial testimony it was discovered that two jurors, during trial, had been driving by the crime scenes about which they were hearing testimony. (2491-2507) One had inadver-

tently driven past the first murder scene, at the convenience store. (2503-2504) The other, however, was going by all three crime scenes as well as past the scene of the co-defendant's arrest, apparently every day of trial. (2497-2499) Yet, the trial judge denied a defense motion to strike these two jurors, and, again, said nothing to the jurors about it -- in fact, didn't even ask them to stop doing it. (2507-2527)

* * *

Bearing in mind it is the whole jury selection process that is challenged by Spencer's various motions, rather than the final composition of a particular jury actually selected in his or any other specific case, it may be noted that the final panel of twelve selected for trial of this case did include three Black jurors. (1349)

* * *

A quick overview will help put what follows in perspective. The facts of this case revolve around a midnight crime spree along Military Trail in West Palm Beach. A convenience store -- a Mr. Grocer store -- was robbed by two Black males, the clerk shot and killed, and a customer shot and his car stolen from the parking lot for the get-a-way. A few moments later, a half mile down the road, that get-a-way car was abandoned, and another victim was shot and killed by two Black males, in the parking lot of the English Pub bar, in an unsuccessful effort to steal his pick-up truck. The two Black males ended up fleeing that scene

on foot. Moments later, a few blocks down the road from that scene, another person's car was stolen from him, by two Black males, at gunpoint, while that victim talked to the "911" operator on a pay phone about seeing the two killers walking down the street from the English Pub towards him. (The robbery could be heard on the "911" recording.) From there police pursued that victim's car with the two Black males in it, and eventually caught the co-defendant, Vernon Amos, hiding near where the car was abandoned during the chase. The other occupant, whoever he was, escaped. Appellant Leonard Spencer was arrested on these charges several weeks later in Ocala, Florida. (See: 1771-1798)

In opening statements, Spencer's counsel made it clear to the jury that the crimes occurred as alleged, and the only defense issue -- insofar as it concerned this particular defendant -- would be the sufficiency of proof as to Spencer's identity as one of the perpatrators. He told them the facts would show that Spencer initially was with the two perpatrators of these crimes, driving his car, in which he brought them to West Palm Beach from Belle Glade. At the convenience store, where it all began, Spencer went in to buy a soda, which he put on the counter to purchase, but when he saw the third man coming into the store and realized a robbery was about to take place, he immediately walked out as the other guy walked in, got in his car, and drove home to Belle Glade, leaving the other two behind to do whatever they

were going to do and to get back home however they could find a way. (1805-1822)

Regarding the State's identity evidence, Spencer's counsel told the jury as his final point in opening statement that the only witness identifications of Spencer done prior to this trial, identifying him as a participant in these crimes, were done by photographs, never by a live identification based on actually seeing him. (1822)

With the defense issue framed in that manner, the State presented its "identity" evidence, as to this defendant, in the following manner -- and in the following order.

Terry Howard was the customer inside the convenience store who witnessed the robbery-murder of the clerk, and who was shot himself, and whose car was taken by the murderers. (1845-72) At no time during his direct examination by the State (1845-1872), or on cross-examination, or on re-direct (1872-1903), was he ever asked to identify anyone in the courtroom, or to look at or testify to any photographs used in any pre-trial photo line-ups. He was not even asked about his ability or inability to make any identification.

Bobby Lee Helvey was a customer at the same store, who drove up as the two Black males were running out the store. (1911-1918, at 1912-1914) On direct by the State he was asked if he had done a photographic line-up identification before trial, and acknowledge he had identified one of the two Black males in a

photo line-up. (1916) However, he was never asked on direct to look at and testify about any photographs used in that pre-trial photo line-up (1911-1918), nor was he ever asked whether the person selected by him in that photo line-up was one of the two defendants on trial, or whether either of the defendants in the courtroom now were someone he had picked out at the photo line-up or someone he had seen fleeing the store that night. Consequently, he was not asked those question on cross (1918-1920), or re-direct (1920), or re-cross (1920-1922).

John Foster was a passenger in a car pulling into the parking lot of the English Pub bar. (1972) The car he was in pulled up next to a pick-up truck to park, and he saw a white male and two Black males by the truck scuffling, and he saw the Black males shoot the white male, and then saw them try, unsuccessfully, to drive off in the pick-up truck. (1972-1986) At no time in his direct examination by the State (1972-1987), and so at no time on cross (1987-1996), was he ever asked to identify anyone in the courtroom, or to testify about or identify any photographs used in any pre-trial photo line-ups.

Deputy Sheriff Robert Anderson was a deputy who had started to stop the murderers' get-a-way car when he saw it coming out of the convenience store parking lot, for driving without headlights on, but abandoned the stop when he got a radio call of a robbery in progress inside the store. (2017 et seq., at 2022-2026) Later he was involved in attempting to find the suspects at the

scene where the last get-a-way car was abandoned, and was there on the scene himself when co-defendant Vernon Amos was found hiding in the trunk of a junked car. The co-defendant was arrested by this officer. (2029-2072) Deputy Anderson identified the co-defendant in the courtroom, Vernon Amos, as the individual arrested that night. (2027)

However, at no time in his direct examination by the State (2017-2072), and, so, at no time in his cross (2072-2084), was Deputy Anderson ever asked to identify the other suspect, or to look at or comment on any pre-trial photo identifications of the other suspect. He was not even questioned about his ability or inability to make an identification of the other suspect.

Mark Nordman was a witness at the English Pub. His testimony is a bit confusing, but basically it comes down to this so far as the murder at that scene is concerned. He pulled his car into the parking lot of the bar around midnight, to wait for a friend (2085-2088), and as he drove in he heard gunshots. (2089) He then saw a white man laying on the ground. (2087) And he saw two Black males running from the scene. (2086)

Later the same morning he was taken by police to a junkyard (i.e., scene of the arrest of co-defendant Vernon Amos), and there made a positive one-on-one live identification of the person police had in custody, identifying him as one of the two Black males he had seen at the English Pub. (2091-2093) On direct Mark Nordman testified that, four days later, he was shown

a nine photograph line-up, and he identified the same person again, and also identified in that photo line-up the other Black male he had seen at the English Pub. (2135-2136, 2143-2145)

So far as it relates to Leonard Spencer, at no time during Mark Nordman's direct or re-direct examination by the State was he ever shown any photographs in court, or asked about the specific photographs used in any earlier photographic line-up; nor was he ever asked to identify anyone in the courtroom as either the other suspect whose photograph he had identified, or as someone he had seen at the English Pub that night. (2085-2136, 2152-2153). Consequently, he was never asked about those matters on cross- or re-cross examination. (2137-2155)

Allen Sedenka was the person whose car was the last one taken, at gunpoint, while he was on a pay phone with the "911" operator telling about seeing the two Black males running away from the English Pub and coming towards him. (2177-2181) Allen Sedenka had a police scanner in his car, and so knew the police were looking for two Black males fleeing a shooting at the English Pub, when he first saw them and stopped to call 911. (2177-2181) When the two Black males got to where he was, they took his car from him at gunpoint, while he still was on the phone. (2181-2182)

Mr. Sedenka testified he had been shown photo line-ups twice, once later the same morning as the crime, and again the same day about two-and-a-half to three hours after the first

photo line-up, and he identified someone in the line-ups both times. (2246-2247)

However, at no time while on direct or redirect by the State (2177-2244, 2243-2249), nor, therefore, on cross-examination (2244-2248), was Allen Sedenka ever shown any photos and asked to identify them as the ones used in those photo line-ups; nor was he ever asked to identify Leonard Spencer in the courtroom as a person identified by him in either photo line-up, or as one of the two Black males who had committed the crime upon him that night.

Deputy Sheriff Arthur Newcomb was the officer who pursued Sedenka's fleeing car with the two Black males in it. (2275) He never got close enough during the chase to see and be able to identify the car's occupants. (2279) The car finally stopped and the two occupants "bailed out," and ran into some woods. (2283-2284) Deputy Newcomb never got a good enough look at them anytime that night to be able to identify either one. (2288)

After the witnesses described above had testified, the State called Detective Robert Poje to the stand. (2290) Spencer knew from pre-trial depositions what subjects this officer would be able to address. Before he testified, Spencer moved in limine to exclude any testimony from this officer, and from any other officer later, concerning identifications made during photo line-ups he may have conduct with any witnesses who already have testified. (2292-2293)

Spencer objected on grounds of lack of the predicate required before officers could testify to other persons' out-of-court identifications. He made the following arguments.

First, the officers' testimony about other persons photo line-up identifications would be hearsay.

Second, it would violate the defendant's right to confront and cross-examine the witnesses who actually made the identifications, since, when those other witnesses were on the stand, the State never showed them the photo line-ups and asked whether those are the photo line-ups referred to in their testimony. The defendant could not conduct such cross-examination himself while the witnesses were on the stand, because the State had not even marked the photo line-up exhibits, much less introduced them into evidence, at that point. (2293-2294)

[In fact, it was even some time after Spencer's motion in limine was made (and denied by the court) that the State finally got around to having an officer bring the exhibits to court to be marked. (3380, 3381)]

Third, the State had not laid the proper and required predicate for testimony from the officers who did nothing more than conducted the photo line-ups. (2294-2312)

Spencer also pointed out to the Court that, in deposition, witnesses Howard and Sedenka both testified they could make a positive identification in the courtroom at trial later. (2312) Spencer expressed amazement that the State never asked those

questions of those or any other witnesses when they testified at trial. He also speculated that, if the State now had reason to believe these witnesses couldn't make an identification in the courtroom, contrary to what they said in deposition, that knowledge would have been **Brady** discovery materials, and the failure to reveal that information to the defense very well could be a discovery violation for which the prosecutor could be held in contempt. (2311-2313)

The State assured everyone there was no **Brady** violation, and explained it never asked the identity questions of any of its eyewitnesses simply because, prior to trial, none had expressed "absolute certainty" that they would be able to do an in-court identification. (2316)

The court entertained extensive argument of counsel for the state and defense on this issue (2291-2359), and, in the end, denied the motion in limine (2353-2359).

Later in trial the State called only one witness to testify concerning the photo line-up identifications of Leonard Spencer.

Detective Richard Oetinger (3379 et seq.) brought the "Leonard Spencer" photo line-up to court. (3380) It contained six photographs. (3392) One of the six was a photograph of Leonard Spencer. (3387-3390) When first asked about it on direct, Detective Oetinger testified he showed the photo line-up with Spencer's photograph in it to three people -- witnesses Mark Nordman, Terry Howard, and Allen Sedenka (3380-3381) -- and only

two of the three made identifications of him (3390). But when asked about each one's viewing of the photo line-up, he described it as follows.

Detective Oetinger showed the six-man photo line-up to witness Alan Sedenka (the victim whose car was stolen while he was on the phone with the "911" operator), and in a few seconds of viewing it, Sedenka picked out Leonard Spencer's photograph. (3398-3399)

Detective Oetinger showed the same photo line-up to witness Mark Nordman (the witness who was in a car that parked next to the pick-up truck at the English Pub). Nordman carefully studied the photos for ten or fifteen minutes, and tried to eliminate what photos he could one at a time, and finally settled on the photograph of Leonard Spencer. (3394-3397)

Finally, Detective Oetinger showed the photo line-up to witness Terry Howard (the man shot in the convenience store), and Howard "chose two photographs that looked similar to one of the individuals that he thought might be involved," and one of the two photographs he picked was Leonard Spencer's. (3391-3394, at 3394)

After the State rested, neither defendant presented any testimony or evidence. At conclusion of the State's case Spencer moved for directed verdict of acquittal on grounds of insufficient evidence as to the essential element of Spencer's identity as a perpetrator of the crimes. (3522-3528)

Spencer argued that, even assuming the court was correct in admitting Detective Oetinger's testimony about three eyewitnesses' pre-trial photo identifications of Spencer, it was insufficient identify evidence to bypass a directed verdict of acquittal. At trial the eyewitnesses themselves had not reconfirmed under oath such photo identifications, nor had they made direct in-court identifications of the accused. Identity was only established, in the end, by sworn in-court testimony by the detective about other people's unsworn out-of-court identifications of Spencer, with no one ever making an in-court identification of Spencer -- and with no one ever making a "sworn" identification of him at any time, in or out of court. (3522-3528)

The court denied Spencer's motion for directed verdict of acquittal. (3586, 5172)

SUMMARY OF ARGUMENT

Pursuant to local administrative order of the circuit court, Leonard Spencer was tried in the eastern "jury district" of Palm Beach County, before a jury drawn only from the eastern half of the county. **Administrative Order No. 1.006-1/80, "In Re: Glades Jury District/ Eastern Jury District".**

Leonard Spencer is Black, and a resident of the western half of the county. On the eastern side of the county, where the crimes occurred and so where his case went to trial, the population is less than 10% Black. But the population from which jurors are drawn in the western half of the county, where Spencer lives, is over 50% Black.

The trial court denied Spencer a county-wide jury selection process, denied him trial in the western jury district, and denied him trial during a week when a new venire for selection of Grand Jurors would be drawn county-wide and would be used for petit jury service, too.

The jury district system as set up in Palm Beach County creates a clear racial bias in the jury selection process, discriminating against Black.

The constitutional guaranty of jury trial includes assurance the jury be drawn from a fairly representative cross-section of the community. **Bass v. State,** 368 So.2d 447 (Fla. 1st DCA 1983).

After Spencer's trial, in the same circuit other judges have found the system racially biased and unconstitutional for the reasons urged by Spencer. **State v. Joseph**, Case No. 87-619 CF A02, Fifteenth Judicial Circuit, in and for Palm Beach County.

The system also violates the statute authorizing local creation of jury districts in the first place, since it fails to preserve the county's population mix in its respective jury districts as specifically required by the statute. **Section 40.015(2), Florida Statutes.**

Under the administrative order, jury districts are used for petit juror service, only. Grand Jurors are drawn from the entire county. This violates a statute which requires Grand Jurors and petit jurors to be drawn from the same area and in the same manner. **Section 905.01(1), Florida Statutes.**

Any statute that affords trial by a jury drawn from less than the entire county is unconstitutional. Cf., **Jordan v. State**, 283 So.2d 131 (Fla. 2d DCA 1974).

The system also violates "equal protection" guarantees of the state and Federal constitutions. Under the administrative order, all criminal trials occur in the eastern district, unless a defendant charged with a crime in the western half of the county elects trial in that district, which election automatically transfers the case there for trial in that district.

People accused of crimes in the western district automatically have juries that excluded from the selection process all

people living in the community where the crimes occurred. They have an automatic change of venue, which they may waive at their option, merely by electing trial in the western district. Other defendants in the same court system, on the other side of the county, have no such options.

The equal protection denial is even more profound because of the racial factor. Defendants in cases out of the western district have discretion to go to trial in the eastern district, with a jury drawn from a population less than 10% Black, or to trial with a jury drawn from a population over 50% Black. Other defendants have no such choice.

When a new Grand Jury is being drawn, a county-wide jury pool is used for that purpose, and while in the courthouse for that purpose, they also are used for petit jury service. Some defendant's do get a county-wide jury, while others like Spencer are denied the same right even when they demand it.

The statute authorizing local creation of jury districts violates several provisions of the **Florida Constitution** mandating that legislation relating to the courts, and to jury selection processes, be enacted by "general law". The statute authorizes local creation of jury districts by local option of the circuit courts. The statute is, at best, a general law of local application, not a general law as constitutionally mandated.

During jury selection the trial court on its own motion struck two of only three Blacks undergoing voir dire, because,

following a recess, they had returned to the fourth floor of the courthouse five minutes early. The judge had told them to stay on the first floor until called. Later, far more serious violations of the court's instructions by persons sitting on the jury, only resulted in the judge denying motions to strike them, and saying nothing to them about the violations. The court's arbitrary and capricious manner of discharging two Black jurors during the jury selection process in this case further biased the selection process against Blacks.

The defense was a lack of sufficient proof that Spencer was a participant in the crimes. The State put on several eyewitnesses, but asked none of them to identify Spencer in the courtroom; and asked none of them to examine in court any photographs they may have viewed before trial; and asked none to reconfirm which photograph they had selected if they had. No eyewitness was ever asked, at any time during trial, any question concernin an identification of, specifically, Leonard Spencer.

After all the eyewitnesses had testified, Spencer moved **in limine** to exclude testimony of any police officers about any photographic line-up they conducted at which Spencer's photograph was selected, on grounds it would be improper hearsay. Spencer contented he was deprived of an opportunity to fully confront and cross-examine the identification witnesses concerning their identifications of him, since the witnesses never addressed the

subject while on the stand, and since the photographic line-up itself -- the actual photo pack used -- never was brought to court by the State until after the eyewitnesses testified. [In fact, it was not brought to court until after the motion **in limine** had been heard and denied.]

After the motion **in limine** was denied, the State put on an officer who testified he had shown three of the eyewitnesses a six-photo line-up, and testified to the witnesses' identifications of Spencer in those photo line-ups.

At end of the State's case, Spencer moved for directed verdict on grounds the officer's testimony was the only "identity" evidence introduced by the State, and, even if his testimony was a proper exception to the hearsay rule, it is not sufficient standing by itself to sustain a conviction. The trial court had relied on the provision in the **Florida Evidence Code** making a hearsay exception for statements of identification by a person made after perceiving him, in order to admit the testimony. Spencer contends, by analogy to **State v. Moore**, 485 So.2d 1279 (Fla. 1986), that even if admissible, such evidence is not sufficient, standing alone, to prove the essential element of identity. **Moore** so found as to identity established by prior inconsistent statements given under oath subject to penalty of perjury, which is another hearsay exception in the same provision of the **Florida Evidence Code** relied on by the judge here.

POINT I

THE TRIAL COURT ERRED FUNDAMENTALLY IN DENYING THE DEFENSE PRE-TRIAL MOTION FOR A JURY VENIRE DRAWN FROM PALM BEACH COUNTY AT LARGE (RATHER THAN FROM A "JURY DISTRICT" OF ONLY ONE-HALF THE GEOGRAPHICAL AREA OF THE COUNTY),

AND

ERRED IN VIOLATION OF "EQUAL PROTECTION" STANDARDS OF STATE AND FEDERAL CONSTITUTIONAL LAW BY DENYING A DEFENSE REQUEST FOR TRIAL IN THE WESTERN HALF OF THE COUNTY OR GLADES JURY DISTRICT,

AND

ERRED FUNDAMENTALLY IN DENYING THE PRE-TRIAL DEFENSE MOTION TO RE-SET THE CASE FOR TRIAL DURING A WEEK WHEN THE JURY POOL ALREADY WAS SCHEDULED TO BE DRAWN COUNTY-WIDE FOR USE IN SELECTING A NEW GRAND JURY.

The Fifteenth Judicial Circuit consists of Palm Beach County only, and has two "jury districts" created by administrative order of the circuit court, **Administrative Order No. 1.006-1/80**, "In Re: Glades Jury District/ Eastern Jury District." The boundary between the two districts is a north-south line that divides the county geographically in half, east and west. [Jurors in the Eastern Jury District serve at the main courthouse in West Palm Beach; jurors in the western or Glades District serve at a branch courthouse in Belle Glade.] (5246-5248)

Section 40.015, Florida Statutes, authorizes each Circuit Court to create, at its option, its own jury districts.

> **Jury Districts; counties exceeding 50,000**
>
> (1) In any county having a population exceeding 50,000 according to the last preceding decennial census and one or more locations in addition to the county seat at which the coun-

> ty or circuit court sits and holds jury trials, the chief judge, with the approval of a majority of the circuit court judges of the circuit, is authorized to create a jury district for each courthouse location, from which jury lists shall be selected in the manner presently provided by law.
>
> (2) In determining the boundaries of a jury district to serve the court located within the district, the board shall seek to avoid any exclusion of any cognizable group. Each jury district shall include at least 6,000 registered voters.
>
> **Section 40.015, Florida Statutes**

The administrative order of the Circuit Court in Palm Beach County says, in pertinent part:

> A Glades Jury District has been established by a majority vote of the Judges of the Fifteenth Judicial Circuit and by resolution of the Board of County Commissioners of Palm Beach County. In implementing this District, the Glades Courthouse Annex is designated as a situs for holding the following jury trials:
>
> Circuit Court Criminal
>
> Normally, all felony jury trials are held at the main courthouse in West Palm Beach; however, where the situs of the crime is within the Glades Jury District, defendant's counsel may request a jury trial at the Glades Annex. In all such cases, the Clerk shall furnish defendant's counsel with form of "Notice and Preference re Jury District," which form shall be signed and filed by him no later than fifteen days after the case is set for trial.
>
> * * *

> Grand Jury
> This Order does not affect the Palm Beach County Grand Jury, which shall be drawn from the county at large.
>
> Administrative Order No. 1.006-1/80, "In Re: Glades Jury District/ Eastern Jury District"
>
> Also see: (5247

As result, and over his objections, Spencer was tried and convicted on capital charges, and received a jury recommendation of death (which recommendation the court followed), by a jury drawn only from the eastern half of the county. Totally excluded from the pool of prospective jurors for trial of his case were all persons living in the entire western half of the county, where the defendant himself resides, and where a majority of the population, like the defendant himself, is Black.

Now, on appeal, Leonard Spencer challenges the constitutional validity of such a jury district system, and of such a trial.

The western half of the county or Glades Jury District is rural, consisting exclusively of small towns like Belle Glade, South Bay, and Pahokee. It is heavily oriented to farming and farm labor, and, so, to minority populations such as Hispanic and Black. (5249)

The eastern half or Eastern Jury District is urban, and is characterized by wealthy communities like Jupiter, Palm Beach, Wellington, and Boca Raton, all communities that are predominantly caucasian, and is dominated by the West Palm Beach metropoli-

tan area, a major metropolitan area of high-density and predominantly caucasian population. (TR 5249)

[These differences were exemplified by stories in the national press just prior to Spencer's trial, when the towns of Palm Beach and Wellington were receiving national press attention for community-wide involvement with Prince Charles and championship polo, at the same time that Belle Glade and South Bay were receiving national media coverage for community-wide problems with poverty and an AIDS epidemic. (5249)]

Since jury pools in Palm Beach County are drawn from voter registration lists, Spencer documented the racial diversity between the two jury districts by presenting facts on the county's registered voters. Data maintained by the Palm Beach County Supervisor of Elections revealed the following about voter registration (and, therefore, about the pools of citizens form which jurors are drawn) in Palm Beach County (5250-5251):

TOTALS FOR PALM BEACH COUNTY AS A WHOLE
VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACKS	PERCENTAGE BLACK
398,797	29,859	7.487 %

TOTALS FOR GLADES JURY DISTRICT
VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACKS	PERCENTAGE BLACK
9,549	4,974	52.08 %

In the western half of the county where jurors are drawn only from within that district, the system draws from a voter registration list, from a pool of citizens, that is over 50 % Black. Based on voter registration, the western half of the county is 52.08 % Black. Yet, in the whole county there are 398,797 registered voters and only 29,859 of those voters are Black, meaning on a county-wide basis Blacks make up only 7.487 % of the population base from which jurors are drawn.

This means that in a county with less than 10 % Black voters, a very significant concentration of Black voters are removed from jury duty at the main courthouse in the urban eastern half of the county, and are concentrated instead for jury duty at a branch courthouse in the rural western half of the county. This distorts the population mix in both jury districts, and in both districts fails to draw prospective jurors from a fairly representative cross-section of the entire county.

When drawing jurors on a county-wide basis, if using a system designed to draw a fair-cross-representation of the county, the system would impartially draw from a population mix that is seven and a half percent Blacks.

Leonard Spencer does happen to be Black, and does happen to be a resident of the western half of the county. But, even without those factors, the failure to preserve the county's racial diversity in the county's jury-selection process is a defect that is fundamental.

The right of an accused to trial by jury is one of the most fundamental rights guaranteed by our system of government, and is the cornerstone of a fair and impartial trial, and any infringement of that right constitutes fundamental error. **Nova v. State**, 439 So.2d 255 (Fla. 3rd DCA 1983), at 262.

In **Bass v. State**, 368 So.2d 447 (Fla. 1st DCA 1979), a conviction was reversed for violating the constitutional mandate of fair-cross-representation in the jury selection process. There was a shortage of prospective jurors in the regular venire, so the trial court had the sheriff summon enough qualified persons to complete the panel. A deputy sheriff and court clerk drew the balance of the panel from their all-caucasian church and their all-caucasian acquaintenances. The appeals court found that to be a systematic, even though unintended, exclusion of Blacks, and reversed, because,

> The constitutional guaranty of a jury trial includes assurance that the jury be drawn from a fairly representative cross-section of the community.
>
> **Bass v. State**, id., at 449

The Fifteenth Judicial Circuit itself is split on the constitutionality of its own jury district system. After the notice of appeal was filed in the present case, the same pre-trial demand for a jury pool drawn from the county at large, on the same grounds, was **granted** in another case by another circuit court judge in Palm Beach County. [And, since that time, it has

been granted in numerous other circuit court cases in Palm Beach County.] That case now is on appeal to the Fourth District Court of Appeal: **Alix Joseph v. State of Florida**, 4 Dist.Ct.App. Case No. 87-6199.

[A certified copy of the circuit court's order in **Joseph** is attached as **Appendix A.** **State of Florida -vs- Alix Joseph**, Case No. 87-619 CF A02, Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida.]

Circuit Court Judge Harold Cohen, in the **Joseph** case, finds:

> * * * that the jury district system used for drawing petit jurors in Palm Beach County discriminates racially and is unconstitutional.
>
> **State v. Joseph**, id., at 2-3

Judge Cohen in **Joseph** does what Spencer sought in this case: finds Palm Beach County's jury district system unconstitutional, and directs the Clerk of Court to draw a jury pool from Palm Beach County at large for trial of the case.

Even though Judge Cohen finds there are many excellent reasons for creating two jury districts in Palm Beach County, and finds the racial discrimination resulting from the county's jury district system is unintentional and not purposeful, he rules,

> Nevertheless, the Court cannot overlook the result that has developed, albeit, the unintentional result, of the "jury district" system. The system presently in use in this Circuit has removed from jury duty in the main courthouse in the Eastern District in West Palm Beach a significant concentration of

> Blacks. The Black concentration of prospective jurors has then been shifted to the Glades Jury District in Belle Glade and has had a significant impact in maintaining a fair racial balance in the overall selection process for petit juries in both the Glades and Eastern Jury Districts of Palm Beach County.
>
> * * *
>
> Although there is no intent found to cause any racial discrimination, the unintended result simply fails to maintain a basic population mix that is not racially discriminatory. In **Jordan v. State**, 293 So.2d 131 (2nd DCA, 1974) the Court said:
>
> > It should be observed at this point that the record indicates no bad faith or purposeful intention to discriminate in the jury selection process. Yet, the net effect of the system, as it relates to the appellant, was that his jury panel and the venire from which it was selected (as well as the master jury list which was the ultimate source of both) were constituted as if there had been purposeful discrimination. Jury Commissioners, even those with the purest of motives, are "under a constitutional duty to follow a procedure - "a course of conduct" - which would not "operate to discriminate in the selection of jurors on racial grounds."
> > **Jordan v. State**, supra, at 134, citing **Avery v. Georgia**, 345 U.S. 559, 561

Judge Cohen quotes from the decision in **Jordan v. State**, supra, where the appellate court states:

> Apart from the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, the Sixth Amendment to the U.S. Constitution guarantees the accused a trial by an impartial jury. This comprehends that in the selection process there will be a "fair possibility for obtaining a representative

> cross section of the community." **Williams v. Florida**, 399 U.S. 78, 100 . . . Where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drawn from a fair cross section of the community requires that the jury be drawn from the whole county and not from some political sub-units thereof to the exclusion of others. **Preston v. Mandeville**, 479 F.2d 127 (5th Cir. 1973). A white defendant who was charged with a crime allegedly perpetrated against a black could be similarly aggrieved if the jury list from which his venire were drawn came only from those precincts having a disproportionately high number of blacks.
> **Jordan v. State**, supra, 134.
>
> **State v. Joseph**, surpa, at pages 4-5

Federal interpretations of these same constitutional standards support Judge Cohen's and Appellant Spencer's position here.

The **Sixth Amendment** of the U.S. **Constitution** guarantees a jury selection process that draws from a representative cross-section of the community. Federal court decisions make it clear this right is absolute, and that when it is violated no prejudice or bias need be shown for the defendant to have standing to complain, and that a violation is prohibited even if the defendant himself is not a member of the "class" of citizens unlawfully excluded.

In **Peters v. Kiff**, 407 U.S. 493 (1972) the U.S. Supreme Court held exclusion of blacks constitutes denial of due process to any defendant, white or black, and standing to complain exists

even if the defendant is not a member of the class excluded, and harm need not be shown.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable * * *
>
> It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce * * * In light of the great potential for harm latent in the unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.
>
> **Peters v. Kiff**, 407 U.S. at 503-504 (footnote omitted)

In **Duncan v. Louisiana**, 391 U.S. 145 (1968), the court extended these Sixth Amendment rights to criminal trials in state courts.

In **Williams v. Florida**, 399 U.S. 78 (1970), the court upheld juries composed of only six rather than the traditional twelve, but reaffirmed that in criminal trials the system used to select the six must draw from a group of laypersons representative of a fair cross-section of the community, and that this latter right is part and parcel of the Sixth Amendment right of fair trial by jury. **Williams v. Florida**, 399 U.S. at 101.

Later, in **Taylor v. Louisiana**, 419 U.S. 522 (1975), the Supreme Court said, point blank, "the selection of a petit jury from a representative cross section of the community is an essen-

tial component of the Sixth Amendment right to a jury trial." **Taylor v. Louisiana**, 419 U.S. at 528.

> We accept the fair-cross-representation requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. **Duncan v. Louisiana**, 391 U.S. at 155-156, 20 L.Ed.2d 491, 88 S.Ct. 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." **Thiel v. Southern Pacific Co.**, 328 U.S. 217, 227, 90 L.Ed. 1181, 66 S.Ct. 984, 166 ALR 1412 (1946) (Frankfurter, J., dissenting).
>
> **Taylor v. Louisiana**, 419 U.S. at 530-531

In addition to racial bias, Spencer raised a substantial "equal protection of the laws" challenge. (5264-5265)

The constitutional right of "equal protection of the law" means that every one is entitled to stand before the law on equal terms with, and to enjoy the same rights as belong to others in like situation. C.f., **Caldwell v. Mann**, 157 Fla. 633, 26 So.2d 788 (Fla. 1946).

Palm Beach County's jury-district system denies equal protection of the law to the defendant charged with an offense in the Eastern Jury District. A person charged with a crime in that district, say in West Palm Beach, has no choice but to stand trial at a courthouse in the that district, before a jury drawn only from that district. People from the community where the crime is alleged to have taken place automatically are <u>included</u> in the selection process for the petit jury.

But, according to the administrative order creating the county's jury districts, another person charged with the same crime, when alleged to have occurred in the western or Glades District, say in Belle Glade, automatically gets trial in West Palm Beach using a jury drawn only from the Eastern District. That automatically <u>excludes and completely disqualifies</u> for jury service all persons living in the town or area of the county where his crime is alleged to have occurred. This is so unless the defendant himself, in that Belle Glade crime, personally elects to stand trial in the Glades District, which he is free to elect at his total discretion. The case is transferred to that jury district only if and only when he makes that election, and

no grounds need be given for his election. **Administrative Order** 1.006-1/80. (5248)

Since the Belle Glade defendant at his option may totally exclude from service on his jury all persons who come from the specific town or area of the county where his crime is alleged to have occurred, he has an automatic and very real change of venue. He may enjoy that change of venue at his discretion. The West Palm Beach defendant has no such right. This holds true even though the two defendants are charged with the same crime in the same county and are to be tried before the same court by the same prosecutor. This is a clear denial of equal protection of the law.

Spencer made just such a request for trial in the Glades Jury District, tracking the administrative order (5299-5302), and it was denied (100-101). Yet another defendant with identical charges, if alleged to have occurred in the Glades District, could make the identical request to Spencer's and it would be granted as a matter of administrative rule, automatically.

The racial factor makes the denial of equal protection even more profound. The accused charged with a crime in the western half of the county has freedom to choose a jury drawn from a group of citizens in the western half of the county that is over 50 % Black, or from a group in the eastern half where less than 10 % of the population drawn from is Black. The other defendant

is compelled to stand trial with a jury drawn from a population base less than 10 % Black.

Another factor constituting the same denial of equal protection is the practice described by the trial judge of summonsing people on a county-wide basis for Grand Jury duty, and then, for the convenience of the court, using them for petit jury duty while there. This means that, even in the Eastern District, some defendants are afforded juries drawn from the entire county, while others, such as Spencer, are not accorded that right -- not even when they demand it.

This latter practice also shows that the costs and inconveniences to the judicial system of providing a county-wide jury pool are no barrier to granting such a demand.

Equal protection of the law also is denied to citizens of the Glades Jury District who serve jury duty. Citizens of any community on the eastern side of the county are always assured their names will be included in the potential list of prospective jurors for trial of crimes committed in their communities, but citizens of the western or Glades District are assured their names will not be included for jury service for crimes committed in their communities. They are automatically excluded -- unless the accused himself personally elects to have them included as potential jurors, by electing trial in their district.

Another significant challenge Spencer makes is this (5263): Since the jury district system fails to draw citizens from a

fairly representative cross-section of the county's whole population, in either jury district, it fails to comply with an important requirement contained in the statute authorizing creation of jury districts in the first place. **Florida Statutes, Section 40.015(2)**, specifically mandates that when jury districts are created, the districts must maintain the same basic population mix. Clearly that was not done in Palm Beach County.

The particular administrative order of the Fifteenth Judicial Circuit conflicts with still another statute that regulates systems for drawing jurors. (5263)

The administrative order in question creates jury districts for use in selecting petit jurors from one or the other half of the county, but requires Grand Jurors be selected county-wide. But **Section 905.01(1), Florida Statutes**, specifically mandates that the grand jury "shall" consist of not less than fifteen nor more that eighteen persons, and,

> The provisions of law governing the qualifications, disqualifications, excusals, drawing, summoning, supplying and deficiencies, compensation, and procurement of petit juries shall apply to grand jurors.
>
> **Section 905.01(1), Florida Statutes**

Spencer was entitled by statute to trial before a petit jury summoned and called from the same geographical area and in the same manner as the Grand Jury.

In Florida the ultimate source of all judicial power is the constitution, statutory allocations of jurisdiction being limited to such as the constitution authorizes. **Re Cox**, 44 Fla. 537, 33 So. 509 (Fla. 1902); **Summer Lbr. Co. v. Mills**, 64 Fla. 513, 60 So. 757 (Fla. 1913); and, **Dunedin v. Bense**, 90 So.2d 300 (Fla. 1956).

The Florida legislature's attempt to write a statute that would authorize each local Circuit Court to create its own jury districts, if and when desired locally, exceeds the legislature's constitutional authority over the judicial branch, in violation of several provisions of the Florida Constitution. **Florida Statutes, Section 40.015.**

Three provisions in the Florida Constitution require legislative enactments affecting jurisdiction or venue of the courts be only by "general law:" **Article III, Section 11(a)(6); Article III, Section 11(a)(1); and, Article V, Section 1, Florida Constitution.** However, a statute empowering local circuit courts to set up their own jury districts, by local option, is not a "general law." If the statute automatically created "jury districts" in all counties that met certain criteria, and created them based on uniform criteria uniformly applied to all counties, then the statute might at least be classified as a general law of local application. Cf., **City of Miami Beach v. Frankel**, 363 So.2d 555 (Fla. 1978); and, **Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.**, 434 So.2d 879 (Fla. 1983).

But this statute fails even to do that. Instead, the statute authorizes **local** creation of jury districts at local option.

This statute's failure to be a general law would be quite clear if the legislature had waited to hear from the circuit judges of each individual circuit, and then enacted special acts for each circuit as requested. Such legislation quite obviously would be "special," not "general." Yet, that is precisely the result of the statute -- that is precisely what it does do. It seeks to accomplish indirectly that which, constitutionally, the legislature can not accomplish directly. The statute does not create jury districts, but, rather, delegates the authority to do so -- that is, the authority to write special acts of local application -- to the local judiciary of the respective circuits. Since that is a power the legislature itself has no constitutional authority to exercise, it is one they have no authority to delegate.

Under the statute, the actual creation of jury districts is not done by the legislature itself, but by the local circuit courts, when and if they desire it. The actual creation of such jury districts is neither automatic nor uniform among the various counties.

Article V, Section 6(b), Florida Constitution, mandates that county courts shall exercise the jurisdiction prescribed by general law, and that "[s]uch jurisdiction shall be uniform

throughout the state." This statute, and any local administrative orders promulgated under it, would appear to violate that mandate, not only because it is not accomplished by general law, but also because some county courts in the state now have jurisdiction that runs county wide, while others have jurisdiction that runs only throughout their respective "jury districts." As a direct consequence of this statute, and contrary to constitutional mandate, jurisdiction of the county courts is not uniform throughout the state.

Article III, Section 11(a)(5), mandates that there shall be no special law or general law of local application pertaining to, "petit juries, including compensation of jurors, except establishment of jury commissions." The statute in question, and the local Circuit Court administrative order enacted pursuant to it, directly concern petit juries.

Florida's constitution also says the legislature, "may establish not more than twenty (20) judicial circuits, **each composed of a county or contiguous counties** and of not less than fifty thousand (50,000) inhabitants * * *." And the constitution says, "There shall be a county judge's court **in each county.**" **Florida Constitution, Article V, Section 7.** (Emphasis added).

The entire constitutional scheme for the whole judicial system in Florida is predicated exclusively upon the basic unit of the county. The constitution expressly uses counties. No other unit of jurisdiction is made allowance for anywhere in the

constitution. It follows, as a matter of logic and constitutional common sense, that the "community" which must be fairly represented in the jury selection process, and the "community" served by any trial court in Florida, is the county -- the whole county.

Spencer maintains that any jury district system violates an accused's right to a jury drawn from the entire county, as guaranteed by the **Florida Constitution** (1968 Revision), **Article I, Sections 16** and 22. If "in all criminal prosecutions" the accused shall have the right to a speedy and public trial "by **impartial jury in the county** where the crime was committed," then trial by a petit jury drawn from less than the entire county -- by a petit jury that totally excludes approximately one-half the geographical area of the county -- fails to comply with that constitutional mandate.

In **Jordan v. State**, 293 So.2d 131 (Fla.2nd DCA 1974), the court said:

> Where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drawn from a fair cross-section of the community requires that the jury be drawn from the whole county and not from some political sub-units thereof to the exclusion of others.
>
> **Jordan v. State**, 293 So.2d 131 (Fla.2nd DCA 1974), at 134. (citations omitted)

Both the **Florida** and **United States Constitutions** confer upon every citizen accused of crime the right to trial by a jury drawn from a fair cross-section of the the community served by the

court, and in this case that community is Palm Beach County. The trial court committed fundamental error by denying Leonard Spencer a petit jury drawn from the whole county. The court then denied him equal protection of the law, in violation of state and Federal constitutional standards, by rejecting his request for trial in the Glades Jury District.

POINT II

THE COURT FURTHER ERRED, AND FURTHER VIOLATED THE CONSTITUTIONAL STANDARDS ARGUED IN THE PREVIOUS POINT ON APPEAL, WHEN IT ARBITRARILY AND CAPRICIOUSLY EXCUSED JURORS DURING VOIR DIRE, FOR THE SIN OF RETURNING TO COURT EARLY. IN THE PROCESS OF EXCUSING THEM THE COURT IMPROPERLY DISCHARGED TWO OF ONLY THREE BLACK PROSPECTIVE JURORS UNDERGOING VOIR DIRE AT THE TIME, THEREBY COMPOUNDING THE RACIAL BIAS IN THE JURY SELECTION PROCESS ABOUT WHICH SPENCER ALREADY HAD COMPLAINED.

Granted, a trial judge has considerable discretion in discharging a person called to serve jury duty, who, in the court's opinion, might not make a competent juror. Cf., **Walsingham v. State**, 61 Fla. 67, 56 So. 195 (1911);, and, **Rule 3.300(c), Florida Rules of Criminal Procedure.** However, this does not mean the trial judge may act in an arbitrary and capricious manner. Cf., **Christopher v. State**, 407 So.2d 198 (Fla. 1981), cert den., 456 U.S. 910. Furthermore, a trial judge is obliged to be very careful in the comments the court makes during jury selection. Cf., **Kozakoff v. State**, 323 So.2d 28 (Fla. 4th DCA 1975), cert. den. 336 So.2d 1184; **Hunter v. State**, 314 So.2d 174 (Fla. 4th DCA 1975); and, **Flynn v. State**, 351 So.2d 377 (Fla. 4th DCA 1977).

The record in the present case reflects the trial judge acted in a very arbitrary and capricious manner -- and in the process further interfered with the defendant's right to a jury selection process that does not discriminate against any particular class of people, which in this case means Blacks.

The trial judge intentionally sought to "intimidate" the prospective jurors during the jury selection process. He specifically said that was exactly what he hoped to accomplish, to intimidate them. (1377)

And the trial judge did it in a most arbitrary and capricious manner. Without affording counsel any opportunity to be hard first, the judge willy-nilly discharged jurors during the jury selection process, for coming into the courtroom early, and for coming up onto the same floor of the courthouse as the courtroom was on, three minutes or five minutes early. (776-782, 1374-1390) Yet, later, when jurors actually sitting on the case came into the courtroom early, and when they drove by the crime scenes during trial after hearing testimony about those scenes, the judge not only failed to excuse them when challenged by defense counsel, but failed even to say anything to the jurors about it. (1489-1492, 2491-2527)

The judge even explained on the record the reason for his attitude: he had just received word from the chief judge of the circuit of his pending transfer to another division of court, and he was upset and unhappy about it. (827-829)

As for the Black juror who the judge initially excused, for cause, because she had a pacemaker, that constituted discrimination against an entire and constitutionally significant class of citizens. A class of citizens may be singled out for different treatment concerning jury duty only so long as there is some

reasonable basis for excluding that particular class. **Williams v. State**, 285 So.2d 13 (Fla. 1973).

Pacemakers are quite common today. Spencer suggests this Court may take judicial notice of that fact. And there was nothing in the record of the present case, and nothing to the contrary that this Court may take judicial notice of, that in any manner provides any reasonable basis for excluding that entire class of citizens from jury duty.

As a result of this case being tried in the eastern half of the county, using a jury panel drawn only from the eastern half of the county, Spencer was unable to obtain a jury selection process that drew on a fair cross-representation of Blacks within the county. The trial judge, when he capriciously discharged jurors on his own motion during the jury selection process, further compounded the problem, and further prejudiced Spencer's right to a fair jury selection process, because in the process the judge excused two of the three Blacks sitting in the jury box undergoing voir dire at that time. (780-782)

As to both this point on appeal, and the previous one, it is not relevant that there were three Blacks that ended up sitting on the jury of twelve who eventually were selected to try this case. The percentage of eligible Black jurors actually selected for jury duty in a particular case is not the controlling factor, for the real issue is whether there is a systematic exclusion in

the jury selection process. Cf., **Foxworth v. State**, 267 So.2d 647 (Fla. 1972), cert. den. 411 U.S. 987.

All of the Federal and state constitutional issues argued in the previous point on appeal, relating to discrimination in the jury selection process, apply equally to this point on appeal, and are hereby adopted by reference and reasserted here.

POINT III

THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE, AND MISAPPLIED THE **FLORIDA EVIDENCE CODE**, WHEN IT DENIED SPENCER'S MOTION **IN LIMINE** TO EXCLUDE ANY TESTIMONY BY POLICE OFFICERS, ABOUT OUT-OF-COURT IDENTIFICATIONS OF SPENCER IN PHOTOGRAPHIC LINE-UPS CONDUCTED BY THE OFFICERS, SINCE THE EYEWITNESSES WHO MADE THOSE IDENTIFICATIONS NEVER TESTIFIED CONCERNING ANY IDENTIFICATION OF SPENCER, AND SINCE THE PHOTOGRAPHIC LINE-UP ITSELF -- THAT IS, THE ACTUAL SIX-PHOTO PACKET -- NEVER WAS MARKED OR ADMITTED IN EVIDENCE UNTIL AFTER ALL THE EYEWITNESSES WHO USED IT PRIOR TO TRIAL TO IDENTIFY SPENCER, ALREADY HAD TESTIFIED.

Detective Oetinger testified about how three eyewitnesses made identifications of Spencer in photographic line-ups conducted by him prior to trial. (3391-3394, 3394-3397, 3398-3399) Under the **Florida Evidence Code** that testimony by him was no exception to the hearsay rule, because the necessasry predicate necessary to make it an exception to the hearsay rule had not been established. But, whether or not Detective Oetinger's testimony was admissible under the **Florida Evidence Code**, admitting it in evidence violated this accused's right to confront and cross-examine the witnesses who made those identifications. The trial court erred fundamentally, by denying Spencer's motion **in limine** to exclude that testimony by Detective Oetinger. (2292-2359, 2353-2359)

The right of the defense to cross-examine state witnesses is a constitutional right, not a privilege, that derives from the **Sixth** and **Fourteenth Amendments** of the **United States Constitu-**

tion, and from **Article I, Section 16** of the **Florida Constitution. Ohio v. Roberts**, 448 U.S. 56, 100 S.Ct. 2531, 13 L.Ed.2d 597 (1980); **Pointer v. Texas**, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); **Knight v. State**, 97 So.2d 115 (Fla. 1957); **Coco v. State**, 62 So.2d 892 (Fla. 1953, cert. den. 349 U.S. 931, reh. den. 350 U.S. 855.; and, **Lyles v. State**, 412 So.2d 458 (Fla. 2nd DCA 1982).

If a witness testifies on direct, and for some reason then becomes unavailable for cross-examination, the right to confront and cross-examine requires a reversal of the conviction. **Hall v. State**, 381 So.2d 683 (Fla. 1980).

The trial court in the present case relied on the **Florida Evidence Code, Florida Statutes, Section 90.801(2)(c)**, and admitted in evidence Detective Oetinger's testimony about the eyewitnesses' identifications of Spencer in photo line-ups conducted by him prior to trial. (2353-2359) That provision of the **Florida Evidence Code**, however, specifically acknowledges the right of confrontation, and makes a full honoring of that right a condition precedent to admissibility.

> **90.801. Hearsay; definitions; exceptions**
>
> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:
>
> (c) One of identification of a person made after perceiving him.

Note exactly what the rule says. It says the statement must be one of identification of a person after perceiving him, and then, not only must the witness who made the statement be subject to cross-examination, but the witness must be subject to cross "concerning the statement." id.

Even if this Court concludes the three witnesses who made identifications of Spencer in photographic line-ups were subject to cross-examination, it must acknowledge they were not, while on the stand, subject to cross "concerning the statement" in which they identified Spencer.

At Spencer's trial the eyewitnesses who made the out-of-court identifications of him as a perpetrator of these crimes were never asked on direct about -- indeed, were never even asked whether -- they ever identified Leonard Spencer as a perpetrator. While testifying on direct they made no reference to Spencer, none whatsoever, as to any aspect of the case. (1845-1903, 2085-2155, 2177-2249) The simple fact of the matter is, they were never "examined" regarding the subject of any identification by them of Leonard Spencer, and so they could not be "cross-examined" on the subject.

As the Florida Supreme Court itself has noted, concerning the scope of cross-examination, the right to fair and full cross-examination of a witness is absolute, and extends to "the subjects opened by the direct examination." **Coco v. State**, supra. Also see: **Coxwell v. State**, 361 So.2d 148 (Fla. 1978). In this

case the subject of Leonard Spencer, and the subject of any identifications of Leonard Spencer (as opposed to the co-defendant or anyone else), was never opened by the direct examination. The subject, of Leonard Spencer's identification as a participant in these crimes, was never touch upon by the direct examination.

The subject of identification of anybody on trial in this case never was touched upon by the direct examination of these three eyewitnesses. This is what distinguishes the present case from **Salter v. State**, 382 So.2d 892 (Fla. 4th DCA 1980). In the present case it more directly involves an overt effort by the State to get into evidence the three eyewitnessses' line-up identifications of Spencer, excusively through "hearsay" testimony of the officer who conducted the photo line-ups, specifically to deprive the defense of any opportunity to cross-examine the identification witnesses themselves, or to test the strength of their identifications. That this was the prosecutor's motive is quite clear in the record, since the prosecutor specifically told the court that he had not asked the identity questions in his direct examination of the three eyewitnesses because he did not feel they could identify Spencer in court with "absolute certainty." (2316) In other words, the prosecutor speceficially did it that way to avoid the photo line-up identifications being tested while the witnesses who actually made those identifications were

on the stand -- i.e., intentionally to avoid cross-examination of these particular witnesses by defense on that subject.

There is still another reason why these three eyewitnesses could not be cross-examined on the matter of their earlier photographic identifications of Spencer. The six-photo line-up used for those identifications was not yet in the courtroom. The photo packet involved was only brought into court, and introduced in evidence, by the State well **after** the identification witnesses had testified and had been excused. (2293-2294, 3380, 3381)

Bear in mind, an essential element required to be proved by the State, the element of identity, is involved. This issue concerning the sufficiency of the State's proof of identity was the only one at issue in the trial -- at least in so far as it concerns Leonard Spencer's case. (See, e.g., 1805-1822, at 1822) For any defendant to be denied a genuine, full opportunity to cross-examine identification eyewitnesses, about their identifications of the defendant, when that is the only issue being raised as a defense argument to the jury, is a violation of the confrontation clause, as well as a violation of the controlling provision of the **Florida Evidence Code.**

Some Florida courts have interpreted the confrontation clause to apply to physical evidence as well as to live witnesses. **Johnson v. State,** 249 So.2d 470 (Fla. 3d DCA 1971), cert. den. 280 So.2d 673; **Alexander v. State,** 288 So.2d 538 (Fla. 3d DCA 1974); **Stipp v. State,** 371 So.2d 712 (Fla. 4th DCA 1979),

cert. den. 383 So.2d 1203; **G.E.G. v. State**, 417 So.2d 975 (Fla. 1982) Here the photographic line-up itself -- the actual six-photo packet -- was not made available for testing by cross-examination until after the witnesses, whose testimony made it a relevant exhibit, already had testified and been excused.

POINT IV

THE COURT ERRED IN DENYING A DIRECTED VERDICT OF ACQUITTAL, ON ALL COUNTS, SINCE THERE WAS NO EVIDENCE OF SPENCER'S IDENTITY AS A PERPETRATOR OF THESE CRIMES OTHER THAN DETECTIVE OETINGER'S TESTIMONY THAT THREE PEOPLE IDENTIFIED SPENCER IN PHOTO LINE-UPS CONDUCTED BY HIM, AND DETECTIVE OETINGER'S TESTIMONY, STANDING ALONE, IS INSUFFICIENT TO SUPPORT A VERDICT OF GUILTY.

The trial court denied a directed verdict of acquittal. (3586, 5172) Spencer argued in support of his motion for directed verdict that, even assuming the court was correct in admitting Detective Oetinger's testimony about the three eyewitnesses' identifications of Spencer in photo line-ups he conducted before trial, the detective's testimony is insufficient to bypass a directed verdict. No eyewitness ever identified Spencer in the courtroom. No eyewitness even confirmed, under oath at trial, making any earlier identification of him in a photo line-up. None of the eyewitness to any of the crimes ever made a "sworn" identification of Spencer at any time, in or out of court. In the end, Spencer's identity was established only by sworn testimony of Detective Oetinger, about other people's unsworn out-of-court identifications of Spencer. (3522-3528)

No eyewitness to any of the crimes so much as referred to Leonard Spencer during the course of trial. Beyond that, except for Detective Oetinger's testimony, no other evidence established Spencer's identity as one of the people who took part in commission of the crimes. Fingerprints were lifted from the get-a-way

vehicles used and attempted to be used during the crime spree, but Leonard Spencer's prints were not among them. (See testimony of: Sgt. Richter 3432 et. seq.; Sgt. Free 2546 et seq., 3317 et seq.; Detective Lynn 2767 et seq., 3303 et seq.; and, Sgt. DiBattista 3313 et seq.)

Under the **Florida Evidence Code** it makes no difference whether the witness admits or denies or fails to recall making the prior identification. **Section 90.801(2)** of the **Evidence Code** says that a statement identifying a person made after perceiving him, is an exception to the hearsay rule, if and only if the declarant testifie at trial and is subject to cross-examination concerning the statement. The statement is admissible as substantive evidence, not merely for impeachment purposes, even if the declarant now denies making the statement; and, it is admissible even though the identification was made from a photopack and not "real-life." **Brown v. State**, 413 So.2d 414 (Fla. 4th DCA 1982), at 415.

However, even though admissible as substantive evidence, it does not follow that such a statement is sufficient, standing alone, to support a conviction.

In **Brown v. State**, id., the Court did not address the latter issue, though it did note in its opinion that there was other corroborating evidence tending to show the truthfulness of the original statements of the witnesses. There were, the court

said, other circumstances the jury could rely on in choosing to believe the witnesses earlier identifications of the defendant as one of their assailants, rather than their in-court denials. **Brown v. State**, id., at 415.

In the present case, however, there is an absence of such other circumstances, or corroborating evidence.

Consider how this Court has construed another subsection of the same provision of the **Florida Evidence Code**, i.e., **Section 90.801(2)(a)**.

In **State v. Moore**, 485 So.2d 1279 (Fla. 1986), this Court found that prior inconsistent statements (in that case, Grand Jury testimony) were admissible as substantive evidence, not merely for impeachment purposes, so long as the witnesses who made them were available for cross-examination concerning the statements, and even though the witnesses now denied the truth of (but not the making of) the prior sworn statements. However, this Court reversed the murder conviction that resulted, because those prior inconsistent sworn statements were the **only** evidence on the issue of identity, just as in the present case. This Court in **Moore** found that prior inconsistent statements, standing alone, do not constitute sufficient evidence to sustain a conviction. The prior statements used in **Moore** involved the same issue invovled in the instant case: the question of identity, of the defendant on trial, as a participant in the crimes.

In the present case the same logic must apply, but for even more compelling reasons. At least in **Moore** the prior statements were under oath subject to the penalty of perjury. In this case the prior statements were not given under oath. The statements in this case are inherently less reliable than they were in **Moore.**

Leonard Spencer contends the trial court erred in denying a directed verdict of acquittal, and that this Court, as in **State v. Moore,** id., must reverse on grounds of insufficient evidence as to the issue of identity.

POINT V

THE TRIAL COURT ERRED IN DENYING SPENCER'S CONSTITUTIONAL CHALLENGES TO FLORIDA'S CAPITAL PUNISHMENT LAWS, AND HIS CONSTITUTIONAL CHALLENGES TO THE DISCRIMINATORY APPLICATIONS OF THOSE LAWS, INSOFAR AS ACTUAL IMPOSITION OF DEATH SENTENCES IS CONCERNED, FOR CRIMES BY BLACKS AGAINST NON-BLACKS.

Prior to trial Spencer adopted all motions filed by co-defendant Vernon Amos concerning constitutional challenges to Florida's capital punishment laws, and to the discriminatory application of the death sentence against Blacks for killings of non-Blacks. (5419-5421) The trial court specifically ruled on and denied Spencer's motions (5440-5441).

Spencer now urges those same constitutional challenges to this reviewing Court. He requests leave to adopt, by reference, the arguments presented in the **Brief of Appellant Vernon Amos**, as to all motions adopted by Spencer at pages 5425-5428 of the record, and denied by the trial court as to Spencer at pages 5440-5441 of the record on appeal.

In attempting to deal with these issues in this manner on appeal, Spencer in no way seeks to belittle the significance of, or to bypass, these vital issues. However, the arguments and record are identical insofar as it concerns these two defendants, who were tried together for the same offenses in this case. Additionally, this Court has dealt with the same issues in other appeals, and the arguments here are ones already dealt with (and rejected) by this Court. Judicial economy, Spencer suggests,

would be served best by permitting such adoption of the co-defendant's brief.

Should the Court find this unacceptable, then Spencer hereby requests leave to file supplemental argument.

POINT VI

THE TRIAL COURT ERRED BY DENYING SPENCER'S PRETRIAL MOTION FOR PRECLUSION OF DEATH QUALIFICATION OF THE JURORS, AND BY DENYING A BIFURCATED JURY TRIAL.

As with Point V on appeal, Leonard Spencer raised these constitutional challenges by adopting the motions concerning them, filed by co-defendant Vernon Amos (5419-5421), and the trial court entered a separate order denying the motions as to Spencer (5440-5441).

Spencer and Amos were tried together before the same jury, for the same crimes allegedly committed together, and, insofar as these constitutional challenge are concerned, their record and their arguments are identical. Again, Spencer suggests, judicial economy is served best by allowing such adoption of co-defendant Vernon Amos's appellate argument.

As with Point V on appeal, Spencer requests leave to adopt by reference the arguments presented in the **Brief of Appellant Vernon Amos.** Should this Court deny leave to do so, then Spencer requests leave to file supplemental argument.

POINT VII

THE TRIAL COURT ERRED, IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION STANDARDS IN THE FEDERAL AND STATE CONSTITUTIONS, AND IN VIOLATION OF CRUEL AND UNUSUAL PUNISHMENTS STANDARDS OF THE CONSTITUTIONS, AND IN VIOLATION OF EXISTING STATUTORY LAW RELATING TO "PHASE II" AND SENTENCING IN CAPITAL CASES, BY THE ENTIRE MANNER IN WHICH THE COURT CONDUCT OF THE "PHASE II" TRIAL, AND THE LATER SENTENCING PROCEEDINGS.

In the court's instructions to the jury during Phase II of trial (5589), and in the court's findings at time of sentencing (5619), the court improperly doubled "pecuniary gain" and robbery, for which Spencer was separately convicted and punished. Such "doubling" was held to be wrong in **Oats v. State**, 446 So.2d 90 (Fla. 1984), at 95.

The court also erred by instructing the jury on (5589), and at time of sentencing by making a finding of (5619), the aggravating circumstance of "avoiding arrest". There simply is no evidence in the record to support a finding that this aggravating circumstance is established. The mere fact that victims were killed, and that they might have been able to identify the defendant if they had not been, is not sufficient to support such a finding. **Hansbrough v. State**, 509 So.2d 1081, at 1086. Yet, that is all that the evidence shows in the present case. Indeed, a perusal of the whole record makes it clear the State's case at trial was that the motive was robbery, as charged along with the murder counts.

Spencer suggests that, before this aggravating factor properly to exist, the record must reflect that the jury could not have, and did not, convict the defendant for felony murder, unless the felony actually charged was one of resisting arrest or escape or some other offense directly and specifical related to avoiding arrest or killing witnesses. It is illogically that the State can go to a jury with alternate theories of premeditated murder and felony murder in Phase I, with the felony being robbery, and then maintain at Phase II that this aggravating factor was the motivating factor for the killing.

As for avoidance of arrest, the mere fact of death is not sufficient, especially when, as here, the victim is not a law enforcement officer. Proof of the requisite specific intent must be very strong. It must be shown that avoidance of arrest was the dominant or only motive for the murder, or that the only motive was to eliminate the witness. **Oats v. State**, 446 So.2d 90 (Fla. 1984), at 95; 511 So.2d 526; and, 458 So.2d 762. Clearly that was not done in this case.

The sentencing judge improperly submitted to the jury at Phase II an instruction on (5589), and at time of sentencing improperly found (5619), another aggravating circumstance: that the homicides were "committed in a cold, calculated and premeditated manner". The legislative intent of **Section 921.141(1), Florida Statutes,** was for contract type killings. See:

Hansbrough v. State, supra.; **Bates v. State**, 465 So.2d 615 (Fla. 1976); and, **State v. Dixon**, 283 So.2d 1 (Fla. 1973).

The court considered victim testimony at sentencing: the mother of one murder victim (4962-4966; the grandmother of the other murder victim's children (4966-4971); and, the mother of that same victim's children (4972-4973). Victim testimony like that is not allowed, as held in **Booth v. Maryland**, __U.S.__, 107 S.Ct. 2529, __L.Ed.2d__ (1987), decided after trial of this case. It should make no difference that it was the judge, not the jury, that considered victim testimony in this case. The judge is no less human, and no less susceptible to being swayed. Especially not this judge, in light of his conduct towards counsel and jury at outset of trial, as result of the unpleasant news he had just received about being transferred to another division of court. The decision to impose the death sentence must be, and appear to be, based on reason rather than caprice or emotion.

There were mitigating factors that the sentencing judge did consider at time of sentencing, though he found they failed to outweigh the aggravating circumstances. (5625-5627). Since mitigating factors were present, any one of the erroneous findings as to aggravating factors, as outlined above, requires reversal and remand for resentencing. See: **Dobbert v. State**, 375 So.2d 1069 (Fla. 1979).

CONCLUSION

As result of the racial bias inherent in the "jury district" system of the Fifteenth Judicial Circuit, and of the unconstitutionality of the state statute authorizing that system, which was compounded by the trial judge's arbitrary and capricious handling of the voir dire process, Leonard Spencer's Sixth Amendment right of jury trial was infringed. His convictions on all counts should be reversed and the case remanded for retrial.

As result of the improper admission in evidence of a police officer's testimony about eyewitnesses' pre-trial identifications of Spencer in photographic line-ups conducted by the officer, Spencer was denied fair trial as to the one defense he raised at trial (i.e., the sufficiency of the identity evidence). His convictions as to all counts should be reversed, and his case remanded for retrial.

As result of his convictions being based solely on out-of-court, unsworn identifications of him, with no in-court identifications ever being made, and no other evidence establishing his identity, his convictions should be reversed for entry of a directed verdict, as to all counts, of not guilty.

As result of the unconstitutionality of Florida's capital punishment laws, and of the manner in which death is imposed and carried out, his sentence of death should be reversed and remanded for imposition of a sentence of life imprisonment, as to both death sentences imposed at trial of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this pleading was served, by mail delivery, upon Florida Attorney General Robert A. Butterworth (**Assistant Attorney General Richard Bartmon**), Palm Beach County Regional Service Center, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401, on this date, the 17th day of the month of April, 1987.

Respectfully submitted,

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