IN THE SUPREME COURT OF FLORIDA

NO. 76,144

CLEO DOUGLAS LECROY,

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

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

Counsel for Petitioner

INTRODUCTION

A petition for habeas corpus relief was filed in December 1990 to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments, claims demonstrating that Mr. LeCroy 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. The petition also presented questions that were ruled on on direct appeal but that should now be revisited in order to correct error in the appeal process that denied fundamental constitutional rights. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986).

Since the original petition was filed, there have been numerous appellate opinions issued which directly affect the issues raised in Mr. LeCroy's case. 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.

CLAIM I

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 ADDRESSING THE USE OF SPECIAL DISTRICTING PROCESS TO SELECT JURORS, RESULTING IN UNCONSTITUTIONAL SYSTEMATIC EXCLUSION OF A SIGNIFICANT PORTION OF BLACK POPULATION FROM JURY POOL, AND MR. LECROY WAS DEPRIVED OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

I. The Facts

Mr. LeCroy relies upon the facts set forth in the Habeas Petition.[1]

---

[1]Some additional record cites are provided to further aid this Court. Prior to trial, Mr. LeCroy filed his Motion to Dismiss Indictment and Quash Petit Jury Panel, objecting to the process by which the venire was chosen and challenging the racial composition of the jury, citing violations of his Sixth and fourteenth amendment rights (R. 4150-4153). In that motion, Mr. LeCroy stated that the method used by Palm Beach County to procure jurors discriminated and systematically excluded Blacks and others from jury service (R. 4150). He stated that the venire was taken from voter's registration lists and that cards were kept on each potential juror listing occupation, education, property status and precinct (R. 4151-4152). He also showed that the Palm Beach County Jury Commissioners were given broad discretion in determining which voters could be placed on the jury lists and therefore had the opportunity to discriminate (R. 4151). The motion requested a fairly composed jury and was denied at a pre-trial hearing held on October 1, 1981 (R. 774-775).

At the hearing on October 1, 1981, counsel for Jon LeCroy presented the circuit court with a "Challenge to Petit Jury Panel." Counsel for Cleo LeCroy adopted the motion at the hearing (R. 792). That motion also challenged the manner in which the venire was selected and in addition, objected to his being limited to jurors drawn solely from the eastern district and requested a new venire drawn from the whole county.

After a short discussion, during which the court noted the peculiarity of the districting process (R. 792), the court requested the state file a reply and withheld deciding the issue. The state filed its Response to Defendant's Challenge to Petit Jury Panel on December 10, 1981 (R. 4260-4263). In its Response,

(continued...)

II. Spencer Was Founded on Existing Law

In his original petition, Mr. LeCroy cited Spencer v. State, 545 So. 2d 1352 (Fla. 1989) along with other authority to support his claim that the jury districting process in Palm Beach County violated due process. However, Spencer was merely an application of existing and longstanding state and federal law.

Jury districting claims were first raised in the Palm Beach County circuit court in 1984. One case which was being pled and argued in the West Palm Beach jury districting cases was Jordan v. State, 293 So. 2d 131 (Fla. 2d DCA 1974). Jordan clearly compels the result that this Court reached in Spencer:

> [5] 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, 90 S. Ct. 1893, 1906, 26 L.Ed.2d 446 (1970). See State v. Silva, supra. 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

---

[1](...continued)
the State acknowledged that the exclusion of jurors from the Glades district was the defendant's primary complaint and that the defendant was claiming prejudice because the venire did not contain jurors from the Glades district (R. 4261). The court, in its December 22, 1981, order denying this and other motions, also acknowledged that defendant's requests included selecting petit jurors from the whole county, not just from the eastern district (R. 4277-78).

> 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.

293 So. 2d at 134 (emphasis added). In addition to Jordan, numerous other state and federal cases were being cited which compelled the same result which this Court recognized in Spencer.

The virtually identical jury districting claim presented in Mr. LeCroy's case was considered by this Court in Spencer v. State, 545 So. 2d 1352 (Fla. 1989).[2] Accord, Amos v. State, 545

---

[2]In Spencer, this Court found the petit jury venire selection process delineated in the Palm Beach County administrative order violated equal protection rights under article 1, section 2, of the Florida Constitution, and violated the Sixth and Fourteenth Amendments to the United States Constitution. Spencer, 545 So. 2d at 1355. This Court concluded that the "effect of the administrative order was to remove from the jury pool of the West Palm Beach district a significant concentration of the black population of Palm Beach County, specifically 17% of that population." Spencer, 545 So. 2d at 1354. This Court held that the jury selection process "results in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool for the West Palm Beach district, from which the jury for this defendant's trial was drawn." Spencer, 545 So. 2d at 1355. This Court further concluded that the method of determining whether a defendant will be tried in the eastern or western district was a denial of equal protection. Spencer, at 1355.

The constitutional defect which this court found in Spencer, the systematic exclusion of a significant concentration of a racial segment of the county from the jury pool in the eastern district, would also apply a fortiori to any venire of the western Glades District. Of the 368,938 white registered voters in Palm Beach County, only 4,575, or 1.2%, lived in the Glades district. Consequently, following this Court's reasoning in Spencer, the jury selection process would have resulted in "an unconstitutional systematic exclusion of a significant portion of the [white] population from the jury pool for the [Glades] district," specifically [98.8%] of that population. The Glades district likewise presented a grossly disproportionate racial balance in its jury pool (52.08% black and 47.92% white) compared

(continued...)

So. 2d 1352 (Fla. 1989); Craig v. State, 16 F.L.W. 480 (Fla. July 3, 1991); Moreland v. State, 16 F.L.W. 481 (Fla. July 11, 1991). In each of these cases a first-degree murder conviction was reversed for the reasons stated in Spencer. Recently, this Court held that "Spencer should be applied retroactively to all persons who challenged the Palm Beach County jury districts at trial and raised that issue on appeal." Moreland, 16 F.L.W. 481.

In State v. Moreland, 582 So. 2d 618, 620 (Fla. 1991), this Court found that Spencer was not new law but simply "applied existing sixth amendment law to a new situation." See also Nelms v. State, 17 F.L.W. S164 (March 12, 1992).[3] In Craig v. State, 583 So. 2d 1018 (Fla. 1991) this Court found that the same trial court procedures which were employed by Mr. LeCroy's counsel were sufficient to preserve the jury districting issue for appeal.

III. Ineffective Assistance of Appellate Counsel

---

[2](...continued)
to the county at large (7.487% black and 92.513% white). Such a venire was not a fair representative cross-section of the community at large. For these reasons, the differences in the facts in Spencer and in this case concerning the location of the offenses and the location of the trials are immaterial. Both jury district venires were unconstitutional. Only by drawing the jury venire from the whole county, or by restructuring the districts to achieve a fair cross-section with no systematic exclusion of any group and without otherwise violating constitutional requirements, could LeCroy have obtained a jury venire satisfying the requirements of the Sixth Amendment. Cf. Spencer, 545 So. 2d at 1355.

[3]Although it is a related case, Nelms v. State, is inapplicable to Mr. LeCroy in that Nelms failed to make an objection at trial and raised only a statutory challenge to the grand jury. 17 F.L.W. at S165.

The jury districting issue was properly preserved at Mr. LeCroy's trial. Craig; Clark v. State, 363 So. 2d 331 (Fla. 1978). However, although appellate counsel was aware of the jury districting issue, he failed to raise this fundamental issue on direct appeal due to an oversight:

> 1. I am Charles Musgrove. I am a resident of Palm Beach County, Florida.
>
> 2. I am an attorney licensed by the Florida Bar, and I represented Cleo Douglas LeCroy on his direct appeal in 1989.
>
> 3. It has recently come to my attention that there was a valid jury districting claim in Mr. LeCroy's case that could have been, but was not raised on direct appeal.
>
> 4. Not raising this claim on direct appeal was an oversight on my part and not the result of any strategy or tactic. The claim should have been raised in Mr. LeCroy's case.

(See attachment A).

Mr. LeCroy's appellate counsel was aware of the jury districting claim because he knew other appellate advocates were raising the claim on direct appeal where it had been preserved by an objection at trial.[4] The identical issue was being briefed by other appellate counsel at the same time Mr. LeCroy's case was pending on direct appeal. See Moreland v. State, 525 So. 2d 896 (Fla. 4th DCA 1988). In fact Mr. Musgrove himself briefed the issue in another case before Mr. LeCroy's case became final. State v. Walker, 546 So. 2d 802 (Fla. 4th DCA 1989). Appellate

[4]The opinion was not issued in Mr. LeCroy's case until December 15, 1988.

counsel was also aware of the ruling in State v. Alix Joseph, No, 87-619 CF A02 decided March 27, 1987 in the Circuit Court in and for Palm Beach County granting the motion for a county-wide jury. Counsel was aware that the jury districting claim was pending before this Court in Spencer which was argued October 1988 before Mr. LeCroy's case became final.

Other local appellate counsel verify that Mr. Musgrove is being truthful when he says that the issue was known to him but that he missed it due to oversight:

> I know of no reason to disbelieve Mr. Charles Musgrove's sworn statement that he missed the claim in Cleo McCroy's [sic] case due to oversight. I know Mr. Musgrove to be an honest and truthful person.

(attachment B; see also attachment C).

This was not a case where appellate counsel was unaware of the issue. In fact, counsel was aware of the issue but did not plead it due to oversight. The issue was preserved at trial, appellate counsel was aware of the claim, and he simply missed it. This is a classic claim of ineffective assistance of appellate counsel.

In Nelms this court found that appellate counsel cannot be held ineffective for failing to anticipate a change in law. 17 F.L.W. (Fla. DCA 19) at S185. In Nelms this Court relied on the finding in Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989). Mr. LeCroy's case is clearly different in that (1) there was no contrary law in effect as in Stevens; and (2) unlike Nelms, appellate counsel was aware of the claim and simply failed to

raise it due to oversight. It would be contrary to fundamental interests of due process to bar this claim on the grounds of failing to anticipate a change in law when the failure was actually due to an oversight.

Mr. LeCroy's direct appeal was marked by a general lack of advocacy in other respects as well and is an egregious example of ineffective assistance of counsel. Appellate counsel's initial brief presented approximately fifteen pages of argument. In contrast, the State's answer brief presented more than three times the amount of argument and citations to case law. The lack of appellate advocacy on Mr. LeCroy'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.

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

IV. The State of the Law at the Time of Appeal and Trial

The law in Florida is quite clear on the issue of the Palm Beach County jury districting process in effect in 1986. In Spencer v. State, 545 So. 2d 1352, 1354-55, this Court related:

> We must . . . conclude that its effect has removed from the jury pool for the West Palm Beach district a significant concentration of the black population of Palm Beach County, specifically 17% of that population. We find that, under the admitted facts in this cause,

> the administrative order creating the districts results in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool for the West Palm Beach district, from which the jury for this defendant's trial was drawn.

(footnote omitted.)

In so ruling, this Court cited State v. Alix Joseph, No. 87-619 CF AO2 (Fla. 15th Cir. Ct. Mar. 27, 1987), in which the Palm Beach Circuit Court had already ruled the same way on the same evidence, noting that the districting process racially discriminated.[5] Spencer, 545 So. 2d at 1355. In Spencer, this Court simply applied existing law concluding that "jury pools [must] reflect a true cross-section of the county, with no systematic exclusion of any group in the jury selection process, and [] [must] not otherwise violate equal protection constitutional requirements." Spencer, 545 So. 2d at 1355. Indeed, in Moreland v. State, 16 F.L.W. 481 (Fla. July 11, 1991) this Court acknowledged that Spencer did not create new law, but "applied existing sixth amendment law to a new situation."

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

---

[5]It is important to note that State v. Alix Joseph was decided two years prior to Mr. LeCroy's appeal to this Court.

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, a 1989 case,[6] 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).

---

[6]This Court issued its opinion in Kibler prior to the date on which Mr. LeCroy's appeal became final.

All of these cases were decided prior to Mr. LeCroy'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. LeCroy'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.

> We accept the fair-cross-section 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, 88 S.Ct., at 1450-1451. 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 jury 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, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting).

Taylor, 419 U.S. at 530-531.

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, ___ U.S. ___, 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, ___ U.S. ___, 110 S. Ct. at 807.

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

---

[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.

> 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

However, 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]

---

[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-
(continued...)

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 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

---

[8](...continued)
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.")

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. LeCroy 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.[9]

---

[9]Such a stigma seems even more poignant in Palm Beach County in lieu of past national press attention that county has (continued...)

E. The Jury Districting Error Is Fundamental Error and Violates the Sixth, Eighth, and Fourteenth Amendments

From these cases, it is clear that Mr. LeCroy 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 Fifteenth Circuit, as embodied in its administrative order, resulted in a denial of the most basic rights afforded to Mr. LeCroy -- 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 Palm Beach County not to be excluded from jury service on account

---

[9](...continued)
received. For instance, in 1986, the press carried stories within the same week regarding Prince Charles and championship polo in the elite eastern district and wide-spread poverty and AIDS in the deprived western district. More recently, the city of West Palm Beach was under national press attack for its ordinance requiring homeless people to pay for and carry identification.

of race. Powers, at 4271. The error violated the Sixth, Eighth and Fourteenth Amendments.

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. There were two motions filed by the trial attorney concerning the unconstitutionality of the venire's composition. Both motions were argued at a pre-trial hearing, during which time the judge commented on the oddness of the districting process and requested the state file a reply so he could better consider the issue. The defense and state motions, the in-court discussions, and the court's order regarding this issue were part of the record on appeal (R. 4150-4153, 774-775, and 791-793).

Furthermore, the jury selection process in effect in Palm Beach County at the time rose to the level of conspicuous constitutional error. First of all, it was well known that the majority of minorities in Palm Beach County lived in the western half (or district) of the county, as can be seen by reviewing the voter's registration pool for 1986. In addition, case law reaching back to the 1800's clearly establishes that systematic exclusion of a distinctive group from the venire violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellate counsel's failure to raise this issue on direct appeal prejudiced Mr. LeCroy. In light of the substantial precedent favoring relief for those tried before

unconstitutionally composed juries, the concurrent granting of relief by this Court in Spencer, and the recent granting of relief in Craig and Moreland, there is a reasonable probability that Mr. LeCroy 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. LeCroy'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 Spencer, the violation of a constitutional right upon which relief should be granted has been shown. See also Peters v. Kiff, Taylor v. Louisiana, Holland v. Illinois. 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. LeCroy was denied these rights during his trial. Defense counsel timely objected to the jury districting process by filing two motions requesting a venire be drawn from the county at large. Notwithstanding the motions for a new

venire and the trial court's own finding that the system for selecting venires was odd, the court ignored the unconstitutional and unjust exclusion of a significant portion of the population of Palm Beach County from Mr. LeCroy's venire, depriving Mr. LeCroy of his right to a fair trial and a fairly composed and impartial jury. Mr. LeCroy 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 decisions in Spencer, Craig, and Moreland, 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. Indeed, the damage done Mr. LeCroy 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).[10]

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 matter the evidence of guilt. Avery; Hillery. It is impossible to evaluate the harm of such a racially imbalanced venire, and

---

[10]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).

therefore, reversal is mandatory and no harmless error review is allowed. See Hillery, 474 U.S. 254, 263-264.

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.

V. Conclusion

This is not a case where the jury districting claim was not preserved at trial. This is not a case where appellate counsel was not aware that the claim was available. It is a classic case of ineffective assistance of appellate counsel for oversight of a claim. Prejudice is manifest. Quite simply, Mr. LeCroy would have been entitled to a new trial had 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. LeCroy would request that the issue be referred to an appropriate tribunal for a hearing to determine the facts. Relief is warranted.

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 April 1, 1992.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Petitioner

Copies furnished to:

Mark Menser
Assistant Attorney General
Magnolia Park Courtyard
111-29 North Magnolia Drive
Tallahassee, FL 32301

ATTACHMENT A

STATE OF FLORIDA)
) ss:
COUNTY OF PALM BEACH)

AFFIDAVIT OF CHARLES WILLIAM MUSGROVE

I, CHARLES WILLIAM MUSGROVE, having been duly sworn or affirmed, do hereby depose and state:

1. I am Charles Musgrove. I am a resident of Palm Beach County, Florida.

2. I am an attorney licensed by the Florida Bar, and I represented Cleo Douglas LeCroy on his direct appeal in 1989.

3. It has recently come to my attention that there was a valid jury districting claim in Mr. LeCroy's case that could have been, but was not raised on direct appeal.

4. Not raising this claim on direct appeal was an oversight on my part and not the result of any strategy or tactic. The claim should have been raised in Mr. LeCroy's case.

Charles William Musgrove
CHARLES WILLIAM MUSGROVE
Florida Bar No. 095137

SUBSCRIBED AND SWORN TO before me this 25th day of February, 1992.

Evelyn Holden
NOTARY PUBLIC, STATE OF FLORIDA
EVELYN HOLDEN
My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA;
MY COMMISSION EXPIRES: APRIL 18, 1994
BONDED THRU NOTARY PUBLIC UNDERWRITERS

ATTACHMENT B

STATE OF FLORIDA)
) ss.
COUNTY OF PALM BEACH)

AFFIDAVIT OF LOUIS CARRES

I, LOUIS CARRES, having been duly sworn or affirmed, do hereby depose and say:

1. My name is Louis Carres. I am an attorney licensed by the Florida Bar and I practice law in Palm Beach County Florida.

2. In 1987 I was practicing law in Palm Beach County. Objections to unconstitutional jury districting practices were being raised in criminal cases before the circuit court in and for Palm Beach County. The circuit court found that the jury districting process in Palm Beach County was unconstitutional. State v. Joseph, No. 87-619CF A02 (Fla. 15th Cir. Ct. March 27, 1987).

3. In 1987, the jury districting issue was also being raised by other attorneys both at trial and subsequently on appeal. If I had been briefing a case on appeal in which such an issue had been denied but properly preserved at the time of trial, I would certainly have briefed the issue on appeal.

4. The jury districting claim was commonly known and discussed among local attorneys. Other reasonably effective appellate counsel were also raising the jury districting claims if it had been preserved in the record by trial counsel. It is my opinion that it would be ineffective and below the standard of competent legal assistance for an attorney handling an appeal to

fail to raise this issue in a case where the issue had been raised in the trial court and an adverse ruling issued.

5. I know of no reason to disbelieve Mr. Charles Musgrove's sworn statement that he missed the claim in Cleo McCroy's case due to oversight. I know Mr. Musgrove to be an honest and truthful person. In one of the records which I specifically reviewed for the possibility of raising the jury districting claim, I believed on the basis of the appellate record that the issue had not be preserved at the trial level. Habeas corpus relief was subsequently granted on this issue in that case due to a hearing, not initially transcribed, where cocounsel's objection at trial was adopted by a co-defendant. The appellate court ruled that it was ineffective for appellate counsel to fail to raise this issue where it had been preserved at trial. Mitchell v. State, 567 So.2d 1037 (Fla. 4th DCA 1990).

FURTHER AFFIANT SAYETH NAUGHT.

The foregoing instrument was acknowledged before me this 25th day of March, 1992, by LOUIS CARRES, who is pesonally known to me who did take an oath.

LOUIS CARRES, ESQ.

Sworn to & Subscribed
to me this 25th day
of March, 1992

Florestine Wilson
Notary Public

COMM. NO.
CC-038678

ATTACHMENT C

STATE OF FLORIDA)
) ss.
COUNTY OF PALM BEACH)

AFFIDAVIT OF ANTHONY CALVELLO

I, ANTHONY CALVELLO, having been duly sworn or affirmed, do hereby depose and say:

1. My name is Anthony Calvello. I am an attorney licensed by the Florida Bar and I practice law in Palm Beach County Florida.

2. In 1987 I was practicing law in Palm Beach County. There were objections to unconstitutional jury districting practices being raised in criminal cases before the circuit court in and for Palm Beach County. I raised such a claim on appeal after the circuit court found that the jury districting process in Palm Beach County was unconstitutional in State v. Joseph, No. 87-619CF A02 (Fla. 15th Cir. Ct. March 27, 1987). See Moreland v. State, 525 So.2d 896 (Fla. 4th DCA 1988); Moreland v. State, 582 So.2d 618, 619 (Fla. 1991).

3. If I had been briefing a case on appeal after March 27, 1987, in which such an issue had been denied but properly preserved at the time of trial, I would certainly have briefed the issue on appeal.

FURTHER AFFIANT SAYETH NAUGHT.

The foregoing instrument was acknowledged before me this ____ day of March, 1992, by ANTHONY CALVELLO, who is pesonally known to me who did take an oath.

ANTHONY CALVELLO, ESQ.

Sworn to and
Subscribed before
me this 26th day of March, 1992

Florestine Mason
Notary Public