IN THE SUPREME COURT OF FLORIDA

NO. 76,144

FILED
SID J. WHITE
DEC 10 1990
CLERK, SUPREME COURT
By
Deputy Clerk

CLEO DOUGLAS LECROY,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order 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 presents 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).

PROCEDURAL HISTORY

After a pretrial appeal by the State, involving the suppression of evidence, State v. LeCroy, 435 So. 2d 354 (Fla. App. 4 Dist. 1983), opinion on rehearing, State v. LeCroy, 441 So. 2d 1182, (Fla. App. 4 Dist. 1983), see also State v. LeCroy, 461 So. 2d 88 (Fla. 1985)(approving in part, quashing in part, and remanding), Mr. LeCroy was convicted, sentenced to death, and the conviction and sentence were affirmed on direct appeal. See LeCroy v. State, 533 So. 2d 750 (Fla. 1988).

JURISDICTION TO ENTERTAIN PETITION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. LeCroy's capital conviction and sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987). Cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). When ineffective assistance of counsel on direct appeal is shown, this Honorable Court has consistently deemed habeas corpus appropriate.

This Court has long held that "habeas corpus is a high prerogative writ," which "is as old as the common law itself and is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such great historical stature, the writ of habeas corpus encompasses a

broad range of claims for relief:

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin, 88 So. 2d at 919-20. See also Seccia v. Wainwright, 487 So. 2d 1156 (Fla. 1st DCA 1986), relying on Anglin. Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty." Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petitioner "has a right to seek habeas relief," and the Court will "reach the merits of the case." Id. See also State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988)("habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree").

This Court has also consistently exercised its authority to correct errors which occurred in the direct appeal process. When this Court is presented with an issue on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous,

the Court will not hesitate to correct such errors in habeas corpus proceedings. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights. . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986).

Mr. LeCroy's petition presents substantial claims demonstrating that he was unlawfully convicted and unlawfully sentenced to death, in violation of fundamental constitutional precepts. The claims are unusual and complex and deserve careful scrutiny. In light of these substantial claims, Mr. LeCroy respectfully urges the Court to "issue such appropriate orders as will do justice." Anglin.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. LeCroy asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

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.

In January, 1981, Cleo LeCroy was arrested and charged with two counts of first degree murder in Palm Beach County. On October 1, 1981, the court heard argument on pretrial motions filed by Cleo LeCroy and his codefendant Jon LeCroy. One of the motions was a Motion to Dismiss Indictment and Quash Petit Jury Panel (R. 791). Trial counsel for Cleo LeCroy requested permission to adopt the motion filed by Jon LeCroy and the State stipulated to the adoption of the motion (R. 792).

Counsel for Mr. LeCroy objected to the selection process for the petit jury as set forth in Administrative Order 1.006-1/80:

> MR. DUBINER: The next one is to challenge the petit jury panel.
>
> I have handed you Administrative Order 1.06-180 (sic), which was signed by Judge Rudnick, who was the chief judge on January 10th, 1980, and I am asking the Court to take judicial notice of that administrative order, as it relates to this motion.

(R. 791). The administrative order objected to was the same

order upon which relief was granted by this Court, in a case in which counsel did raise the issue on direct appeal, in Spencer v. State, 545 So. 2d 1352 (Fla. 1989).

In Spencer, this Court found that the petit jury selection process delineated in Administrative Order 1.006-1/80 had the effect of removing a significant concentration of the Black population from the jury pool for the West Palm Beach district. Further, the procedure of allowing the accused in one district a choice of panel, but not in the other, violates equal protection rights under article I, section 2, of the Florida Constitution and the sixth and fourteenth amendments of the United States Constitution.

Mr. LeCroy's trial counsel objected to the jury selection process as set forth in Administrative Order 1.006-1/80. The issue was preserved. The very same process has been found to be constitutionally defective. Spencer. His appellate counsel, however, without a tactic or strategy, failed to address this significant issue on direct appeal.

The Fifteenth Judicial Circuit consists of Palm Beach County only, and has two "jury districts" created by the administrative order of the circuit court noted above. See Administrative Order No. 1.006-1/80, "In Re: Glades Jury District/Eastern Jury District." The boundary between the two districts is a north-south line that divides the county geographically in half, east

and west. [Jurors in the Eastern Jury District serve at the main courthouse in West Palm Beach; jurors in the western or Glades District serve at a branch courthouse in Belle Glade.]

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

> Jury Districts; counties exceeding 50,000
>
> (1) In any county having a population exceeding 50,000 according to the last preceding decennial census and one or more locations in addition to the county seat at which the county or circuit court sits and holds jury trials, the chief judge, with the approval of a majority of the circuit court judges of the circuit, is authorized to create a jury district for each courthouse location, from which jury lists shall be selected in the manner presently provided by the law.
>
> (2) In determining the boundaries of a jury district to serve the court located within the district, the board shall seek to avoid any exclusion of any cognizable group. Each jury district shall include at least 6,000 registered voters.
>
> Section 40.015, Florida Statutes.

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

> A Glades Jury District has been established by a majority vote of the Judges of the Fifteenth Judicial Circuit and by resolution of the Board of County Commissioners of Palm Beach County. In implementing this District, the Glades Courthouse Annex is designated as a situs for holding the following jury trials:

> Circuit Court Criminal
> Normally, all felony jury trials are held at the main courthouse in West Palm Beach; however, where the situs of the crime is within the Glades Jury District, defendant's counsel may request a jury trial at the Glades Annex. In all such cases, the Clerk shall furnish defendant's counsel with form of "Notice and Preference re Jury District," which form shall be signed and filed by him no later than fifteen days after the case is set for trial.
>
> . . .
>
> Grand Jury
> This Order does not affect the Palm Beach County Grand Jury, which shall be drawn from the county at large.
>
> Administrative Order No. 1.006-1/80, "In Re: Glades Jury District/Eastern Jury District"

Over his objections to the jury selection process, Mr. LeCroy was tried and convicted on capital charges, and received a jury recommendation of death (which recommendation the court followed) by a jury drawn only from the eastern half of the county. Totally excluded from the pool of prospective jurors for the trial of this case were all persons living in the entire western half of the county.

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

The eastern half or Eastern Jury District is urban, and is characterized by wealthy communities like Jupiter, Palm Beach, Wellington and Boca Raton, all communities that are predominantly Caucasian; this district is dominated by the West Palm Beach metropolitan area, a major metropolitan area of high density and predominantly Caucasian population.

Since jury pools in Palm Beach County are drawn from voter registration lists, the racial diversity between the two jury districts is demonstrated by the facts relevant to who the county's registered voters are. Data maintained by the Palm Beach County Supervisor of Elections reveals the following about voter registration (and, therefore, about the pools of citizens from which jurors are drawn) in Palm Beach County:

TOTALS FOR PALM BEACH COUNTY AS A WHOLE
VOTER REGISTRATION

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

TOTALS FOR GLADES JURY DISTRICT
VOTER REGISTRATION

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

In the western half of the county where jurors are drawn only from within that district, the system draws from a voter

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

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

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

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

there were no ineffective assistance of counsel claim, the issue would be properly before the Court at this juncture, as it involves fundamental error. See Nova; Kennedy. But relief herein is appropriate also because counsel rendered inadequate assistance in failing to present the issue on appeal.

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

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

Bass v. State, 368 So. 2d at 449.

Prior to this Court's ruling in Spencer, the Fifteenth Judicial Circuit itself was split on the constitutionality of its own jury district system. The same pre-trial demand for a jury pool drawn from the county at large, on the same grounds, was granted in other cases by other circuit court judges in Palm Beach County. Appellate counsel should have raised the claim,

and had no tactical reason for failing to do so.

Federal interpretations of the constitutional standards support Petitioner LeCroy's position here. The sixth amendment guarantees a jury selection process that draws from a representative cross-section of the community. Federal court decisions make it clear this right is absolute, and that when it is violated no prejudice or bias need be shown for the defendant to have standing to complain, and that a violation is prohibited even if the defendant himself is not a member of the "class" of citizens unlawfully excluded. Thus, in Peters v. Kiff, 407 U.S. 493 (1972), the Supreme Court held that exclusion of Blacks constitutes denial of due process to any defendant, white or black, and standing to complain exists even if the defendant is not a member of the class excluded, and harm need not be shown.

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

Peters v. Kiff, 407 U.S. at 503-504 (footnote omitted).

In Duncan v. Louisiana, 391 U.S. 145 (1968), the court extended these sixth amendment rights to criminal trials in state courts. In Williams v. Florida, 399 U.S. 78 (1970), the court upheld juries composed of only six rather than the traditional twelve, but reaffirmed that in criminal trials the system used to select the six must draw from a group of laypersons representative of a fair cross-section of the community, and that this latter right is part and parcel of the sixth amendment right of fair trial by jury. Williams v. Florida, 399 U.S. at 101.

Later, in Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme Court held: "the 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 v. Louisiana, 419 U.S. at 528.

> We accept the fair-cross-representation requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S. at 155-156, 20 L.Ed.2d 491, 88 S.Ct. 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only

> consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 90 L.Ed. 1181, 66 S.Ct. 984, 166 ALR 1412 (1946) (Frankfurter, J., dissenting).

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

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

Palm Beach County's jury-district system denied equal protection of the law to Mr. LeCroy. Under the system in effect at the time, a person charged with a crime in the Eastern jury district had no choice but to stand trial at a courthouse in that the district, before a jury drawn only from that district. People from the community where the crime is alleged to have taken place automatically were included in the selection process for the petit jury.

But, according to the administrative order creating the county's jury districts, another person charged with the same crime, when alleged to have occurred in the western or Glades District, automatically went to trial in West Palm Beach using a jury drawn only from the Eastern District. That automatically excluded and completely disqualified for jury service all persons living in the town or area of the county where his crime is alleged to have occurred.

Under the provisions of Administrative Order, the racial factor made the denial of equal protection even more profound. The accused who was charged with a crime in the western half of the county had freedom to choose a jury drawn from a group of citizens in the western half of the county that was over 50% Black, or from a group in the eastern half where less than 10% of the population drawn from was Black. The other defendant was compelled to stand trial with a jury drawn from a population base less than 10% Black.

Since the jury district system failed to draw citizens from a fairly representative cross-section of the county's whole population, in either jury district, it failed to comply with an important requirement contained in the statute authorizing creation of jury districts in the first place. Florida Statutes, Section 40.015(2), specifically mandates that when jury districts are created, the districts must maintain the same basic

population mix. Clearly that was not done in Palm Beach County.

The particular administrative order of the Fifteenth Judicial Circuit conflicted with still another statute that regulated systems for drawing jurors. The administrative order created jury districts for use in selecting petit jurors from one or the other half of the county, but required Grand Jurors be selected county-wide.

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

In Jordan v. State, 293 So. 2d 131, at 134 (Fla. 2d DCA 1974), the court said:

> Where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drawn from a fair cross-section of the community requires that the jury be drawn from the whole county and not from some political sub-units thereof to the exclusion of others.

The Florida and United States Constitutions confer upon

every citizen accused of crime the right to trial by a jury drawn from a fair cross-section of the the community served by the court, and in this case that community is Palm Beach County. The trial court committed fundamental error by denying Cleo LeCroy a petit jury drawn from the whole county. The court then denied him equal protection of the law, in violation of Florida and Federal constitutional standards, by allowing this districting process to be employed. Counsel should have raised the issue, and rendered ineffective assistance in failing to do so. Habeas corpus relief is proper.

CLAIM II

THE TRIAL COURT VIOLATED FLORIDA LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS CONSTITUTIONAL DUE PROCESS BY ADVISING THE JURY, WITHOUT NOTICE TO COUNSEL, THAT IT WOULD BE "LOCKED UP" IF THE JURORS DID NOT REACH A TIMELY VERDICT, AND APPELLATE COUNSEL RENDERED PREJUDICIALLY DEFICIENT ASSISTANCE IN FAILING TO RAISE THE ISSUE.

At the close of the guilt/innocence phase of the trial, the jury was sent home and told to return the next morning for instructions on the law and deliberation of a verdict. The Court then instructed the jury:

> Then, I intend to recess for the day and come back the next morning, at which time I will read you the instructions.
>
> Now, the reason why I am telling you this is that it will become obvious.

> Under Florida law, if a jury is required to go into an overnight recess after the deliberations have begun, under Florida law I am required to lock you up in a hotel, not lock you up but keep you sequestered in a hotel where you can't separate, and with the permission of the State and the Defense we have agreed to avoid that possibility but it will take me about forty-five minutes to read the charges to you Friday morning. And if you come in at 9:00 o'clock, you will have the case by 10:00 and you can begin your deliberations at 10:00 o'clock and go to whenever.
>
> Now, by telling you about this sequestration, I don't mean for one moment to urge you to rush to judgment. We all want you to take your time, consider the evidence, weigh it and analyze it, apply it to the law that I gave you, because this case is important to the State and it is important to the Defense and the stakes are very high. I don't think I have to tell you about that.
>
> I hope you understand the process.
>
> So, we are going to recess for the night.

(R. 2912-13)(emphasis added). (Significantly, the defense indicated that it was waiving any sequestration requirement. R. 2902, 2907).

The Court's instruction was in error for several reasons. The instruction is reversible error per se because it was given without any prior notice to defense counsel. It is error because it was coercive by the actual threat that the jury would be "locked up." Finally, the instruction was given before there was any indication that there was an actual jury deadlock which could

justify giving an "Allen" charge.

Florida has adopted a rule regarding the giving of an "Allen charge." Florida Rule of Criminal Procedure 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Pursuant to Rule 3.410, this Court has reversed cases where the trial court instructed the jury outside the presence of the defense attorney on the premise that there was no opportunity for a prior objection or consideration of the proposed instruction. Ivory v. State, 351 So. 2d 26 (Fla. 1977); Bradley v. State, 513 So. 2d 112 (Fla. 1987); Williams v. State, 488 So. 2d 62 (Fla. 1986); Curtis v. State, 480 So. 2d 12277 (Fla. 1985). In this case, defense counsel had no prior notice that the court would be charging the jury regarding the consequences of a lengthy deliberation, and no notice whatsoever of the coercive wording of the charge. Counsel had no notice and no opportunity to object.

The unfortunate wording of the court's instruction only illustrates the necessity for notice and consultation regarding special jury instructions. After the court had informed the jury that "under Florida law I am required to lock you up in a hotel,"

the court tried to correct this coercive and bizarre interpretation of the law of sequestration but the damage had already been done. The jury had received a clear message that a lengthy deliberation would not be favored by the court and that the court would be required to lock them up. This charge went beyond "a subtle form of intimidation or pressure," as proscribed by this Court in State v. Bryan, 290 So. 2d 482 (Fla. 1974); Clark v. State, 379 So. 2d 97 (Fla. 1979).

Finally, the instruction was given long before there was any indication of a potential deadlock. There was nothing to indicate that the jury would engage in nonproductive deliberations which would justify an "Allen" charge. The result was to heighten the coercive effect of the threat to lock the jury up.

The facts and error were evident on the face of the record. Appellate counsel was ineffective for failing to raise this issue on direct appeal. Mr. LeCroy's state and federal constitutional rights under the sixth, eighth and fourteenth amendments have been violated and relief is proper.

CLAIM III

THE TRIAL COURT VIOLATED THE PRINCIPLES OF HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987), AND LOCKETT V. OHIO, 438 U.S. 386 (1978), WHEN IT PRECLUDED MR. LECROY FROM PRESENTING, AND THE JURY FROM CONSIDERING, EVIDENCE ESTABLISHING MITIGATING CIRCUMSTANCES IN

DEROGATION OF MR. LECROY'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND MR. LECROY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS APPELLATE ATTORNEY'S FAILURE TO FORGIVE THIS ISSUE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court precluded Mr. LeCroy from introducing evidence during the penalty phase that the American Bar Association had approved a resolution opposing capital punishment for persons who commit their crime under the age of eighteen (R. 3571), that that resolution was based on two years of research which revealed that of all offenders, juveniles are the least likely to repeat their crimes, and that even in those jurisdictions which authorize capital punishment for juveniles, juveniles almost never receive the death penalty (R. 3572). Further, trial counsel was precluded from presenting testimony that the death penalty does not serve as a deterrent to juvenile offenders because to the degree they understand what dying means, they find it attractive (R. 3573). This evidence was proffered through the testimony of Professor Victor Streib, a law professor at Cleveland State University College of Law, who had spent five years conducting studies in capital punishment as it relates to juveniles, and who was the chairman of the ABA subcommittee on capital punishment on juveniles (R. 3563-6).

The trial court sustained the State's objection to this evidence, on the grounds that it was irrelevant and immaterial

(R. 3575). Defense counsel repeatedly objected to the trial court's ruling, arguing that it was "relevant to the mitigating circumstances and explains the mitigating circumstances" (R. 3575; 3576; 3578). Defense counsel further argued that the statistical data proffered was "relevant to the mitigating circumstances of age and it could explain for the jury" (R. 3578).

The jury was instructed that they could consider Mr. LeCroy's age (seventeen at the time of the offense); however, due to the trial court's ruling, trial counsel was precluded from presenting substantial evidence explaining the significance of that age, statutorily and nonstatutorily.

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original). This Court and the United States Supreme Court have consistently reaffirmed Lockett. See Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). Most recently, the United States Supreme Court did so in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), holding that "the exclusion of mitigating evidence . . . renders the death sentence invalid."

Id. at 1824 (emphasis added). Mitigating evidence is evidence demonstrating that a sentence of death is improper. See McKlesky v. Kemp, 481 U.S. 279 (1987). Just as significantly, the eighth amendment requires that jurors in capital sentencing proceedings be allowed to hear and consider accurate information relevant to the sentencing decision. See, e.g., California v. Ramos, 463 U.S. 992 (1983). The information Petitioner sought to present was accurate and certainly relevant to the jury's sentencing determination, and the trial court erred under the eighth amendment in failing to allow the jury to consider it.

The proceedings resulting in this sentence of death violated the eighth amendment. Mr. LeCroy's sentencing jurors were never allowed to hear compelling evidence which could have demonstrated that a sentence less than death may have been proper. When counsel sought to present it, the trial court ordered that he was not to do so. It thus precluded the jury's consideration. Further, the trial court also refused to consider the evidence. As this Court and the United States Supreme Court have made clear, such judicial actions and instructions, precluding a capital sentencing jury's consideration of relevant evidence, violate the eighth amendment. Mr. LeCroy's sentencers were unconstitutionally precluded, and relief is proper.

Appellate counsel should have raised the issue, but without a tactic or strategy failed to do so. This was prejudicial

deficient assistance. Habeas corpus relief is appropriate.

CLAIM IV

THE SENTENCING COURT'S FAILURE TO RECOGNIZE AS MITIGATING CIRCUMSTANCES THE MULTITUDE OF MITIGATING CIRCUMSTANCES CLEARLY PRESENTED BY PETITIONER AND SET OUT IN THE RECORD VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT THE CLAIM ON DIRECT APPEAL.

In its October 1, 1986, sentencing order (R. 4870-4878) the trial court considered some, but not all, of the mitigation it heard in the course of Mr. LeCroy's trial. The court found the statutory mitigating factor that Mr. LeCroy had no significant history of prior criminal activity (R. 4874) and found the age of Mr. LeCroy in mitigation, but noted that "in spite of his youthful age, this defendant was mentally and emotionally mature" (R. 4876).

In making this finding, the trial court ignored the unrefuted testimony of a mental health professional, Susan LaFehr Hession, that Mr. LeCroy was "extremely immature" and younger than his chronological age (R. 3965).

Finally, the court found that no non-statutory mitigating circumstances were shown (R. 4876). The court's sentencing order states:

> That the defendant was a good probationer prior to his capital crime; had

> good family ties and support; that he and family members helped in locating the Hardeman bodies; the defendant's recent marriage, the closeness of the jury vote on the death penalty; the potential for the defendant's rehabilitation, et cetera do not constitute mitigating circumstances, in this court's opinion.

(R. 4876)(emphasis added).

In the course of the sentencing phase before the judge alone, the court heard the completely undisputed testimony of Susan LaFehr Hession, as noted above, that Cleo was immature, and much younger than his chronological age; the judge also heard Ms. Hession's unrefuted testimony that Cleo had not been a behavior problem in the jail, that he had been a houseman for many years, and that Cleo had "adjusted to incarceration the best of any prisoner [she had] ever seen." (R. 3967-3968). See Skipper v. South Carolina, 476 U.S. 1 (1976).

Still more non-statutory mitigation was presented during the penalty phase. Mr. LeCroy's mother, Joyce LeCroy, testified that they had a very close family, and always did everything together. Cleo was always very helpful around the house, and helped with yard work (R. 2583-4). She also testified that Cleo had been immature, but had matured while in jail, and was a good father to his daughter (R. 3584-7). She testified that the family loved Cleo, and that they would always stand behind him and support him and that they did not want him to be executed (R. 3588).

Mr. LeCroy's father, Thomas LeCroy, testified that Cleo was

helpful around the house, that he was a good worker, that he was the president of Future Farmers of America, and played JV football (R. 3592). He testified that Cleo had a good relationship with his daughter, and that there was a lot of good he could give to her (R. 3594), and that the family would always stand behind Cleo (R. 3595).

Debbie Lynn LeCroy Hill, Cleo's sister, testified that Cleo would do anything for her (R. 3597), that they were a very close family and that neighbors were still concerned about Cleo (R. 3598). She testified that Cleo was behind in school, and that he didn't catch on quickly to things in school (R. 3599). She testified that she loved her brother and didn't want him to be executed.

Jeffrey Dale Hill, Cleo's brother-in-law, testified that Cleo worked as a helper to him in his carpentry work, and that he was an excellent worker. Jeffrey testified that there was still good in Cleo (R. 3605-6).

Charles Daniel LeCroy, Cleo's brother, testified that he and Cleo used to fish and play basketball and football together, and that the family was very supportive of Cleo (R. 3611).

Linda LeCroy King, Cleo's sister, testified that Cleo helped her take care of her children while her husband was in the hospital having surgery, that Cleo was a decent person (R. 3618), and that she would support him always, even if he never got out

of prison (R. 3619).

Launa LeCroy, Cleo's wife, testified that she met Cleo while he was in jail (R. 3623) and that they got married because they loved each other (R. 3625). She testified that Cleo was a good husband to her and a good father to his little girl (R. 3628).

In addition, Bruce Edgerly, who was Cleo's juvenile probation officer on a 1984 trespassing charge (R. 3531-2), testified that Cleo did very well on his probation (R. 3535) and that the family was very supportive of Cleo (R. 3536). He testified that he "used this family as a, in essence, as a role model" (R. 3537).

The eighth and fourteenth amendments require that a state's capital sentencing scheme establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976). A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Id. at 1450. Here, the trial court simply did not believe that certain mitigating factors which had been established were mitigating factors, a clear error

of law under the eighth amendment.

This Court has recognized that factors such as a previous history of good character, being a good father and brother, being a good worker, good behavior in jail and even a parent's love for the defendant are mitigating. See, e.g., Perry v. State, (non-violent background is mitigating).

More recently, this Court noted that each of the mitigating circumstances above proposed by Mr. LeCroy must be expressly considered as mitigating factors by a trial court:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision

> in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

Campbell v. State, 15 F.L.W. 342, 344 (Fla. June 14, 1990) (emphasis added). In footnote 6 the Court listed five possible general categories of non-statutory mitigating circumstances as follows:

1) abused or deprived childhood.

2) contribution to community or society as evidenced by an exemplary work, military, family or other record.

3) remorse and potential for rehabilitation; good prison record.

4) disparate treatment of an equally culpable codefendant.

5) charitable or humanitarian deeds.

Here, the trial court's view that these items were not mitigation, although they plainly are, violated the eighth amendment. See Campbell.

In Lamb v. State, 532 So. 2d 1051 (Fla. 1988), this Court remanded the case for resentencing where it was not clear that the trial court had considered the evidence presented in mitigation. In addition to information about a drug problem,

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends

> feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals;

Lamb, 532 So. 2d at 1054. The court quoted from its 1987 opinion in Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), saying:

> the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Since the court was "not certain whether the trial court properly considered all mitigating evidence," id. at 1054, the case was remanded for a new sentencing.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstances. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App.

> 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S.Ct. at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

102 S. Ct. at 879. Justice O'Connor's opinion makes clear that a capital sentencer may not refuse to consider proffered mitigating circumstances. This, however, is what happened here. Much of the mitigation presented by Mr. LeCroy was simply ignored because of the judge's restrictive view.

Here, the judge refused to recognize non-statutory mitigating circumstances that were present as mitigating factors. Under Penry v. Lynaugh's requirement that a capital sentencer fully consider and give effect to the mitigation, 109 S. Ct. 2934

(1989), as well as under Eddings, the sentencing court's refusal to consider the non-statutory mitigating circumstances as mitigation was error.

Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. The required balancing cannot occur when the "ultimate" sentencer failed to consider obvious mitigating circumstances. The factors should now be recognized. Mr. LeCroy is entitled to relief on this claim.

Appellate counsel here was ineffective in failing to raise this issue. Mr. LeCroy was thus deprived of the appellate reversal to which he was entitled. Cf. Campbell. Mr. LeCroy is entitled to have his death sentence vacated and the matter remanded to the trial court for full consideration of all mitigation. Furthermore, this claim involves fundamental eighth amendment error, and thus should be addressed by this Court in this action.

CLAIM V

THE TRIAL COURT'S EXCLUSION OF TESTIMONY CONCERNING MR. LECROY'S CO-DEFENDANT'S ADMISSIONS VIOLATED MR. LECROY'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THIS COURT IN DENYING RELIEF ON THIS CLAIM DID NOT FULLY CONSIDER THAT FEDERAL PRECEDENT DEMONSTRATED THAT RELIEF WAS PROPER.

This Court decided this claim adversely to Mr. LeCroy on direct appeal. Petitioner respectfully asserts that the Court's ruling was fundamentally in error, and urges that the Court reconsider.

Mr. LeCroy's defense was that he did not commit the crime. In support of this defense, trial counsel proffered the testimony of Deputy Sheriff Alderman who had talked to Jon LeCroy, Mr. LeCroy's brother and co-defendant, during the search for the Hardemans. Jon LeCroy told Alderman that he had last seen the Hardemans alive after Cleo had seen them (R. 2162). Jon also told Alderman that it wouldn't bother him to see dead bodies, because he had seen dead bodies five or six days earlier (R. 2166). Trial counsel made the same proffer during the testimony of Officer Kenneth Hannah, who was a party to the conversation between Alderman and Jon LeCroy (R. 2174). In addition, trial counsel proffered the testimony of Elsie Bevan who had also heard Jon LeCroy make statements that he was the last one to see the victims alive (R. 2297). All of this proffered testimony was

excluded by the trial judge as hearsay. The exclusion of this crucial testimony denied Mr. LeCroy his right to present a complete defense, in violation of the sixth, eighth and fourteenth amendments.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. Washington v. Texas, 388 U.S. 14 (1967). This fundamental right is an integral part of a fair trial. Crane v. Kentucky, 476 U.S. 683, 690 (1986). See also Pointer v. Texas, 380 U.S. 400 (1965).

The hearsay rule is grounded on the notion that untrustworthy evidence should not be presented to the trier of fact. However, in Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court made clear that due process requirements supersede the application of the hearsay rule:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony was also critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 410 U.S. 294, 302 (emphasis added). See also Rock v. Arkansas, 107 S. Ct. 2704 (1987); Taylor v. Illinois, 108 S. Ct. 646 (1988). Where the testimony contains sufficient indicia of reliability and directly affects the ascertainment of guilt or

innocence, the defendant's rights to due process and to present witnesses in his own behalf outweigh the State's interest in strict application of an evidentiary rule. Chambers. This is such a case.

Chambers sets forth four general considerations relevant to a determination of the inherent reliability of a declaration against interest:

> (1) The time of the declaration and the party to whom the declaration was made.
>
> (2) The existence of corroborating evidence in the case.
>
> (3) The extent to which the declaration is really against the declarant's penal interest.
>
> (4) The availability of the declarant as a witness.

Chambers, 410 U.S. 294, 300-301. See also United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976); State v. Gold, 431 A.2d 501, 509 (Conn. 1980).

In this case the declaration against interest consisted of statements made before the declarant was a suspect and during the search for the missing Hardemans, and was made to various law enforcement and game and wildlife officers. The term "declaration against penal interest" refers to statements which tend to subject the declarant to criminal liability, and "encompasses those disserving statements . . . that would have

probative value in a trial against him." State v. Gold, 431 A.2d 507, 513. While Jon LeCroy's trial has not yet been transcribed, it is anticipated that these declarations were actually used against him in his trial for first degree murder. Further, a great deal of the State's case against Cleo LeCroy rested on proof that he was the last one to see the Hardemans alive. Testimony that it was actually Jon who had last seen them alive was crucial to the defense.

Moving to the first factor, the time of the initial declarations was prior to Jon or Cleo LeCroy being suspected of complicity, and the declarations were made during casual conversation.

As for the existence of corroboration factors, extensive evidence tending to corroborate and support Jon's declarations was available. There was certainly enough corroborating evidence that the State felt justified in charging Jon with two counts of first degree murder and arguing that he was the triggerman.

The last of the considerations set forth in Chambers is the availability of the declarant as a witness. In this case, at the time of Cleo's trial Jon LeCroy was unavailable as a witness because he had not yet been tried. Trial counsel contended that the testimony was admissible (R. 2174) based on the constitutional principles set forth in Chambers v. Mississippi. Under those principles, the trial court erroneously excluded the

evidence.

This testimony was critical to Mr. LeCroy's defense. The prosecution's evidence against him was weak and circumstantial. No evidence directly connected Mr. LeCroy to the crime. The State's evidence consisted mainly of Cleo's own inculpatory but widely inconsistent statements. Evidence that it was in fact Jon who last saw the Hardemans alive was critical, and would have established a reasonable doubt that Mr. LeCroy did not commit the crime.

This claim was raised on direct appeal. However, despite the fact that counsel referred specifically to Chambers v. Mississippi, appellate counsel did not direct this Court to that case, nor discuss Mr. LeCroy's due process rights. This claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a plain violation of the sixth, eighth and fourteenth amendments. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The failure to present this claim properly on direct appeal deprived Mr. LeCroy of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Because of appellate counsel's failure, this Honorable Court

ignored the Chambers principle that state evidentiary rules do not outweigh a defendant's right to fundamental fairness and due process. Chambers, 410 U.S. at 294, 295. Mr. LeCroy offered Jon LeCroy's statements to rebut the State's circumstantial case, i.e. to raise a reasonable doubt. See Chambers; Washington v. Texas; Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1976); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982). Due process and the right to present a defense require that testimony with significant indicia of reliability and directly affecting the determination of guilt or innocence be admitted. A defendant's rights to due process and to present witnesses and a complete defense outweigh the State's interest in strict application of an evidentiary rule that would otherwise exclude such testimony. Chambers, 410 U.S. 284, 298-99; see also Pettijohn v. Hall, 599 F.2d 476 (1st Cir 1976). The exclusion of this testimony violated the sixth, eighth and fourteenth amendments. Contrary to this Court's opinion, LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988), this error was not harmless. Without a transcript of Jon LeCroy's trial, it is impossible to speculate why Jon was acquitted. However, clearly the State felt, originally, that Jon's statements were sufficient to charge him with two counts of first degree murder and to argue that he was the triggerman. These statements should also have been allowed in Cleo LeCroy's trial to establish reasonable doubt. This Honorable Court, it is

respectfully submitted, erred in its disposition on direct appeal. Relief is proper.

CLAIM VI

MR. LECROY'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND MR. LECROY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE ON APPEAL.

Despite the critical importance of the jury's role at sentencing, see Tedder v. State, 322 So. 2d 908 (Fla. 1975), Mr. LeCroy's jury was repeatedly told by the prosecutor and by the judge himself that their role was minor, that the judge was not obligated to follow their recommendation, that it was the judge's job, not theirs, to sentence, and that their function was only to return a recommendation (R. 1273, 3528, 3638, 3714, 3718, 3719, 3720, 3721). These comments and instructions derogated the jury's sentencing role, contrary to the eighth amendment, by diminishing their "awesome sense of responsibility" for sentencing. See Caldwell v. Mississippi, 472 U.S. 32, 105 S. Ct. 2633 (1985).

Mr. LeCroy acknowledges that this Court has held that Caldwell is inapplicable in Florida. See King v. Dugger, No. 73,360 (Fla. Jan. 4, 1990). Mr. LeCroy respectfully urges that

the Court reconsider that view, and vacate his eighth amendment violative sentence of death. Counsel's failure to present the issue on appeal may have been based on this Court's holdings. Effective counsel, however, would have presented the claim, at least to preserve it.

CONCLUSION AND RELIEF SOUGHT

The various claims set out above all involve, inter alia, ineffective assistance of appellate counsel, and/or fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S.S 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins,

655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> 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 deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed. See, Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). As in Matire, Mr. LeCroy is entitled to relief. See also Wilson v. Wainwright; Johnson v. Wainwright.

This petition also presents independent claims raising matters of fundamental error and/or claims predicated upon significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. LeCroy's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. A remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including, inter alia, any questions concerning appellate counsel's deficient performance -- should also be ordered.

WHEREFORE, Cleo Douglas LeCroy, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death. Since this action also presents question of fact, Mr. LeCroy urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual questions attendant to the claims presented, including, inter alia, questions regarding appellate counsel's deficient performance.

Mr. LeCroy urges that the Court grant habeas corpus relief, or alternatively, a new appeal, for all the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia Terenzio, Assistant Attorney General, Palm Beach County Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, FL 33402 this 10th day of December, 1990.

Attorney