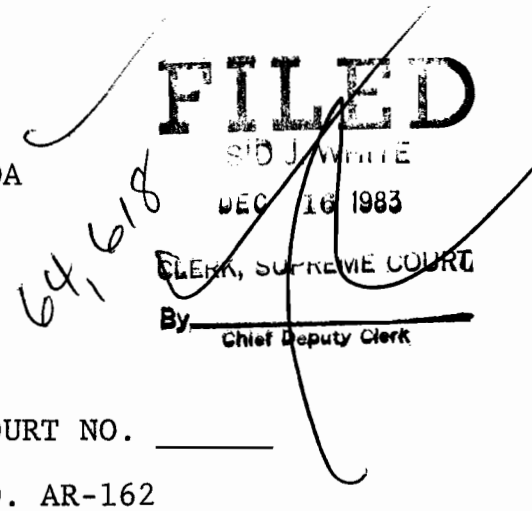
IN THE SUPREME COURT OF FLORIDA



64,618

STATE OF FLORIDA,

PETITIONER,

-VS-

LARRY WILLIAMS,

RESPONDENT.

SUPREME COURT NO. _____

1st DCA NO. AR-162

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent was charged with battery on a law enforcement officer in violation of Section 784.07, Fla.Stat. He entered a plea of not guilty and the cause proceeded to trial.

During jury selection the trial judge denied respondent's challenge for cause of two prospective jurors when both unequivocally stated under oath that they could render a fair and impartial verdict. Respondent's basis for the challenge was that "not only is the defendant entitled to a jury free of bias or partiality, but he is entitled to a jury that is free of suspicion of bias or partiality." This suspicion of bias was predicated upon the mere fact that the prospective jurors were correctional officers employed by the Department of Corrections and the victim in the case also a correctional officer.

On appeal the lower tribunal in a 2-1 opinion reversed the judgment and sentence on the authority of Irby v. State, ___ So.2d ___ (Fla.1st DCA 1983), 8 F.L.W. 2126, petition for certiorari pending, State v. Irby, Case No. 64,435. (Petitioner's Appendix 1-5). The court majority concluded that notwithstanding the prospective jurors' sworn statements of impartiality there was both "an appearance and a substantial probability of inherent juror bias" (Slip Opinion at p. 2).

It is noted that neither venireman served on the jury because they were excused peremptorily by the defense.

Petitioner filed a timely Motion for Rehearing and Motion for Rehearing En Banc (Petitioner's App. 6-8) and said motion was denied on November 8, 1983 (Petitioner's App. 9). Petitioner thereafter filed its timely Notice invoking this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3), Fla.Const.

ISSUES

ISSUE I

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN WILLIAMS V. STATE, ___ So.2d ___ (FLA.1st DCA 1983), CASE NO. AR-162, OPINION FILED OCTOBER 4, 1983, EXPRESSLY CONSTRUED ARTICLE I, SECTION 16, FLORIDA CONSTITUTUION.

ISSUE II

THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN WILLIAMS V. STATE, SUPRA, EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS RENDERED 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.

ISSUE I

THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN WILLIAMS V. STATE, ___ So.2d ___ (FLA.1st DCA 1983), CASE NO. AR-162, OPINION FILED OCTOBER 4, 1983, EXPRESSLY CONSTRUED ARTICLE I, SECTION 16, FLORIDA CONSTITUTION.

ARGUMENT

In Irby v. State, supra, the authority cited by the lower tribunal as controlling in this case, the lower tribunal held that Section 913.03(10), Fla.Stat., its clear language to the contrary notwithstanding, had to be interpreted to require an excusal of a prospective juror where there was ". . . both an appearance and a substantial probability of inherent juror bias" to insure the constitutional right to a fair trial by impartial jury.

Petitioner respectfully submits that the lower tribunal in adopting the inherent bias test has in fact and in law construed a controlling provision of the Florida Constitution and that this cause merits review by this Court.

The appellate courts of this State has frequently looked to the federal construction of provisions of the United States Constitution in construing similar or identical provision of the Florida Constitution. State v. Cantrell, 417 So.2d 260 (Fla.1982), and State v. Hetland, 366 So.2d 831 (Fla.2d DCA 1979), approved, 387 So.2d 963 (Fla.1980). In Smith v. Phillips, 455

U.S. 209 (1982), the United States Supreme Court rejected the implied bias doctrine to determine whether an individual was accorded a fair trial by an impartial jury. The Court stated:

> A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendnat's right to an impartial jury.

70 L.Ed.2d at 86.

The lower tribunal's conclusion that Article I, Sec. 16, Fla.Const., required the excusal of a juror simply because there was an appearance of bias is an erroneous construction of the Florida Constitution and an incorrect interpretation of the statute relied upon. See: Mills, Jr. dissenting, at pps. 4 and 5.

ISSUE II

THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN WILLIAMS V. STATE, SUPRA, EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS RENDERED 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.

ARGUMENT

The district court's decision is in direct and express conflict with the Court's opinion in Morgan v. State, 415 So. 2d 6 (Fla.1982). In Morgan, the defendant sought to disqualify correctional officers from sitting on the jury because the capital murder occurred in the prison and government witnesses included prison investigators and correctional officers. This Court held that correctional officers as a group were not statutorily excluded from service. Further, this Court stated that it had reviewed the transcript of jury selection and concluded that ". . . all persons selected were qualified; none were subject to challenge for cause." Morgan, supra, at 10 (emphasis supplied).

It is apparent that if this Court had applied the "implied bias" rationale, as the district court did in the instant case, the result in Morgan would have been the exact opposite. The instant decision is in direct and express conflict with Morgan. The district court of appeal attempted to distinguish Morgan in the Irby case, supra, on the factual

basis. (Opinion at p. 3, fn. 2). The district court ignored the fact that in Morgan a correctional officer resolved credibility issues, specifically whether a prison investigator procured a free and voluntary confession from the defendant. The district court's distinction is one without a difference.

Further, the instant opinion is in direct and express conflict with this Court's opinion in McCollum v. State, 74 So. 2d 74 (Fla.1954), wherein it was held that a showing of personal or professional contact does not in and of itself disqualify a person from serving as a juror in a criminal prosecution where the professional party is interested or is the injured party. Id. at 79. The district court's opinion involves implying bias on the part of a potential juror solely on the basis that the juror shares a professional or occupational relationship with the injured party in a criminal prosecution. "The 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." (emphasis supplied) (Opinion at p. 2).

Petitioner submits the instant opinion, by holding manifest error occurred by virtue of the trial court refusing to disqualify as jurors all correctional officers, directly and expressly conflicts with Morgan and McCollum, supra.

CONCLUSION

Petitioner has demonstrated that this Court may invoke its discretionary jurisdiction to review the instant case on the basis of construction of our State's constitution in a manner which has created a legal question of statewide importance, on the basis of conflict of decisions, or both. Petitioner urges this Court to exercise its discretionary jurisdiciton and review the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been forwarded to Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32301, via U. S. Mail, this 16th day of December 1983.

Raymond L. Marky

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Assistant Attorney General