NO. 68690

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MORRIS LAVON BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

TABLE OF CONTENTS

TABLE OF CITATIONS

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Brown v. State, 526 So.2d 903 (Fla. 1988) is set fort in Appendix A.

JURISDICTION

Review is sought pursuant to 28 U.S.C. Section 1257(3). The judgment below was entered on May 12, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

Brown claims the trial court denied him his Sixth Amendment right to a fair trial when it moved his trial to a county with a significantly smaller number of black persons eligible for jury service.

STATEMENT OF THE CASE

An indictment filed in the circuit court for Jackson County on April 19, 1985, charged Edward Cotton and Morris Brown with first degree murder, attempted first degree murder, robbery with a firearm, robbery, and escape with a firearm (R 1-3). Cotton and Brown pled not guilty to these offenses (R.15); subsequently, the court severed Brown's case from Cotton's case based upon Bruton v. United States, 391 U.S. 123 (1968) (R.207).

Cotton proceeded to trial and a jury found him guilty as charged on all counts (R.320-321). The jury also recommended that the court sentence Cotton to serve a sentence of life in prison for committing the murder it had found him guilty of committing (R.339). The trial court, after Brown's trial was completed, sentenced him to life in prison (R.2697).

Brown filed several pre-trial motions. Specifically, for purposes of this petition, he filed the following motions:

1. Motion for a change of venue (R.72). This motion was granted in part (R.94)[1] in that the trial was moved to Bay County rather than to a county where the proportion of blacks to whites was similar to that of Jackson County.
2. Motion to challenge the jury panel selected in Bay County as not being of the same or similar racial makeup as that of Jackson County (R.460). Denied (R.2973).

Brown proceeded to trial in Bay County. After hearing the evidence, arguments, and the law, the jury found Brown guilty as charged of first degree murder, robbery, robbery with a firearm, and escape with a firearm. (R.541-42). The jury, however, found Brown guilty of aggravated assault with a firearm, a lesser included offense of the charged offense of attempted murder (R.451).

Brown proceeded to the penalty phase of the trial, and the jury, after hearing this evidence, arguments concerning it, and the law controlling it, recommended that the court sentence Brown to life in prison without the possibility of parole for 25 years (R.543).

The court, however, rejected that recommendation and sentenced Brown to death. Regarding the other offenses, the court sentenced Brown as follows:

a. As to count II (aggravated assault with a firearm), ten years concurrent with counts I, III, and IV.
b. As to count III (Robbery with a firearm), life concurrent with counts I, II, IV.
c. As to count IV (robbery), thirty years concurrent with counts I, II, III.
d. As to count V (escape), life, consecutive with counts I, II, III, IV (R.724-29).

On appeal, the Florida Supreme Court affirmed Brown's convictions but reduced the sentence of death to life imprisonment without the possibility of parole for twenty-five years. Brown v. State, 526 So.2d 903 (Fla. 1988). With regard to the jury issue, the court affirmed because in this case three blacks served on his jury, thus refuting his claim he was

---

[1]The state filed a motion for alternative venue relief (R.228) which is what the court granted.

denied a trial by a fair cross-section of his community. Id. at 906. The state filed a motion for rehearing which the court denied.

STATEMENT OF THE FACTS

In the early evening hours of April 4, 1985, 19 , year-old Edward Cotton was cruising about Jackson County in his father's car, with two of his 14 year-old girl friends (R 4850). He had about $140 that he had gotten illegally (R 4946-4947), and he carried a .22 caliber pistol (R 4851). After a while, he dropped the girls off at their home, and later picked up 18 year-old Morris Brown (R 4851). They rode first to Marianna, then to Greenwood, and finally stopped across the street from a food store in Malone (R 4854).

Brown went inside the store, bought some food, and returned to the car (R 4852). He told Cotton only one person, a Mrs. Dekle, was working there (R 4854). He also put on Cotton's shirt, and Cotton give him the gun he carried (R 4854). Cotton asked what he was to do (R 4855), and Brown told him his job was to take the money out of the cash register (R 4855).

The pair went inside the store wearing masks (R 4960), and while Cotton got the money from the cash register and tried to force open the safe, Brown held Cotton's gun to Mrs. Dekle's head (R 5017).

Cotton looked to the front of the store and saw someone pull up in a car (R 4857). Russell Conrad entered the store, but Mrs. Dekle told him to run, and he did (R 5018). Brown ran outside the store, told Conrad to return, and fired two shots when he did not (R 5081-5082).

Cotton meanwhile had fled the store with the money from the cash register and Mrs. Dekle's purse (R 4856). Brown joined him and the two drove away. As they left, cotton was going through Mrs. Dekle's purse, throwing away items he had taken out of it (R 4860). Some of what he threw out the window landed in the back of his truck (R 4860).

They passed Officer Bevis of the Jackson County Sheriff's office at an intersection, and having been alerted to the robbery, Bevis pursued Cotton's car (R 5134). Cotton said

that Brown said they should not stop, but Cotton decided to do so (R 4861).

Bevis approached the car and asked to look inside of it, to which Cotton agreed (R 4862). Bevis found a mask and Mrs. Dekle's credit card on the seat; underneath the seat, he found the gun (R 4862-4863). Brown, by now, was outside of the car and Bevis pointed his gun at him and said that if Brown ran he would blow his head off (R 4863).

Bevis then had both men put their hands on this car, and as they stood there, he called on his radio. As he was doing this, Cotton said Brown moved to his side and said, "Let's jump him." (R 4865). Cotton said he did not want to do so (R 4865), but as Bevis tried to put his hand cuffs on Cotton, Brown jumped Bevis and the two men struggled in the road (R 4866). They fell down with Brown on top, and Cotton said he tried to break up the fight (R 4866). He evidently was unsuccessful as he returned to the middle of the road where he watched the struggle (R 4866).

Cotton heard a shot, then he heard Bevis say, "please don't shoot." He then heard two more shots (R 4866).

Cotton and Brown fled in Cotton's truck, and soon another police car gave chase (R 4869). At some point, Cotton stopped his car and both fled into some nearby woods (R 4869). By this time, however, Cotton had had enough, and he returned to the road and surrendered to the police (R 4871).

Several hours later, and after an extensive hunt by the police using dogs and a helicopter (R 5296), Brown was captured (R 5296).

Bevis had been shot three times, once in the arm, and twice in the head (R 5899). Either shot to the head would have caused instant death (R 5918-5919).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Both counsel for Brown and the State knew Brown could not get a fair trial in Jackson County, the county in which Bevis had been killed (R 72, 228). Extensive publicity of his murder had saturated this small, rural county (R 886-892).

Brown moved for a change of venue (R 72) and specifically asked his case be moved to another county where the same ratio of blacks to whites existed as that in Jackson County (R 890). The State countered with a motion requesting that venue be changed to the neighboring county (Bay County), but once a jury had been selected, the court should move the trial back to Jackson County (R 228). The court, after hearing extensive argument and testimony (R 2804-2973), granted the State's Motion to the extent that it moved Brown's trial to Bay County (R 94).

The racial makeup of Bay County, however, was significantly different than that of Jackson County. Approximately 22% of the persons in Jackson County eligible for jury duty were black (R 2784) whereas in Bay County only 8% of the potentially eligible jurors were black (R 2784).

On appeal, Brown argued that moving his trial to Bay county denied him his Sixth Amendment right to a jury selected from a fair cross-section of his community. By granting the State's motion, the court had systematically excluded a significant portion of blacks from the pool of those eligible to be called to sit in this case.

The Florida Supreme court rejected that argument because in this case three of the twelve jurors that sat in this case were black.

> Since the percentage of blacks on the actual jury (twenty-five percent) exceeded the percentage of blacks in the community (twenty-two percent), appellant cannot claim to have been denied the opportunity to be tried by a representative cross-section of his community.

Brown v. State, 526 So.2d 903, 906 (Fla. 1988).

REASON FOR GRANTING THE WRIT

ISSUE PRESENTED

DID THE FLORIDA SUPREME COURT ERR WHEN IT SAID BROWN WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO BE TRIED BY A REPRESENTATIVE CROSS-SECTION OF HIS COMMUNITY BECAUSE IN HIS CASE THE PERCENTAGE OF BLACKS THAT ACTUALLY SAT AS JURORS EXCEEDED THE PERCENTAGE OF BLACKS ELIGIBLE TO SIT AS JURORS IN JACKSON COUNTY?

The Florida Supreme Court missed the point of Brown's argument and what this Court's decisions on this issue have said. Brown did not argue he was denied a fair trial because the percentage of blacks that actually sat as jurors at his trial was statistically less than he should have had had he been tried in Jackson county. He did not argue that because, besides being factually wrong, it was legally incorrect. A person is entitled to a fair jury and not to one of any particular makeup. Batson v. Kentucky, 476 U.S. 79 (1986). Had Brown argued to the contrary, the Supreme Court would have been correct in rejecting that argument.

But Brown argued he was entitled to a jury pool which represented a fair cross-section of his community. Taylor v. Louisiana, 419 U.S. 522 (1975). In his case 103 prospective jurors responded to the clerk of courts summons for jury duty (R 2902-2904). Of those 103, only 8 were black (R 2904). If Brown had been tried in Jackson County, 21 of the 103 prospective jurors would have been black. As demonstrated at the hearing on Brown's Motion to change venue, this discrepancy between the number of blacks that should have shown up and the actual number that did was more than a three standard deviation difference.[2] Said another way, if this case had been tried in Jackson County, the chances of having only eight prospective

---

[2]A standard deviation is a measure of the predicted fluctuations from the expected value. Castanada v. Partida, 430 U.S. 482 (1977) f.n. 17. In general, if the number of standard deviations between an observed number and the expected number is greater than two or three, then a social scientist would suspect that a particular selection was not randomly made. Id.

black jurors show up would have been less than one chance in one hundred (R 2867).

Such a significant discrepancy between the number of black juror's that should have been called to serve and those who actually were called evidences a systematic or deliberate effort to exclude a large portion of the community from participating in Brown's trial, and it denied him his Sixth amendment right to a fair trial. Duren v. Missouri, 439 U.S. 357 (1979).

The historical reason and the constitutional justification for providing jury trials are that juries stand between the accused and government oppression. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Juries represent the conscience of the community, Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct 1444, 20 L.Ed.2d 491 (1968), and as such they provide an important barrier to protect the defendant from action by the state to unfairly convict him.

Consequently, a necessary corollary to this right is the requirement that any particular jury be drawn from a fair cross-section of the community, Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). That is, the right to a trial by jury is meaningless if the state can manipulate the pool of those eligible to serve on the jury so that only those it wants to serve are called. Whenever the representative quality of the jury is compromised, then the jury becomes a ready weapon for governmental oppression, and instead of being a shield to protect the defendant, it is a sword of the state.

In Duren, supra, Duren challenged Missouri's automatic excusal of women from serving on petit juries. In its opinion this Court established a three prong test that must be satisfied in order to establish a prima facie violation of the fair-cross section requirement of the sixth amendment. Id at 364:

1. the group alleged to be excluded is a "distinctive" group in the community.
2. the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community
3. this under-representation is due to systematic exclusion of the group in the jury-selection process.

Applying this test to this case reveals that Brown had made a prima facie case that he had been denied a fair cross-section of the community in the selection of his jury. That is, he is a black man and is a member of a distinctive group in Jackson County. Second, 22% of the people called to serve on his jury should have been black, but in fact there were only eight which was about 8% of the 103 people called to serve. As mentioned above, the likelihood of this happening in Jackson County was less than one chance in one hundred. Brown has thus met the second prong of the Duren test.

Finally, this under-representation of blacks was systematically done (as opposed to a random or chance occurence) as it was by the court's order granting the state's motion for alternative venue relief that moved the trial to Bay County, and by doing so, created this under-representation. Id at 367. Brown thus has demonstrated a prima facie case of a fair cross section violation.[3]

The Florida Supreme Court ignored this Court's rulings in this case when it looked to the racial composition of the jury that actually served in this case. This court has never approved such an analysis, and that court has ignored this court's rulings on this matter.

This case presents a troubling and important problem. The state, under the guise of wanting to be fair, can ask for a

---

[3]Because Brown is raising this claim under the sixth amendment's guarantee of a right to a fair trial, he does not have to show a discriminatory intent on the part of the state. He would have needed to show such an intent only if he had raised an issue claiming a denial of equal protection in the exclusion of blacks from the venire. Duren, supra. see f.n. 26.

change of venue. Normally a defendant would be happy about such a request, but after the euphoria of the moment has worn off, he may not be so pleased. In place of having to select a jury from a pool of inflamed citizens, he now has to choose his jury from one that does not reflect the racial make-up of his community. In short, he has sold his right to select his jury from a fair cross section of his community in order to buy his right to a fair and impartial jury. In this case, the Florida Supreme Court told Brown that was a fair exchange. But The Court missed the point that Brown should not have to sell one right to secure another.

Although the point Brown raised was, as the Florida Supreme court recognized, novel, it raised the question of whether and under what circumstances a defendant can be forced to trade one constitutional right for another. Because the Florida Supreme Court's ruling on this issue is clear and the facts were well developed below, this court should accept jurisdiction in this case to resolve this important question.

CONCLUSION

Based upon the argument above, Brown respectfully asks this honorable court to grant his petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT