IN THE SUPREME COURT OF FLORIDA

NO. 76,039

JIM ERIC CHANDLER,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

A petition for habeas corpus relief was filed in September 1990 to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments, claims demonstrating that Mr. Chandler was deprived of the effective assistance of counsel on direct appeal and that the proceedings resulting in his capital conviction and death sentence violated fundamental constitutional imperatives.

Since the original petition was filed, there have been numerous appellate opinions issued which directly affect the issues raised in Mr. Chandler's petition for writ of habeas corpus. This memorandum is necessary in order to discuss the new case law in an orderly fashion so as to aid this Court in addressing the issues. In addition, Counsel was unable to adequately brief the claims due to the fact that CCR was defending four (4) outstanding death warrants at the time the original habeas petition was filed and was unable to prepare a complete and competent pleading.

In the instant memorandum, references to the transcripts and record of the original trial proceedings will follow the pagination of the Record on Appeal and will be designated by (R. ____). References to the resentencing trial proceedings will be designated as (R.S. ____). References to the voir dire of the resentencing proceedings will be designated "(RSV. ____)." References to the motions, orders, pleadings, and etc. filed in the resentencing proceedings will be designated "(RSP. ____)."

These designations are necessary because there are three different pagination sequences for the resentencing Record on Appeal: one for the trial transcript, one for the voir dire proceedings, and another for motions, orders, and pleadings.

CLAIM I

THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE JURORS WHO HAD EXPRESSED A CLEAR AND UNEQUIVOCAL BIAS IN FAVOR OF THE IMPOSITION OF A SENTENCE OF DEATH DEPRIVED MR. CHANDLER OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Four seperate individuals in the venire from which Mr. Chandler's resentencing jury was selected expressed a predisposition for and bias towards the death penalty. Defense counsel moved to excuse these jurors for cause but was denied. He then was forced to exeercise peremptory challenges as to these jurors.

Juror Mellin stated unequivocally that he believed that anyone convicted of first degree murder during a robbery should be "automatically" sentenced to death (RSV. 333). Juror King believed the death penalty "should be imposed on any murder that was not in self defense murder." (RSV. 363). Juror Ruggirello expressed his understanding and belief that death was "almost always" appropriate where kidnapping reults in death (RSV 344-

45).[1] Juror Martino expressed her understanding and belief that death penalty was automatically appropriate as "a life for a life" (RSV. 684-85).[2]

Peremptory challenges were made by written notation during the trial. The defense challenged prospective jurors Mr. Mellin, Ms. Martino, Ms. King and Mr. Ruggirello for cause and the court denied all of the challenges (RSV. 404, 406, 408, 409, 690). The above prospective jurors were subsequently excused by the only remaining option: defense counsel exercised his peremptory strikes to excuse the prospective jurors.

After defense counsel exhausted all his peremptory challenges, he requested additional peremptory challenges and the request was denied (RSV. 895-896). Defense counsel then chalenged juror Dodge for cause and was denied (RSV. 939). Ms. Dodge was obviously an objectionable juror who had read about the case both at the time of the first trial and a few days before the resentencing (RSV. 931). Ms. Dodge stated that in one article she had read that Mr. Chandler had mowed the lawn and he had came in and killed the victims, and in another article she read that Mr. Chandler was robbing the victims' house and was surprised when they returned home. Ms. Dodge stated that she had read the news story as recently as the previous Saturday or

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[1]Kidnapping was one of the aggravators the court found in support of the death penalty for Mr. Chandler.

[2]The prosecutor unsuccessfully attempted to rehabilitate Ms. Martino (RSV. 688-89).

Sunday in the Miami Herald. Ms. Dodge thought perhaps Mr. Chandler had received the death penalty in the first trial (RSV. 932-938). Defense counsel was understandably very concerned that Ms. Dodge remembered that the death penalty may have been imposed in the first trial and moved to dismiss her for cause. The request was denied and Ms. Dodge served on the jury panel. Trial counsel was unable to strike Ms. Dodge because all defense peremptory challenges were exhausted.

As this Court and the federal courts have repeatedly affirmed, the constitutional guarantees of juror impartiality are fundamental to due process and are particularly crucial in capital proceedings.[3] Thus, in capital proceedings,

> [i]t is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Hill v. State, 477 So. 2d 553, 556 (Fla. 1985), citing Thomas v. State, 403 So. 2d 371 (Fla. 1981).

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[3] See, e.g., Stroud v. United States, 251 U.S. 15 (1919); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968), cert. denied, 397 U.S. 936 (1970); Hill v. State, 477 So. 2d 553 (Fla. 1985); Thomas v. State, 403 So. 2d 371 (Fla. 1981); Poole v. State, 194 So. 2d 903 (Fla. 1967); cf. Witherspoon v. Illinois, 391 U.S. 510, 523 (1968).

A juror who expresses a predisposition toward the death penalty, and/or an unwillingness recommend a life sentence, cannot sit as a fair and impartial juror, and must be excused for cause upon the motion of the affected party -- Thomas; Hill; Witherspoon v. Illinois, 391 U.S. 510 (1968); Witt v. Wainwright, 469 U.S. 420 (1985); Adams v. Texas 448 U.S. 38 (1980). A trial court's failure to excuse such a juror, upon motion of a party, "violate[s] express requirements in the sixth amendment to the United States Constitution and in article I, section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury.'" Thomas, 403 So. 2d at 375.

The most fundamental right guaranteed a criminal defendant is the right to a trial before a fair and impartial jury. Singer v. State 109 So. 2d 7 (Fla. 1959); Lusk v. State, 446 So. 2d 1038 (Fla. 1984). See also Glasser v. United States, 315 U.S. 60, 84-86 (1942); Irvin v. Dowd, 366 U.S. 717, 722-23 (1961); Turner v. Louisiana, 379 U.S. 466, 471-473 (1965). To this end, the standard for determining juror impartiality is "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given by the court." Lusk, 446 So. 2d at 1041. Thus,

> if there is a basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on the motion of a party, or by [the] court on its own motion.

Singer, 109 So. 2d at 24.

The theme of the necessity of a fairly composed jury to protect defendants from systematic abuses runs through all jury-oriented jurisprudence.[4] The importance of jury composition is even greater in capital cases, where those jurors may be called upon to condemn a person to death. Hill; Thomas; Poole; Witherspoon.

A fair jury is a fundamental shield against unlawful convictions and executions. The petit jury plays a key role in the American justice system by acting as a safeguard for persons accused of crimes against "the arbitrary exercise of power by prosecutor or judge." Batson v. Kentucky, 476 U.S. 79 (1986). See also Duncan v. Louisiana, 391 U.S. 145 (1968); Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 12-13 (1986).

The right to trial by jury is the cornerstone of our criminal justice system, Ex parte Milligan, 4 Wall. 2, 123, 18 L.Ed 281 (1866), and any erosion of that right through discrimination undermines the integrity of our courts and the principles of democratic government. Edmonson.

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[4]As stated in Washington v. Davis, 426 U.S. 229, 239 (1976), "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." In Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2085 (1991), the Supreme Court described the jury as "a quintessential governmental body. . . exercis[ing] the power of the court and of the government that confers the court's jurisdiction, . . . perform[ing] the critical governmental functions of guarding the rights of litigants and 'insur[ing] continued acceptance of the laws by all of the people.'"

The sixth amendment guarantees a venire composed of a fair cross-section of the community.[5] In Bass v. State, 368 So. 2d 447 (Fla. 1st DCA 1979), a conviction was reversed for violation of the constitutionally mandated requirement of a fair cross-section in the jury selection process.

> The constitutional guaranty of a jury trial includes assurance that the jury be drawn from a fairly representative cross-section of the community.

Bass, 368 So. 2d at 449.[6]

It has long been established law that Florida requires a reverse Witherspoon inquiry in a capital case to determine whether a juror is predisposed to sentence a defendant to death. Thomas. Once a juror expresses such a predisposition, a challenge for cause must be granted. Thomas; Hill; Ross v. Oklahoma, 487 U.S. 81 (1988). General questions regarding a juror's ability to be "fair" are not sufficient:

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[5]In Duncan v. Louisiana, 491 U.S. 145 (1968), and its companion case, Bloom v. Illinois, 391 U.S. 194 (1968), the Supreme Court extended the Sixth Amendment's guaranty of trial by jury to criminal cases in state courts through the Fourteenth Amendment Due Process Clause.

[6]The United States Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), affirmed that in criminal trials petit jurors must be drawn from a group of laypersons representative of a fair cross-section of the community, and that this right is part and parcel of the Sixth Amendment right to fair trial by jury. Williams, 399 U.S. at 100, 102. See also, United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988); Smith v. Texas, 311 U.S. 128 (1940); Strauder v. West Virginia, 100 U.S. 303 (1880).

In Taylor v. Louisiana, 419 U.S. 522, 528 (1975), the Court held, "[T]he selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial."

> Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors -- whether they be unalterably in favor of o opposed to the death penalty in ever case -- by definition are the ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

Morgan v. Illinois, 60 U.S.L.W. 4541, 4545 (June 15, 1992)(emphasis added). Furthermore, even one juror who is predisposed to give death requires a new sentencing. Morgan, 60 U.S.L.W. at 4545 n.8.

Finally, a state such as Florida, which requires that the sentencing jury balance aggravating versus mitigating circumstances, requires even stronger application of Witherspoon principles:

> The balancing approach chosen by Illinois vests considerably more discretion in the jurors considering the death penalty, and, with stronger reason, Witherspoon's general pricinples apply. Cf. Turner v. Murray, 476 U.S. 28, 34-35 (1986)(WHITE, J., plurality opinion).

Morgan, 60 U.S.L.W. at 4544 n.6.

Reverse Witherspoon violation is fundamental error and violates the Sixth, Eighth, and Fourteenth Amendments. The error in Mr. Chandler's case is particularly egregious and deprived him of the right to a trial by a fair and impartial jury. Fundamental errors may be raised for the first time in collateral proceedings notwithstanding the fact that they could have been, but were not, raised on direct appeal. See Nova v. State, 439 So. 2d 255, 261 (Fla. 3d DCA 1983); cf. O'Neal v.

State, 308 So. 2d 569 (Fla. 2d DCA 1975); Dozier v. State, 361 So. 2d 727 (Fla. 4th DCA 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978); Flowers v. State, 351 So. 2d 387 (Fla. 1st DCA 1977). Because "[t]he right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government," Floyd v. State, 90 So. 2d 105, 106 (Fla. 1956), and is "the cornerstone of a fair and impartial trial," Nova, 439 So. 2d at 262, citing Florida Power Corporation v. Smith, 202 So. 2d 872 (Fla. 2d DCA 1967), an infringement of that right constitutes fundamental error. Nova. The trial court's refusal to excuse for cause those jurors who expressed a bias towards death was precisely such an error, as it "violated the express requirements in the Sixth Amendment to the United States Constitution and in article I, section 16 of the Florida Constitution, that an accused be tried by 'an impartial jury.'" Thomas, 403 So. 2d at 375; Hill, Poole, 477 So. 2d at 556. This issue is before this Court on the merits, and the merits demand relief. See Hill; Thomas.

Appellate counsel's failure to raise this issue on direct appeal prejudiced Mr. Chandler. In light of the substantial precedent favoring relief for those tried before jurors who would automatically vote for death, there is a reasonable probability that Mr. Chandler would have received relief on direct appeal had his counsel raised this claim. Surely, confidence in the outcome of the prior proceedings is undermined in light of appellate counsel's failure to raise the unconstitutionality of Mr.

Chandler's trial jury on direct appeal. Counsel's failure to raise the claim on direct appeal resulted in the failure of this Court to address this meritorious issue. By failing to raise this issue on direct appeal, appellate counsel's performance fell below the range of professional competence for attorneys in criminal cases. Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

In view of this Court's considered determination in Hill, the violation of a constitutional right upon which relief should be granted has been shown. Habeas corpus relief is proper.

There is no question but that the right of a defendant to a fair trial, a trial by an impartial jury, is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution and article I, section 16 of the Florida Constitution. Mr. Chandler was denied these rights during his trial. Mr. Chandler was deprived of his rights under both the United States and Florida constitutions and should be granted a new trial or, at least, a new direct appeal.

Appellate counsel's utter failure to address this properly preserved issue on direct appeal, especially in light of this Court's later decision in Hill, demonstrates both his ineffectiveness as counsel and the highly prejudicial nature of this omission.

The constitutional violation involved in this case cannot be deemed harmless since the fair composition of the jury is an essential element of our criminal justice system. Kiff.

This constitutional error is of such proportion that this Court should address the issue directly even if it finds appellate counsel was not ineffective for omitting it.

Trial counsel satisfied all of the requirements to preserve Mr. Chandler's objections for appeal as set down by Hill and Thomas (See also Floyd v. State, 569 So. 2d 1225 (Fla. 1990). Trial counsel moved to strike each of the jurors for cause; the trial court denied each request; trial counsel was forced to expend peremptory challenges on each of the jurors at issue; trial counsel exhausted all defense peremptory challenges; counsel asked for, but was not given, additional peremptory challenges; and an undesirable juror was seated on the jury panel.

The record is clear that the error that occurred here was properly preserved for appeal. When, as here, a trial court erroneously refuses to dismiss for cause even a single excludable juror, thus forcing the defendant to use peremptory challenges, the defendant is entitled to relief. In Hill, where the trial court refused to dismiss for cause one potential juror who expressed a predisposition towards death, and who thus "did not possess the requisite impartial state of mind," id., 477 So. 2d at 556, this Court found that the error could not be harmless "because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available him." Id. Here, as in Hill, the defendant had requested additional peremptories (RSV. 917). Here also the trial court's erroneous

refusal to grant Mr. Chandler's challenges for cause forced him to exhaust the peremptories which he had been allotted by statute. Mr. Chandler is thus entitled to the same relief afforded Mr. Hill.

In Hill, the error involved a single juror. In Mr. Chandler's case, there are four jurors involved. All four of these jurors were challenged for cause by Mr. Chandler, and all four challenges were denied by the trial court. The error here is thus four times more egregious than that which entitled Mr. Hill to relief. Cf. Thomas.

In regard to the issue of the ineffectiveness of appellate counsel, this Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985)(emphasis supplied).

Appellate counsel, however, did nothing with respect to this issue. Appellate counsel did not "highlight" the fundamental deprivation of his client's constitutional rights engendered by

the trial court's refusal to dismiss the jurors for cause and "present it to the court . . . in such a manner designed to persuade the court of the gravity of the alleged derivations from due process." Wilson, supra, 474 So. 2d at 1165. Appellate counsel did nothing, and this Court was thus deprived of the "careful, partisan scrutiny of a zealous advocate." Id. at 1165.

As noted above, this claim was clearly preserved and ripe for appellate review under Hill and Thomas: counsel at trial had moved to strike each of the jurors for cause; the trial court had denied each request; trial counsel had been forced to expend peremptories on each of the jurors at issue; trial counsel had exhausted all defense peremptory challenges; counsel had asked for, but was not given, additional peremptory challenges; and an undesirable juror was seated on the jury panel. There simply exists no tactical or strategic reason which can be ascribed to appellate counsel's failure to present this claim. See, e.g., Wilson; Johnson (Paul) v. Wainwright, 498 So. 2d 939 (Fla. 1986) (habeas corpus relief appropriate where counsel fails to urge clear claim of reversible error on appeal). This claim would have provided Mr. Chandler with relief. See Wilson, (Court's independent review of record cannot cure harm caused by counsel's failure to zealously advocate a meritorious claim on direct appeal). There simply was no reason whatsoever for counsel to ignore the claim; the omission could not but have resulted from counsel's ignorance of the law. In any event, counsel's omission

was a clear example of prejudicial ineffective assistance, see Johnson (Paul) v. Wainwright, and relief is now appropriate.

Counsel on direct appeal rendered ineffective assistance of counsel in failing to raise the reverse Witherspoon issue due to oversight, even though he believed the claim should have been raised.

In conclusion, this is not a case where the reverse Witherspoon claim was not preserved at trial. This is not a case where the law was not in place at the time of the direct appeal. This is simply a classic case of ineffective assistance of appellate counsel for oversight of a claim which was more than obvious on the face of the record. Prejudice is manifest. Quite simply, Mr. Chandler would have been entitled to a new sentencing proceeding had effective counsel raised the claim. He only failed to do so due to an oversight. To the extent that this Court has any question regarding appellate counsel's knowledge of the claim or failure to raise it due to oversight, Mr. Chandler would request that the issue be referred to an appropriate tribunal for a hearing to determine the facts. Relief is warranted.

CLAIM II

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BECAUSE OF HIS COUNSEL'S FAILURE TO PRESENT TO THIS COURT THE SUBSTANTIAL AND MERITORIOUS ISSUE THAT MR. CHANDLER WAS TRIED BY A PETIT JURY WHICH WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY, RESULTING IN UNCONSTITUTIONAL SYSTEMATIC EXCLUSION OF A SIGNIFICANT PORTION OF NON-WHITE POPULATION FROM JURY POOL, AND MR. CHANDLER WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At an evidentiary hearing prior to Mr. Chandler's resentencing trial, testimony established that the underepresentation of non-white individuals on Mr. Chandler's jury pool was a direct result of random selection of persons from voter registration lists. Mr. Chandler's jury pool of 175 persons was selected from the voter registration list in St. Lucie County (RS. 117). While 68% of the white residents are registered to vote, only 50.3% of the non-white residents are registered to vote (RS. 126-27). Whites comprise 80.6% of the total population in St. Lucie County at the time of Mr. Chandler's resentencing and non-white 19.4% of the population (RS. 122-23). However, whites represent 89.9% of the registered voters whereas, non-whites represent 12.2% of the electorate (RS. 123).

This underepresentation of non-whites as registered voters as compared to the percentage of non-whites in the total population is reflected in Mr. Chandler's jury pool. As represented on the 175 member venire called in Mr. Chandler's case, 86.3% are white while 13.7% are non-white (RS. 124).

Comparing the percentage of non-white residents in St. Lucie County (19.4%) with the percentage of non-white members on Mr. Chandler's jury venire (13.7%), non-whites are 5.7% less on the jury pool than their percentage in the total population (RS. 127). This underrepresentation of 5.7% of the total population of non-whites (19.4%) is equivalent to one-fourth or 27% of the non-white population. Thus, over one-fourth or 27% of the non-white population was excluded from Mr. Chandler's jury pool through the process of utilizing votor registration lists in St. Lucie County to select a jury pool.

I. THE LAW

The sixth amendment prohibits discrimination, whether intentional or not, in the overall jury selection process. The Constitution insures every criminal defendant "the right to . . . an impartial jury." Decisions by the Supreme Court of the United States and the United States Courts of Appeals have repeatedly held that a defendant may challenge the discriminatory selection of jurors pursuant to the protections of the sixth amendment. See Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Bowen v. Kemp, 769 F. 2d 672 (11th Cir. 1985); Gibson v. Zant, 705 F. 2d 1543, 1547 (11th Cir. 1983). In Duren the United States Supreme Court enunciated the elements which must be established to constitute a fair cross-section prima facie case:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from

> which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Once a prima facie case is set forth, the burden shifts to the State to disprove the defendant's claim. Discriminatory intent is irrelevant to a sixth amendment challenge. Id. at 368, n.26. See also Bowen v. Kemp, 769 F. 2d 672, 684 n.7 (11th Cir. 1985); Batson v. Kentucky, 106 S. Ct. 1712 (1986); and Griffith v. Kentucky, 107 S. Ct. 708 (1987).

If the jury selection system resulted in a representative cross-section of the community, it would be anticipated that the composition of any one jury pool would be reflective of the constitution of the eligible community. In assessing whether a jury selection system accomplishes the constitutional mandate of obtaining a representative sample of the community, courts focus on a cognizable group within the community, and compare the percentage of those groups appearing in the jury pool to the percentage of the group in the general population. The goal of a representative jury may be compromised at various stages of the selection process. Specifically, if the list from which prospective jurors are selected does not represent a fair cross-section of the community, then the jury selection process is constitutionally defective ab initio.

"[I]f the use of voter registration lists as the origin for jury venires were to result in a sizable underrepresentation of a particular class or group on the jury venires, then this could

constitute a violation of a defendant's 'fair cross section' rights under the sixth amendment. Bryant v. Wainwright, 686 F.2d 1373, 1378 n. 4 (11th Cir. 1982), cert. denied, 461 U.S. 932. See Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979). Accordingly, the sixth and fourteenth amendments mandate that Mr. Chandler be granted relief.

In Craig v. State, 16 F.L.W. 480, 481, (Fla. July 3, 1991) this Court rejected the position that the defendant's race is relevant to the consideration of this claim. In that case, as in this one, the defendant was white. As a basis for its decision, the Court in Craig cited Kibler v. State, 546 So. 2d 710 (Fla. 1989) in which the Court "expressly held that a white defendant has standing to raise a claim of discrimination in the jury selection process." Craig, 16 F.L.W. at 481 (citing Kibler v. State).

Kibler relied on an array of pre-1989 case law dating back to 1972, to support the contention that any defendant, regardless of his race, had standing to raise a claim of racial discrimination in jury selection. The Kibler Court stated that State v. Neil did not limit which defendants could contest peremptory challenges made for race-related reasons, and that Castillo v. State, 466 So. 2d 7 (Fla. 3d DCA 1985) approved in part, quashed in part on other grounds, 486 So. 2d 565 (Fla. 1986), clarified Neil as standing for the proposition that the defendant's race does not affect his standing to object to race

discrimination in jury selection. Kibler, 546 So. 2d at 711 (citing Castillo v. State, 466 So. 2d at 8 n. 1.)

Both Castillo and Kibler relied directly on the United States Supreme Court's decision in Peters v. Kiff, 407 U.S. 493 (1972). Kibler likewise relied on Taylor v. Louisiana, 419 U.S. 522 (1975), Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983), United States v. Childress, 715 F.2d 1313 (8th Cir. 1983), People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, State v. Superior Court, 157 Ariz. 541, 760 P.2d 541 (Ariz. 1988), and Seubert v. State, 749 S.W.2d 585 (Tex.Ct.App. 1988). All of these cases were decided prior to Mr. Chandler's direct appeal.

The Peters v. Kiff decision, its predecessors, and the succession of similar decisions in regard to jury composition based on the Sixth and Fourteenth Amendments clearly defined the state of the law in 1986, when the trial in the instant case took place, and in 1989, when the appeal took place. The "existing sixth [and fourteenth] amendment law" at the time of Mr. Chandler's appeal was longstanding and compelling.

A. THE IMPORTANCE OF THE JURY AND THE RIGHT TO TRIAL BY AN IMPARTIAL JURY

As stated in Washington v. Davis, 426 U.S. 229 (1976), "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Davis, 426 U.S. at 239. This theme of a

fairly composed jury protecting the defendant from systematic abuses runs through all jury-oriented jurisprudence.

In Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2085 (1991), the Supreme Court described the jury as "a quintessential governmental body. . . exercis[ing] the power of the court and of the government that confers the court's jurisdiction, . . . perform[ing] the critical governmental functions of guarding the rights of litigants and 'insur[ing] continued acceptance of the laws by all of the people.'" (citations omitted). Indeed, the jury is the finder of fact and its conclusions on the facts in evidence are, for the most part, final. Edmonson, 111 S. Ct. at 2085. The importance of jury composition is even greater in capital cases, where those jurors may be called upon to condemn a person to death.

Surely a fair jury is a shield against unwarranted convictions and executions. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court said that the petit jury played a key role in the American justice system by acting as a safeguard for persons accused of crimes against "the arbitrary exercise of power by prosecutor or judge." See also Duncan v. Louisiana, 391 U.S. 145 (1968); Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 12-13 (1986).

The right to trial by jury is the cornerstone of our criminal justice system, Ex parte Milligan, 4 Wall. 2, 123, 18 L.Ed 281 (1866), and any erosion of that right through

discrimination undermines the integrity of our courts and the principles of democratic government. Edmonson.

B. SIXTH AMENDMENT RIGHT TO VENIRE COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY.

In Duncan v. Louisiana, 491 U.S. 145 (1968), and its companion case, Bloom v. Illinois, 391 U.S. 194 (1968), the Supreme Court extended the Sixth Amendment's guaranty of trial by jury to criminal cases in state courts through the Fourteenth Amendment Due Process Clause.

In Bass v. State, 368 So. 2d 447 (Fla. 1st DCA 1979), a conviction was reversed for violation of the constitutionally mandated requirement of a fair cross-section in the jury selection process.

> The constitutional guaranty of a jury trial includes assurance that the jury be drawn from a fairly representative cross-section of the community.

Bass, 368 So. 2d at 449.

The United States Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), affirmed that in criminal trials petit jurors must be drawn from a group of laypersons representative of a fair cross-section of the community, and that this right is part and parcel of the Sixth Amendment right to fair trial by jury. Williams, 399 U.S. at 100, 102. See also, United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988); Smith v. Texas, 311 U.S. 128 (1940); Strauder v. West Virginia, 100 U.S. 303 (1880).

Later, in Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held, "[T]he selection of a petit jury from a

representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor, 419 U.S. at 528.

In Holland v. Illinois, 110 S. Ct. 803 (1990), the Supreme Court sought to distinguish the rights protected by the Sixth Amendment from those protected by the Equal Protection Clause. Holland's case involved the use of peremptory challenges to exclude black jurors. Holland challenged on Sixth Amendment grounds.

First, the Court held that a white defendant has standing to raise a Sixth Amendment challenge to the exclusion of blacks from his jury. Holland, 110 S. Ct. at 805. Moreover, the court affirmed that "our cases hold that the sixth amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." Holland, 110 S. Ct. at 805 (citing Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975)).[7] The Court noted "[t]he fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis." Holland, 110 S. Ct. at 807.

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[7]The Court turned aside an extension of the fair cross-section requirement of the venire to the petit jury on sixth amendment grounds, but noted that the question was the scope of the sixth amendment guarantee, not Holland's standing to assert it. Holland.

C. DUE PROCESS RIGHT TO NON-EXCLUSIVE VENIRE

In Peters v. Kiff, 407 U.S. 493 (1972), the Supreme Court held that exclusion of blacks from the grand and petit jury pools constitutes denial of due process to any defendant, white or black, that a defendant has standing to complain even if s/he is not a member of the excluded class, Peters v. Kiff 407 U.S. at 500, and that actual bias or harm need not be shown, Peters v. Kiff, 407 U.S. at 502, 504. The Court said:

> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. 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. For there is no way to determine what jury would have been selected under a constitutionally valid system, or how that jury would have decided the case. In light of the great potential for harm latent in an 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.
>
> Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Peters v. Kiff, 407 U.S. at 503-504 (footnote omitted). Cf. Powers v. Ohio, 59 U.S.L.W. 4268 (U.S. April 1, 1991)(No. 89-5011).

D. EQUAL PROTECTION RIGHTS TO NON-EXCLUSIVE VENIRE: DEFENDANT'S RIGHT AND THIRD PARTY EXCLUDED JURORS' RIGHT

Long before the Sixth Amendment's right to an impartial jury was recognized as obligatory upon the states through the Due Process Clause, the United States Supreme Court had held that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." Strauder v. West Virginia, 100 U.S. 303, 305 (1880). See also, Norris v. Alabama, 294 U.S. 587, 599 (1935); Neal v. Delaware, 103 U.S. 370, 397 (1881).[8]

Recently in Powers v. Ohio, 111 S. Ct. 1364 (1991), the Court reaffirmed its adherence to these equal protection principles when it said, "For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's

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[8]Strauder has since been cited by the Supreme Court and other courts to stand for more general legal principles than just that persons of one's own race may not be excluded from venires. See Washington v. Davis, 96 S. Ct. 2040 (1976)("Almost 100 years ago, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause . . . "); United States v. Scarfo, 850 F.2d 1015 (citing Strauder as supporting the fair cross-section requirement of the Sixth Amendment); Edmonson v. Leesville Concrete Co., Inc., 59 U.S.L.W. 4574 (U.S. June 3, 1991)(No. 89-7743)(citing Strauder and Neal v. Delaware as having established "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process.")

purposeful conduct." Powers, 111 S. Ct. 1364, 1367. The Court went further and held that the Equal Protection Clause precludes racial exclusions through peremptory challenges even though the defendant is not of the same race as the excluded jurors. Powers, 111 S. Ct. at 1369.

In Whitus v. Georgia, 385 U.S. 545 (1967), the court stated, "For over fourscore years it has been federal statutory law, 18 Stat. 336 (1875), 18 U.S.C. §243, and the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on . . . the verdict of a petit jury from which Negroes were excluded by reason of their race." Whitus, 385 U.S. at 549 (citations omitted.); see also Washington v. Davis, 426 U.S. 229; Cf. Vasquez v. Hillery, 474 U.S. 254, 264 (1986)(stating that it is an equal protection violation to exclude persons based on race from grand juries: "a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race.")

Not only is the defendant denied equal protection of the law in his own right through such exclusions, but he also has standing to raise the third-party equal protection claims of the racially excluded jurors. Powers, 111 S. Ct. at 1371-1373; Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077 (1991).

Racially excluded jurors have an equal protection claim based on their exclusion just as Mr. Chandler does. Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970); Batson v.

Kentucky, 476 U.S. 79 (1986); Powers; Edmonson. Race discrimination in juror selection "offends the dignity" of those discriminated against. Edmonson, 111 S. Ct. at 2087; Powers, 111 S. Ct. at 1366. Because juror selection is to be based upon "individual qualifications and ability impartially to consider evidence presented at trial," Batson, 476 U.S. at 87, excluding a juror based on his or her race constitutes nothing less than a racial slur, an insult, a brand of inferiority. See, Batson; Edmonson; Carter; Powers. To exclude an entire community composed almost entirely of minorities merely heightens the implication that minorities, due to some genetic inferiority, cannot perform the duties of an impartial fact-finder at trial. Surely here not only did individual persons suffer, but the whole community did as well. See Batson, 476 U.S. at 87.

II. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate counsel's failure to raise this issue on direct appeal prejudiced Mr. Chandler. In light of the substantial precedent favoring relief for those tried before unconstitutionally composed juries. Surely, confidence in the outcome of the prior proceedings is undermined in light of appellate counsel's failure to raise the unconstitutionality of Mr. Chandler's trial jury on direct appeal. Counsel's failure to raise the claim on direct appeal resulted in the failure of this Court to address this meritorious issue. By failing to raise this issue on direct appeal, appellate counsel's performance fell below the range of professional competence for attorneys in

criminal cases. Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987); Harrison v. Jim Erices, 880 F.2d 1279 (11th Cir. 1989).

This claim was properly preserved for appellate review. Original trial counsel for Mr. Chandler's resentencing had filed a pre-trial motion to quash jury:

> 2) That the use of voter registration lists as the sole source of the jury venire deprives the defendant of his right to a trial by an impartial jury drawn from a fair cross-section of the community. Use of the voter registration list leads to systematic exclusion and significant under-representation of blacks and hispanics because of the lower percentage of minorities who actually register to vote. Evidence of total population figures compared to voter registration figures shall be admitted at the hearing on this Motion to substantiate the above allegations.

(RSP. 92).

Subsequently, trial counsel, Mr. Udell, made a motion to adopt all previous motions and this motion was granted by the trial court (RSP. 215). A hearing was conducted on this motion in which trial counsel presented evidence demonstrating that 27% or one-fourth of the non-white population was excluded from Mr. Chandler's jury through the use of voter registration lists to select the jury venire (RS. 115-32).

It is clear that Mr. Chandler has standing to challenge the procedures employed here under the Sixth Amendment, Holland v. Illinois, the Fourteenth Amendment Due Process Clause, Peters v. Kiff, and the Fourteenth Amendment Equal Protection Clause, Spencer v. State; Strauder v. West Virginia, 100 U.S. 303, 305

(1880); Powers v. Ohio. Accord Kibler v. State; Hamilton v. State; Bryant v. State. It is also clear from the cases that in any of these instances, a defendant has standing to assert his challenge whether he himself is a member of the excluded group. Craig; Kiff; Powers; Accord Kibler v. State, 546 So. 2d 710 (Fla. 1989); Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989); Bryant v. State, 565 So. 2d 1298, 1300 (Fla. 1990).

The procedures employed by the Nineteenth Circuit, as embodied in its administrative order, resulted in a denial of the most basic rights afforded to Mr. Chandler -- the right to trial by an impartial jury chosen from a venire drawn from a representative cross-section of the whole of the community. It also violated the rights of the citizens of the western half of St. Lucie County not to be excluded from jury service on account of race. Powers, at 4271. The error violated the Sixth, Eighth and Fourteenth Amendments.

The constitutional violation involved in this case cannot be deemed harmless. Indeed, the damage done Mr. Chandler is impossible to assess, since the fair composition of the jury is an essential element of our criminal justice system. Kiff.

While the influence of the voir dire process may persist through the whole course of the trial proceedings, Powers, 59 U.S.L.W. at 4272, the influence of an unconstitutional jury venire is far more pervasive. It affects even the voir dire process through its covert taint because voir dire is inadequate to disclose systematic exclusions which occurred in the formation

of the venire itself. In capital cases, the taint affects not only the guilt/innocence phase of trial, but the sentencing as well. Powers, 59 U.S.L.W. at 4272. "The Fourteenth Amendment's mandate that race be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." Powers; See also State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988).[9]

Because of the fundamentally corrosive effect of discrimination in jury selection on the judicial system, society, the excluded jurors, and the defendant's rights, those responsible for jury selection have the duty to insure that there is no discriminatory impact in the jury selection process, Hill v. Texas, 316 U.S. 400 (1942); Alexander v. Louisiana, 405 U.S. 625 (1972); Avery v. State of Georgia, 345 U.S. 559 (1953), no matter how slight, See Vil. of Arlington v. Metro Housing Dev., 429 U.S. 252, 266 n. 13 (1977), and cases cited therein. If that duty is not met, the defendant's conviction must be reversed no

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[9]The rights reaffirmed in Holland and Powers are fundamental, and have been long recognized as such. Alexander v. Louisiana, 405 U.S. 625 (1972); Vasquez v. Hillery, 474 U.S. 254; Duncan v. Louisiana, 391 U.S. 145; United States Ex Rel. Wandick v. Chrans, 869 F.2d 1084 (7th Cir. 1989); Scruggs v. Williams, 902 F.2d 1430 (11th Cir. 1990); Taylor v. Louisiana, 419 U.S. 522 (1975); See Floyd v. State, 903 So. 2d 105, 106 (Fla. 1956) ("The right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government.") Peters v. Kiff; Norris v. Risley, 918 F.2d 828 (9th Cir. 1990); Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1; Rose v. Clark, 478 U.S. 570 (1986). As this Court has stated, "It would seem equally self-evident that . . . discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being -- to insure equality of treatment and even handed justice." State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988).

matter the evidence of guilt. Avery; Hillery. It is impossible to evaluate the harm of such a racially imbalanced venire, and therefore, reversal is mandatory and no harmless error review is allowed. See Hillery, 474 U.S. 254, 263-264.

Petitioner challenged the composition of his venire, thereby preserving this issue for appeal. Craig. The issue was clearly disclosed on the face of the record before appellate counsel. No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Chandler of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now.

CLAIM III

MR. CHANDLER WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF INFORMATION CONCERNING THE VICTIM'S FAMILY BACKGROUND AND OTHER UNDULY PREJUDICIAL VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

Throughout the course of Mr. Chandler's resentencing, the prosecution team utilized inflammatory comments and victim impact evidence to deny Mr. Chandler a fair sentencing proceeding. Not only did the State introduce evidence of the impact of the crime agaist the Steinbergers, but victim impact evidence from Mr.

Chandler's 1972 Texas offense was featured during the resentencing proceeding.

During voir dire of Mr. Chandler's resentencing, the assistant state attorney introduced his carefully planned strategy to provoke an unbridled emotional response from the jurors by asking the venire to disregard Mr. Chandler's rights because the victims had rights:

> MR. MORGAN [ASSISTANT STATE ATTORNEY]: Your Honor, I'm leaning toward going into the area but, in an abundance of caution, I'll withdraw the question.
>
> MR. MORGAN: Now, you know, Mr. Udell has talked to you a little bit about, you know, the rights of his client. He's asked a couple of questions regarding that.
>
> Would everybody agree, or has anybody ever thought about the concept that victims have rights?
>
> MR. UDELL: Judge, I object. May we approach the bench?

(RSV. 808).

During his opening argument the assistant state attorney stressed to Mr. Chandler's jury the victims' age, employment status, and physical handicaps, all personal characteristics of the victims expressly prohibited from consideration by a capital sentencer (RS. 178-79).

During the testimony of Detective Redstone, the assistant State attorney sought to introduce the family photos of the couple (RS. 240-41). The State attorney also sought to emphasize the sale of items allegedly stolen during the crime as a

desecration of the victims' marriage. Defense counsel objected and moved for a mistrial (RS. 245).

The State Attorney's attempt to unleash the jury's emotions at Mr. Chandler's trial and resentencing were especially evident during the direct testimony of the State witnesses: John Karasek,[10] and Lowell Wolf.[11] The testimony, argument and victim impact evidence were manipulated to elicit maximum emotional impact. This parade of improper remarks and evidence, considered either individually or cumulatively, rendered Mr. Chandler's resentencing trial fundamentally unfair.

The State's incipient pandering of victim impact evidence to Mr. Chandler's sentencer included grotesque recreations of how Rachel Steinberger walked as a result of degenerative bone disease, demonstrated by her neighbor from Ft. Lauderdale, John Karasek (RS. 514-21).

Lowell Wolfe was called by the State at the resentencing to present nothing more than bald victim impact evidence. There was simply no relevant purpose for the bulk of Wolf's testimony at the resentencing other than to inflame the sentencer with naked, 14 year old, victim impact evidence. He was asked to display his scars to Mr. Chandler's jury as the general tenor of the

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[10]Mr. Karasek (RS. 514-520) was a neighbor of the Steinbergers when they lived in Ft. Lauderdale not Sebastian where the couple was residing at the time of the offense.

[11]Mr. Wolf (RS. 549-571) was the victim from a 1972 Texas crime who testified to the immediate and continuing effects of that aggravated battery, for which Mr. Chandler was never convicted.

proceeding focused on the victims instead of the aggravating and mitigating evidence (RS. 566-71).

During his closing argument the State Attorney reemphasized the emotional appeal for the victim of a previous crime:

> [MR. COLTON:] What did Lowell Wolf (phonetic) tell you? He spent two weeks in a hospital, most of that time unconscious. At least three separate blows to the head. He told you about the fractures he received. He told you about the operations he's had to have on his eyes since that time. He's told you about the problems he's still having with his ears.

(RS. 827). The prosecutor even used the impact on Mr. Chandler's own family to argue for a death sentence:

> You know one of the saddest parts about a case like this, not quite as sad as the pictures that you see there, but one of the other sad parts about a situation like this is that not only has this man retavit (phonetic) and caused desperation and despair to the families of the victims but he's done the same thing to his family.

(RS. 849).

The prosecutor's final argument to Mr. Chandler's jury relied entirely upon victim impact evidence in deciding Mr. Chandler's ultimate fate. Once again counsel objected and moved for a mistrial:

> But the state's position is that mercy is not a mitigating factor in this case under the circumstances and evidence that you've heard. But while Mr. Udell is up here asking you to show mercy to his client, after he does that I ask you to review in your minds whether or not he deserves mercy. Does he deserve you to consider what's been presented as other aspects of his character which should on mitigation [sic]. And when you're considering Mr. Udell's request that you give

him mercy I ask you to consider the facts of this case. And I ask you to examine whether he deserves mercy after he put himself in the position of being God as to the fate of Rachel and Howard Steinberger. I submit to you that back there in those woods behind that house on July of 1980 they didn't have a lawyer provided for 'em..

MR. UDELL: Oh Judge I...

MR. COLTON: They didn't have anybody arguing mitigating circumstances for 'em.

THE COURT: Mr..Mr. Colton..

MR. UDELL: Judge can we approach the bench?

THE COURT: You may.

COUNSEL APPROACH THE BENCH

MR. UDELL: Judge again I move for a mistrial, ask the court to instruct the jury to disregard that state's comment or the prosecutor's comment that Mr. and Mrs. Steinberger didn't have lawyer back there with them. That's highly improper, we'd ask for a curative instruction and ask that that be stricken from the record. We'd cite in support Brooks v. Kemp (phonetic) 762 F 2nd 1383. I've nothing further.

MR. COLTON: Your Honor of this case is that those comments are acceptable. Those were comments made in closing argument in the last trial and that case was reviewed by the Supreme Court and they were upheld. And I submit to you there's nothing improper about it and that Mr. Udell knew there was nothing improper. And that I have..I would request that he stop interrupting for frivolous objections.

THE COURT: I'll permit you to make those statements and I thank you. Deny your motion.

END OF BENCH CONFERENCE

> MR. COLTON: As I was saying and you consider if Mr. Udell request that you consider mercy for his client I ask that you consider the mercy that he showed them, that he showed Rachel and Howard Steinberger who didn't have a paid attorney.
>
> MR. UDELL: Standing objection.
>
> THE COURT: Noted..
>
> . . .
>
> MR. COLTON: Ask yourselves as Mr. Udell talks to you, Mr. Udell where was their juror? Where was their mercy? Where were their mitigating circumstances? Who argued them for 'em? Nobody brought in pictures of them when they were children. Did he consider the 40 years of marriage that he destroyed? Did he show mercy when he yanked those wedding rings off of her fingers and was so callous that he took 'em into a bar before the sweat dried on his neck and sold those rings? Is that what deserves mercy?

(RS. 856-58)(emphasis added).

This Court has long addressed the concern that the passions of the jury may not be improperly inflamed as matters of Florida law. Welty v. State, 402 So. 2d 1159 (Fla. 1981); Lewis v. State, 377 So. 2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). In Jones [Randall] v. State, 569 So. 2d 1234, 1239 (Fla. 1990), this Court stated:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

> Here, none of the relatives' testimony was necessary to establish the identity of the victims. It is apparent that such testimony was impermissibly designed to evoke the sympathy of the jury.

In Mr. Chandler's case, the prosecution overstepped the bounds of proper argument by interjecting inflammatory remarks virtually identical to those found to be reversible error in other cases. Taylor v. State, 583 So. 2d 323, 329-330 (Fla. 1991). The prosecutor argued the deceased victim's lack of choice while the defendant, if in jail, could laugh, cry, eat, read, watch TV, participate in sports, make friends and live to find out the wonders of the future.

This evidence was neither germane to the issues of guilt nor probative on the issue of the character of the defendant or the circumstances of the crime during sentencing, but was introduced by the State solely for its inflammatory value and to unduly prejudice the jury against the defendant.

Federal law prohibits improper prosecutorial argument against mercy. In a recent opinion the Eleventh Circuit reversed a death sentence because the prosecutor argued that the jury should disregard mercy. Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992).

The eighth amendment requires an individualized and particularized sentencing. Reversal is mandated where the sentencer is contaminated by impermissible evidence or

argument.[12] Mr. Chandler's trial contains numerous characterizations and opinions of the crimes which have been rejected by this Court. Both the jury and judge relied on improper factors in reaching a sentence of death. Mr. Chandler's case presents the constitutionally unacceptable risk that his sentence was based on impermissible evidence in violation of the Eighth Amendment.

Consideration of such evidence and argument violates the well-established constitutional principle that discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 274 (1972)(Brennan, J., concurring). See also California v. Ramos, 463 U.S. 992, 999 (1983); Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out

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[12]For purposes of the Eighth Amendment, the Eleventh Circuit and the Supreme Court have treated the jury as a sentencer. Espinosa v. U.S., No. 91-7390 (U.S. June 29, 1992); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S.Ct. 1353 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987).

arbitrarily or capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985) (O'Connor, J., concurring). Under Florida law, aggravating circumstances specified by statute are exclusive, and no other circumstances or factors may be used as aggravation for purposes of the imposition of the death penalty. Elledge v. State, 346 So. 2d 998 (Fla. 1977); Miller v. State, 373 So. 2d 882 (Fla. 1979). See also Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Florida law also recognizes the constitutionally unacceptable risk that a jury may impose a sentence of death in an arbitrary and capricious manner when exposed to victim impact evidence. The personal characteristics of the victim did not provide any evidence relevant to Mr. Chandler's culpability. In Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981), this Court held:

> We acknowledge and adhere to the well-established rule in Florida that a member of the deceased victim's family may not testify for the purposes of identifying the victim when nonrelated, credible witnesses are available to make such identification. . . . The basis for this rule is to assume the defendant as dispassionate a trial as possible and to prevent the interjection of matters not germane to the issue.

(emphasis added.) See also Lewis v. State, 377 So. 2d 640, 643 (Fla. 1979), also a death penalty case. "[T]he law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990). In Jones, this Court disapproved testimony "impermissibly designed to evoke

sympathy of the jury." The Welty holding has been expanded to prohibit any testimony about a victim which does not "prove or tend to prove a fact in issue." Stano v. State, 473 So. 2d 1282, 1285 (Fla. 1985). See also Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991)("To be relevant, evidence [about the victim] must tend to prove or disprove a fact in issue"). The presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case. However, these are the very same impermissible considerations that the State emphasized and the jury and judge relied on in Mr. Chandler's case.

Arguments and evidence such as those presented in Mr. Chandler's case have been long condemned as violative of due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460 ("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character ...."); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984)(because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires"). See also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be

based on a complete assessment of the defendant's individual circumstances ... and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law'") (citations omitted).

In Mr. Chandler's case, basic Eighth Amendment requirements were simply flouted. The prosecutor's arguments and the improper victim impact evidence demonstrate plainly that Mr. Chandler's death sentence was based upon "factors that are constitutionally impermissible or totally irrelevant to the sentencing process," Stephens, and upon "caprice or emotion," Gardner, rather than upon a reasoned, individualized or particularized assessment of Mr. Chandler's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982).

In Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), where defense counsel was found to be ineffective for failing to object to the introduction of certain testimony, the Court explained:

> We have no difficulty concluding that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the cause of [Vela's] defense." Strickland, 693 F.2d at 1262. Indeed, given the extremely prejudicial effect of this testimony, we fail to see how anyone could conclude otherwise. Faced with the task of assessing Vela's punishment, the jury was informed that the man he had killed was kind, inoffensive, a star athlete, an usher in his church, a member of its choir, a social worker with under-privileged children of all races, a college student holding down two jobs while he attended classes and played on the championship football team, and the father of a three-year-old child. The truth of these statements is, of course, not in issue; the point is that they are irrelevant to the severity of Vela's sentence, and should not have been considered by the jury.

....

> We cannot in reason conclude that the jury did not consider this inadmissible, improper, highly prejudicial testimony in determining Vela's sentence. The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. Each item of testimony has an incremental effect; large segments of highly prejudicial, inadmissible testimony have a considerable effect, skewing the calculus and invalidating the result reached.

Vela, 708 F.2d at 966 (emphasis added). Likewise, in Mr. Chandler's case, the factors urged by the prosecutor's arguments were "irrelevant" and "should not have been considered." Also as in Vela, the interjection of these impermissible factors into the sentencing decision was prejudicial--no one "could conclude otherwise." But these factors were the heart of the State's case for death.

The prosecutor's highly improper argument was not corrected by the jury instructions. This prevented Mr. Chandler's jury from providing Mr. Chandler the "particularized consideration" the Eighth Amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Peek v. Kemp 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986)(en banc)(the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.) vacated for reh'g in banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(en banc).

This Eighth Amendment error requires reversal. As the Supreme Court discussed in Caldwell v. Mississippi, 472 U.S. 320 (1985), "Because we cannot say that this [error] had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 472 U.S. at 341. Contamination occurred, and neither the Eighth Amendment nor the Florida Constitution will permit a death sentence to stand where there is such a risk of unreliability. Stringer v. Black, 112 S. Ct. 1130 (1992). Here the record proves that Mr. Chandler's death sentence rested on impermissible considerations. Defense counsel's failure to object and move for a mistrial was inexcusable, and prejudicially deficient. In light of Stringer v. Black, relief must be granted. This Court must reverse and grant a new sentencing before a jury.

This record is replete with prosecutorial error. Mr. Chandler was sentenced to death on the basis of the very constitutionally impermissible "victim impact" evidence and argument which this Court has condemned. In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. Counsel's performance in this regard was deficient. The victim impact evidence here was unmistakable. It simply cannot be said that Mr. Chandler as a result of appellate

counsel's glaring ignorance of relevant law was not prejudiced. Counsel should have urged this claim on direct appeal, and was ineffective for failing to do so. Welty was the law. Appellate counsel's failure was clearly premised upon ignorance of Welty. Habeas relief is warranted. Relief is therefore now appropriate.

ADDITIONAL CLAIMS

Appellate counsel raised only four (4) claims on direct appeal from the resentencing. He woefully failed in his duty to raise all possible issues on behalf of Mr. Chandler. The lack of appellate advocacy on Mr. Chandler's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. See, e.g., Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

The appellate-level right to counsel rests on the Sixth Amendment right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel must function as "an active advocate on behalf of his client." Anders v. California, 386 U.S. 738 (1967); see also Penson v. Ohio, 109 S. Ct. 346 (1988); McCoy v. Court of Appeals of Wisconsin, Dist. 1, 108 S. Ct. 1895, 1900 (1988). S/he must examine the record, research the law, and put forth arguments on the client's behalf, whether that client is indigent or wealthy. Douglas v. California, 372 U.S. 353, 358 (1965) (indigents have an equal protection right to counsel on appeal); Ake v. Oklahoma, 470 U.S. 68, 76 (1985); McCoy v. Court of Appeals of Wisconsin, Dist. 1,

108 S. Ct. 1895, 1902 (1988); Murray v. Giarrantano, 109 S. Ct. 2765, 2769 (1989).

The United States Supreme Court stated in United States v. Cronic, 466 U.S. 648, 653 (1984), that "[l]awyers in criminal cases are necessities not luxuries." Accord, Gideon v. Wainwright, 372 U.S. 335 (1963); Penson v. Ohio, 109 S. Ct. 346, 352 (1988). However, appellate counsel has to be more than just a lawyer. To provide the process due an appellant, s/he must "champion" the client's case on appeal, Douglas, 372 U.S. at 356, not merely act as amicus curiae, Anders, 386 U.S. at 744. See also Lucey, 469 U.S. at 395 (accused is entitled to representation by an effective advocate); Strickland v. Washington, 466 U.S. 668 (1984) ("that a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command . . . [a]n accused is entitled [] be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair."); Cronic, 466 U.S. 648, 656 (counsel must require the "prosecution's case [] survive the crucible of meaningful adversarial testing"); Penson, 109 S. Ct. at 352 ("Truth -- as well as fairness -- is 'best discovered by powerful statements on both sides of the question.'") (citing the quote by Lord Eldon from Kaufman, Does the Judge Have a Right To Qualified Counsel, 61 ABAJ 569 (1975)).

Without effective appellate advocacy on behalf of a death-sentenced client, this Court cannot properly perform its duty, as set forth in Art. I, sec. 9, of the Florida Constitution, of

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

"The mere fact that [this Court is] obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically provided by counsel." Mylar, 671 F.2d 1302. In addition, the advocacy of counsel must be timely, not after oral arguments or on rehearing. Accordingly, the duties of an 'active advocate' mandate that appellate counsel assert his [or her] client's position at the most opportune time." Mylar.

This Court has long protected the right of indigents to effective appellate representation. In Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation on appeal fell below an acceptable standard." See also Dougan v. Wainwright, 448 So. 2d 1005 (Fla. 1984). ([The attorney's] representation of Dougan suffered from [] major defects [] and simply cannot be found to have met the standard of Knight v. State, 394 So. 2d 997 (Fla. 1981)); Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985) (counsel "failed

to grasp the vital importance of his role as champion of his client's cause."); Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986) ("substantial omission by appellate counsel . . . result[ed] [in] prejudice to the appellate process sufficient to undermine confidence in the outcome.") Subsequently, upon Mr. Barclay's new appellate record, briefing, and argument, this Court reversed Barclay's death sentence and ordered that a new life sentence be imposed. This Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . " Harris v. Wainwright, 473 So. 2d 1246, 1247 (Fla. 1985). In Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986), this Court found that where reversible error occurred at trial and counsel was ineffective in not raising the issue on direct appeal, a new trial is the proper remedy.

Appellant cannot be denied appellate counsel, Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied 423 U.S. 876 (1975), nor can s/he legally be provided ineffective assistance of that counsel. Lucey, 469 U.S. 387, 394 n. 6. "Nominal representation on an appeal as of right . . . does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Lucey, 469 U.S. at 396. Counsel may not waive his client's

defense, Lucey, 469 U.S. at 394 n. 6, and be considered effective.

While there is no federal constitutional right to an appeal generally, Jones v. Barnes, 463 U.S. 745 (1983), the Eighth Amendment demands meaningful appellate review in capital cases. To ensure that death sentences are imposed in an evenhanded, rational, and consistent manner, as opposed to wantonly and freakishly, prompt and automatic appellate review is required. Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. 242 (1976). If effective assistance of appellate counsel is a constitutional imperative in cases in which the constitution does not even require an appeal, it follows a fortiori that enhanced effectiveness is required when the appeal is required by the Eighth Amendment.

Petitioner relies on the discussion presented in the petition as complemented by the factual and legal analysis discussed in his initial and reply briefs on appeal int he Fla. R. Crim. P. 3.850 action. To the extent that this Court has any question regarding appellate counsel's failure to raise any claims, Mr. Chandler would request that the issue be referred to an appropriate tribunal for a hearing to determine the facts.

CONCLUSION

For all of the reasons discussed in his petition and herein, Petitioner respectuflly urges that the Court grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August ___, 1992.

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