IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 64,618

LARRY WILLIAMS,

Respondent.

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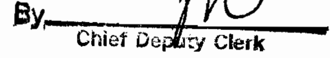

RESPONDENT'S BRIEF ON JURISDICTION

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______________________________	:	

RESPONDENT'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the First District Court of Appeal. Petitioner was the prosecution and the appellee respectively. The parties will be referred to as they appear before this Court.

Petitioner's Brief on Jurisdiction will be referred to as "PB" followed by the appropriate page number in parentheses. References to petitioner's appendix will be by the symbol "A."

II STATEMENT OF THE CASE AND FACTS

While the statement of the case and facts set out in petitioner's jurisdictional brief are somewhat accurate to the extent stated, respondent does not accept them because it fails to set out the facts in the light most favorable to respondent, and also omits certain facts which respondent feels are highly relevant to the issues involved in this appeal. Accordingly, respondent tenders the following as the proper statement of the case and facts:

Respondent is an inmate at the Union Correctional Institution and was found guilty, after a jury trial, of battery on a correctional officer at UCI.

During the beginning of the jury selection, the trial court inquired whether there was anything about the particular charge which would cause the prospective jurors difficulty in being a fair and impartial jury. One prospective juror, Mr. Lobenthal, responded, "Yes sir. I'm a correctional officer. I feel I am personally involved." The trial court excused Officer Lobenthal. The trial court also excused Ms. Woodall who indicated that her husband was a law enforcement officer and that she was possibly prejudiced.

Respondent's counsel moved to challenge for cause two other correctional officers who were called from the venire as prospective jurors. Prospective juror Addison stated on voir dire that he knew respondent and the victim, Sergeant Chastain. Prospective juror McCann stated that he had been the victim of an attempted battery on a law enforcement officer

by a prisoner. The trial court denied respondent's challenges for cause, forcing him to exhaust all six peremptory challenges. Defense counsel then requested an additional challenge, which the court denied, and unsuccessfully moved to back-strike juror Harvey, who was a maintenance and construction supervisor at a related penal institution. Respondent also moved to back-strike the complete jury panel in order to insure respondent a jury free of suspicion of bias or partiality. Juror Harvey remained on the jury.

On appeal, respondent argued that suspicion of bias or prejudice against a defendant is aroused when a correctional officer serves on a jury trying the defendant inmate for battery on a correctional officer. The District Court of Appeal agreed, noting that the disputed issues at trial turned on the credibility of the correctional officers involved in the incident with respondent and the credibility of respondent and his fellow inmates. Quoting Irby v. State, __So.2d__, 8 FLW 2126 (Fla. 1st DCA 1983), petition for review pending, State v. Irby, Case No. 64,435, the court concluded:

> "[T]he circumstances of the present case raise both an appearance and a substantial probability of inherent juror bias in a trial for an alleged offense against a person in the course of employment involving unusual personal risks identical to those shared by the challenged jurors," and that the "denial of appellant's challenge was an abuse of discretion resulting in manifest error which requires reversal of appellant's conviction."

(A-2).

III ARGUMENT

ISSUE I

THIS COURT SHOULD DENY REVIEW BECAUSE THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DOES NOT EXPRESSLY CONSTRUE ARTICLE I, SECTION 16, FLORIDA CONSTITUTION.

Petitioner requests review of the district court's opinion based on the erroneous assertion that the Court's opinion expressly construed Article I, Section 16, Florida Constitution. In so asserting, petitioner relies on the reference to Article I, Section 16 in Irby v. State, supra, on which the majority based its decision, to establish a basis for this Court's jurisdiction. The majority opinion of the district court does not discuss or refer to any constitutional provision or argument, nor does it purport to construe Article I, Section 16. Petitioner cannot rely on the inherency doctrine to claim that the opinion construes the provision of our constitution without reference to it. Ogle v. Pepin, 273 So.2d 391 (Fla. 1973).

Furthermore, the court in Irby v. State, supra, quoted Article I, Section 16 as a threshhold proposition for an accused's right to trial by an impartial jury. The Irby court did not attempt "to explain, define, or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." Ogle v. Pepin, supra at 392, quoting, Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958).

Thus, this Court lacks jurisdiction because the decision of the district court below fails to explain or define any constitutional terms or language.

ISSUE II

THIS COURT SHOULD DENY REVIEW BECAUSE THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S OPINIONS IN MORGAN V. STATE, 415 So.2d 6 (Fla. 1982), AND McCOLLUM V. STATE, 74 So.2d 74 (Fla. 1954), ON THE SAME QUESTION OF LAW.

A. THE DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH MORGAN V. STATE.

Contrary to petitioner's assertion, the district court's opinion in the instant case is not in direct and express conflict with Morgan v. State, 415 So.2d 6 (Fla. 1982). In Morgan, this Court declined to hold that all correctional officers were intended to be included within the classes of persons disqualified from jury service by Section 40.07, Florida Statutes (1977). However, the court did not hold, and has never held, that correctional officers could not be excused for cause from jury service.

Moreover, Morgan is factually distinguishable from the instant case. In Morgan the defendant was charged with the first degree murder of a fellow inmate. Sub judice, respondent was charged with battery of a correctional officer. There is an obvious and significant distinction between Morgan and the

instant facts, wherein a correctional officer served on the jury of an inmate defendant convicted of battery on a correctional officer. The court in Irby v. State, supra, recognized this distinction in a footnote, stating:

> To the extent that Morgan suggests that correctional officers are not statutorily excluded from juror service in all instances, we note that Morgan was directed to service by such officers on juries for criminal prosecutions generally, and did not involve the limited circumstances which the case now before us presents, i.e., correlation of an unusual specific employment risk for the juror and the victim of the offense charged.

8 FLW at 2127 n.2.

B. PETITIONER FAILED TO ARGUE McCOLLUM V. STATE IN THE DISTRICT COURT, AND THE DECISION OF THE DISTRICT COURT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH McCOLLUM V. STATE.

Petitioner failed to argue McCollum v. State, 74 So.2d 74 (Fla. 1954), in the District Court of Appeal when the case was first heard on the merits and unsuccessfully sought to bring the case to the attention of the district court in a motion for rehearing. Petitioner now urges the applicability of McCollum v. State to the instant case for the first time in seeking discretionary review. The district court properly denied petitioner's motion for rehearing because it improperly brought forth new arguments in violation of Florida Rule of Appellate Procedure 9.330(a). This Court should also deny review for the

simple reason that this Court cannot review matters which were not presented to, nor considered by, the district court of appeal when the lower court issued its decision. Winn Dixie Stores v. Goodman, 276 So.2d 465 (Fla. 1973).

Furthermore, petitioner cannot demonstrate express and direct conflict with McCollum v. State.

In McCollum, the defendant sought to discharge for cause six veniremen who had casual physician and patient relationships with the decedent over a course of years. The McCollum court found no reversible error in the trial court's denial of the challenge for cause because it did "not appear from the record that the jurors were biased or prejudiced, or that the circumstances of this case were such as to evince good reason for interest or bias." 74 So.2d at 80.

Here, the circumstances of the case were such as to evince good reason for interest or bias. Officer McCann was not only a correctional officer, but had also been the victim of an attempted battery by a prisoner. Officer Addison was a correctional officer at the very institution where the battery occurred and knew both respondent and the victim. Because of his knowledge of and intimate relationship to the parties, there was a basis for a reasonable doubt that Officer Addison could be a fair and impartial juror without arousing even a suspicion of bias.

There is a manifest distinction between a casual

physician/patient relationship and the relationships between correctional officers, who are exposed to identical unusual employment risks. Thus, McCollum is not only factually distinguishable from the instant case; the case is not in conflict with the instant decision.

IV CONCLUSION

The opinion of the District Court of Appeal, First District, does not expressly construe Article I, Section 16 of the Florida Constitution. Furthermore, the opinion of the court below is not in direct and express conflict with Morgan v. State and McCollum v. State. Therefore, petitioner has failed to establish jurisdiction in this Court and discretionary review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by hand to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Petitioner; and, a copy has been mailed to respondent, Mr. Larry Williams, #042165, Post Office Box 747, Starke, Florida, 32091, this 27 day of December, 1983.

Paula S. Saunders
PAULA S. SAUNDERS