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IN THE SUPREME COURT OF FLORIDA

MERVYN MORELAND,

Appellant - Petitioner

vs.

STATE OF FLORIDA,

Appellee - Respondent

Supreme Court No. 76,752

District Court of Appeal
Fourth District No. 89-2263

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, the Appellee/Petitioner below, was the defendant in the underlying criminal case and will be referred to as the defendant. Appellee, the Appellant/Respondent below, was the prosecution and will be referred to as the State.

The symbol "R" will denote the record on appeal.

The symbol "Tr." will denote the original trial transcript, which forms part of the record on appeal, but remains separately paginated.

STATEMENT OF THE CASE AND FACTS

Defendant, Mervyn Moreland, appeals the Fourth District Court of Appeal's reversal of the trial court's order, based upon the violation of defendant's constitutional right to trial by a jury drawn from a representative cross-section of the community, which granted the defendant a new trial on collateral review, pursuant to Florida Rule of Criminal Procedure 3.850. R. 415. Discretionary jurisdiction was accepted February 28, 1991.

On June 15, 1989, this Court in Spencer v. State, 545 So.2d 1352 (Fla. 1989), reversed the murder conviction and death sentence in that case because the Palm Beach County jury district system, under which Spencer was tried, unconstitutionally and systematically excluded a significant concentration of blacks from the jury pool for the West Palm Beach jury district. The system was also held to violate equal protection rights guaranteed by Article I, Section 2, of the Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution. Spencer, supra at 1352-53

While Spencer was pending before this Court in March of 1987, the defendant in the present capital case, represented by the same law firm that was representing Leonard Spencer, moved for identical relief by virtually the same motion as the defendant in Spencer. R. 178, 293-313.

Defendant, Mervyn Moreland, by pre-trial motion,timely

challenged as unconstitutional, on Sixth and Fourteenth Amendment grounds, the systematic exclusion of blacks from the West Palm Beach jury district where defendant was tried, which constituted one of two districts set up by the Fifteenth Judicial Circuit's Administrative Order No. 1.006-1/80 entitled "In re Glades Jury District - Eastern Jury District." Objection was also made to the denial of equal protection occasioned by the Order in granting defendants in the Glades but not the West Palm Beach Jury district a choice of which district they could be tried in. R. 293-313.

Since grand juries were still required to be drawn from the county as a whole, trial counsel moved simply to have the case "set for trial on a week when a county-wide pool of juror is already scheduled for use in drawing both a grand jury and trial juries." R. 312-13. The State opposed the motion. Tr. 13-14.

The Honorable Carl Harper, the trial judge, acknowledged that Fifteenth Judicial Circuit Judge Harold Cohen had granted a similar motion and found the jury districting system to be unconstitutional. He also recognized that Spencer, supra, was pending before the Florida Supreme Court. Nevertheless, Judge Harper summarily denied the motion stating that if the Supreme Court found the jury district system in question to be un - constitutional, the defendant's case could then be retried. Tr. 17-18.

Defendant was subsequently found guilty of first degree

murder, in a case based entirely on circumstantial evidence, and sentenced to life imprisonment. Inter alia, the issues in defendant's Motion Relating to Composition of Petit Jury Panel were again raised on direct appeal of the conviction to the Fourth District Court of Appeal, as was the fact that the matter was still pending before the Florida Supreme Court. R. 14, 371. The District Court's per curium affirmance was ultimately issued without opinion prior to the Supreme Court's decision in Spencer.

The following year, the defendant was granted an evidentiary hearing under Florida Rule of Criminal Procedure 3.850. At the post conviction hearing before Judge Thomas E. Sholts, Judge Harper having since retired, additional information concerning defendant's Jury Panel Motion was presented to the court by the defendant's trial counsel. She testified that the motion had been submitted in order to obtain for the defendant a jury drawn from a pool representing a cross-section of the county. R. 179.

Counsel testified that the defendant would have been better served by a diverse jury than by one drawn from the disproportionately white and affluent West Palm Beach district. R. 178-80. Though defendant is a white male, he is also an indigent brain damaged alcoholic who worked as a parking lot attendant. Tr. 957-60. While trial counsel conceded on cross-examination that biased black jurors, those prejudiced against a white defendant, would have been undesireable, certainly not all or even most black jurors

would have been biased, and she stated that had she been able to interview a number of black persons she could very well have found acceptable black jurors. R. 180-81. "I was seeking blacks," trial counsel flatly stated, to add diversity to the jury panel. R. 181. The prospective jurors called for consideration in defendant's case were from the West Palm Beach jury district, which included the many affluent white communities of eastern Palm Beach County, and the jurors were exclusively or almost exclusively white. R. 182. Although one black juror was apparently called, he was challenged by the State. Id. Trial counsel's testimony was unrebutted.

Also established at the post conviction hearing was the fact that at the time of defendant's trial, a number of the criminal division judges were granting defendants the right to have their juries drawn from a county-wide jury pool. Judge Sholts himself observed:

> If someone asked for, in those days, a county-wide venire in another case and a judge granted it, everybody on the panel that week was drawn county-wide as opposed to District-One or District-Two wise.

R.12. Thus, numerous defendants were already having their juries drawn from county-wide panels even if they or the judge on their cases had not requested them. That, however, did not occur in the present defendant's case. R. 13. Judge Sholts recognized that the defendant "Mr. Moreland may very well be in a situation that he would not have

been had he been in another divison of the court." R. 208. Moreover, since grand juries continued to be drawn from county-wide venires, in those weeks that a new grand jury was being impaneled, the petit jury pool was also drawn from the county-wide venire. R. 312.

Equal protection, Sixth and Fourteenth Amendment bases relating to the cross-sectional venire requirement were all raised at the hearing and it was argued that denial of defendant's constitutional rights to a representative venire constituted fundamental error necessitating a new trial.

Judge Sholts, however, indicated his reluctance to find fundamental error since "if it is fundamental error in the strict sense of the word then everybody who didn't raise it wouldn't have had to raise it and therefore that might open the floodgates." R. 209. Since the defendant had raised the issue of the unconstitutionality of the jury district system in Palm Beach County, at both the trial and appellate levels, Judge Sholts found:

> The court need not reach the issue raised by the state of whether Spencer sets forth a fundamental rule of law requiring retroactivity in all cases. It is debatable whether Spencer sets forth a new rule of law rather than echoing the existing constitutional requirement that a defendant's jury be drawn from a venire comprising a fair cross-section of Palm Beach County.
> ...The decision in Spencer under the narrow facts applied here requires a retrial of defendant's case.

Order Granting New Trial, R. 415. In attempting to fashion as narrow a ruling as possible, the Court then determined

the fundamentality of the fair cross-section requirement in the context of applying the three prong retroactivity analysis for new rules of law set forth in Witt v. State, 387 So.2d 922 (Fla. 1980). Id. Witt had been originally raised by the State at the post conviction hearing, arguing that Spencer set forth a new but unimportant rule of law that should not be applied retroactively to the present case. The trial court disagreed. Judge Sholts found that the test in Witt allowed a "change of law" to be considered in a Rule 3.850 proceeding if it:

> (a) emanates from this (the Florida Supreme) Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Witt, supra at 931. The court further found that the decision in Spencer:

> (a) emanates from the Supreme Court of Florida
>
> (b) is constitutional in nature, and
>
> (c) constitutes a development of fundamental significance.

R. 415. Consequently, the court found that the State's proffered analysis supported giving limited retroactive effect to the decision in Spencer in order to grant, "under the narrow facts" of the present case, post conviction relief to the defendant herein.

The court also appeared to recognize the central importance of fairness in the Witt decision. R. 207-08. Particularly problematic was the fact that the defendant

herein was denied that which was granted numerous similarly situated defendants, namely a jury venire fairly representative of the county.

The State appealed and the Fourth District Court of Appeal reversed holding that the defendant was procedurally barred from raising in post conviction proceedings the violation of his constitutional rights to a representative venire. This Court's decision in Spencer v. State, supra, was dismissed as a mere "evolutionary refinement" not warranting consideration in collateral proceedings. State v. Moreland, 564 So.2d 1164 (Fla. 4th DCA 1990).

* * *

Although, the applicable decisional law holds that as a matter of law infringement of the right to a jury drawn from a representative venire constitutes a violation of a defendant's Sixth and Fourteenth Amendement rights without reference to the underlying facts, the facts in the present case reinforce the presumption of prejudice, which the State never attempted to rebut, and will be reviewed here briefly since it can be expected that they will be raised, albeit selectively, by the State.

The following is uncontroverted and rests on the evidence, original trial transcripts, etc., and testimony submitted to the court at the post conviction hearing which forms part of the record on appeal, except that the State additionally introduced into evidence, at the hearing, the testimony of Detective Kim C. Myers to impeach the state-

ments of the State's own key trial witness, Timothy King, that his testimony at defendant's trial was the product of police threats and coercion. R. 184-96, 399-402, Tr. 426-28.

The defendant was convicted on purely circumstatial evidence of the first degree murder of Thomas Finkley. R. 331.

Finkley, a violent pimp and crack addict, had been found dead face down on the steps of a crack house with a bullet that had passed through his heart and nearly every other internal organ. R. 397, 47. The man appeared to have been shot as he stood at the foot of the stairs. That was the original conclusion of the officers on the scene as related to the medical examiner. Tr. 528-29. The shooting occurred at night on Sunday, December 21, 1986. The people at the building and on the scene, potential witnesses, were Hatian and did not speak English; consequently, the police lost an important opportunity to learn the details of what had transpired. R. 343.

One witness at the building, not called at trial[1], who did speak to police said that she heard the shot and

[1] The witness was a resident of and the rent collector for the building. She was, in fact, the person that reported the shooting. R. 47. The failure of trial counsel to call this and one other witness was one of the bases for defendant's claim of ineffective assistance of counsel. It was this ground on which the evidentiary hearing for defendant's pro se Motion for Post Conviction Relief had been granted -- the State had conceded, in its reply to the motion, that the alleged failure to call a key witness could be the basis for relief (R. 393). The Supreme Court's decision in Spencer, supra, was issued shortly before the date of the hearing, this issue was then added as a second ground for post conviction relief.

immediately looked out her door and saw the victim lying on the steps. She also heard a commotion and a number of men getting into a car and driving rapidly away. R. 47-48. The witness's statement was completely at odds with the testimony presented at trial, which implicated the defendant in the shooting, that the victim was shot at another location and had run, despite his injuries, to the building. R. 47-48, 397-403, 403.

Investigating the activities of the victim, Finkley, prior to being found at the crack house, the police learned that about an hour before he was shot, he had attacked his prostitute, Mary Howard, in a nearby bar. R. 397-98, Tr. 586, 463. Finkley had back handed the woman, bloodying her face, following a dispute in which he grabbed her purse and removed a man's wallet. It was later established that the wallet contained no money.

The prostitute had been drinking with the defendant and two other acquaintances -- Timothy King and his wife Margery. R. 397-98. She had frequently complained to the Kings about the pimp's beatings and that she was tired of prostituting herself to support his drug habit. R. 397-98, 404.

When Howard was attacked in the bar by the pimp, the Kings came to her aid. Timothy King was seen threatening Finkley with a pool cue, while his wife hurled obscenities at the pimp. R. 398. Calling the women "whores", the pimp was finally ejected by the bartender. Id.

Shortly thereafter, the Kings left the bar with the defendant. All three were heavily intoxicated, the Kings barely able to walk. Tr. 400, 416-17, 594. They drove to defendant's house to pick up some money with the intention of continuing on to a convenience store. The Kings decided, however, to return to the bar to continue drinking, and the defendant dropped them off nearby. He drove on to the store alone and later returned to the bar. R. 399. Subsequently, after the pimp's body was found about one block from the bar, police came to the bar to investigate whether anyone there had heard anything. They learned of the incident with the prostitute, the threatening conduct of Timothy King, and that the Kings and the defendant had left the bar. R. 397-98. The Kings told the police that they had not heard the shooting and knew nothing about it; they had simply returned to the bar and continued drinking. R. 399.

The police investigated the prostitute and the Kings, they also learned that the defendant had a long running relationship with the prostitute. Days later, the police picked up the Kings, brought them to the station and interrogated Timothy King while keeping the wife in a separate area. Timothy King, who had an extensive criminal history, was interrogated for hours and told that he would be charged with the murder. The police also threatened to jail his wife on an old outstanding warrant they had uncovered. Margery King had a nervous condition -- a severe case of agoraphobia. King thought she would have a heart attack

if she were imprisoned. The police threatened to keep the Kings at the station all night if necessary. R. 397-402, Tr. 426-28.

Timothy King recalled, in a statement to the Public Defender's Office, that a Detective Myers brought the Kings to the station and interrogated him. King maintained that he was never advised of his rights even when the police accused him of being the perpetrator:

> Q. And you say, again, that he never advised you of your rights? He was...
>
> A. No, he didn't say nothing.
>
> Q. ...he was inferring it was either you, your wife or Buddy who had done this? Right?
>
> A. Yes. Because he said, "one of three things, because we got phone calls saying that you did it, Buddy did it or your wife did it. And I said, get out of here! I said, I wouldn't shoot anybody. I said, My wife wouldn't shoot anybody, and I don't think Buddy did it." "Well, somebody did it." And then he threw a picture down in front of me, and it was Tommy.
>
> Q. His corpse?
>
> A. Yea. And then <u>he said, uh, asked me if the grand jury would think he would, they would believe me about saying that I wouldn't shoot anybody. I said, "Well, I wouldn't." He goes, did I think they'd believe me and I go, "I don't know."</u>

R. 399-401. Finally, King broke down and changed his story. While King's original account of the events on the night of the shooting parallel the account above, at page 11, the new story he told the police implicated the defendant. R. 397-402, Tr. 426-28.

King told the police that just before he and his wife

reentered the bar, after the defendant dropped them off nearby, he heard a shot and glanced across the street and saw Finkley in the far corner of a service station stagerring and clutching his chest. R. 401. He also stated that he saw, in the distance, the back of a station wagon that looked like the defendant's car driving away in the night. He and his wife then allegedly turned away, reentered the bar and continued their drinking without telling anyone of the incident. R. 401-02.

Rather than obtain an independent statement from Margery King, the police brought her into the room where King was held after he agreed to change his story, and she stayed there while her husband gave the new account of the events on the night of Finkley's shooting. Tr. 494-95. Both the Kings ultimately testified at the defendant's trial to this new version. R. 402.

The sole evidence against the defendant was the testimony of the Kings. There was no physical evidence linking him with the crime. There was not even any blood found at the service station where the pimp was allegedly shot. Finally, the defendant has consistently maintained his innocence. R. 96.

The above recitation of the facts is likely to become important in the event the Court finds it necessary to consider the extent to which the defendant was prejudiced by being denied his constitutional rights to a representative jury venire.

SUMMARY OF ARGUMENT

The Fourth District held that, despite preserving the issues, the defendant was procedurally barred from raising the violation of his constitutional rights to a representative venire since this Court's decision in Spencer v. State, supra, constituted an insignificant "change in decisional law" indistinguishable from the "evolutionary refinement" represented by State v. Neil, 457 So.2d 481 (Fla. 1989).

The Fourth District ignored this Court's language in Neil, relying on U.S. Supreme Court precedent, "that distinctive groups cannot be systematically excluded from venires." Neil, supra at 487. The alleged "change" wrought by Spencer was already a long accepted constitutional principle at the time Neil was handed down.

The Fourth District's opinion also expressly and directly conflicts with this Court's decision in Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), holding that a defendant is not procedurally barred when post conviction relief is based on a properly preserved constitutional issue.

The opinion conflicts with decisions of other district courts of appeal holding that infringement of the Sixth Amendment right to a jury trial "constitutes fundamental error." Nova v. State, 439 So.2d 255 (Fla. 3d DCA 1983); that the fair cross-section requirement is fundamental, Bass v. State, 368 So.2d 447, 449 (Fla. 1st DCA 1979); and that such fundamental error may be raised post conviction, Nova, supra at 261. See also Jordan v. State, 293 So.2d 131 (Fla. 2d DCA 1974).

Denial of defendant's right to due process of law in violation of the Fourteenth Amendment provides an additional basis for reversing the District Court's decision.

ARGUMENT

POINT I

DENIAL OF DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY SELECTED FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY CONSTITUTES FUNDAMENTAL ERROR AND REQUIRES REINSTATEMENT OF THE TRIAL COURT'S ORDER VACATING DEFENDANT'S CONVICTION AND GRANTING HIM A NEW TRIAL.

a. THE DISTRICT COURT ERRED IN REVERSING THE GRANT OF A NEW TRIAL AND IN FINDING THE DEFENDANT PROCEDURALLY BARRED FROM RAISING ON COLLATERAL REVIEW THE VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS DESPITE HAVING PROPERLY PRESERVED THE ISSUES AT TRIAL AND ON APPEAL.

The Fourth District's holding that the decision in Spencer v. State, supra, is an insignificant procedural refinement the benefit of which can be denied defendant under a retroactivity analysis is at odds with the substance of that decision and conflicts as well with Witt v. State, 387 So.2d 922 (Fla. 1980), which set forth the retroactivity analysis purportedly relied upon by the Fourth District to deny defendant the benefit of Spencer. Witt is limited, by its own terms, to new issues of law and rights not recognized at the time of conviction. Witt, supra at 925, 927 n.13, 929.

The decision in Spencer held the Palm Beach County jury districting system violated, in the manner that it created the two districts, the constitutional requirement

that jury pools reflect a cross-section of the county by systematically excluding from the West Palm Beach District a significant proportion of the black population. Specifically, this Court found, based on population data admitted by the State, that black persons had been underrepresented in the West Palm Beach District by 17%. Spencer, supra at 1353. Spencer's two first degree murder convictions and death sentence were reversed. The lack of any intentional discriminatory conduct, while acknowledged by the Court, was deemed irrelevant. Id. at 1354-55. Additionally, the two district system was found to violate the equal protection rights of defendants by affording defendants in the Glades district, but not those in the eastern district, a choice of which district they could be tried in. Id.

Not only does Spencer lack any language suggesting that this Court set forth a "new constitutional doctrine," Witt, supra at 925, but the decision is mandated by a long line of U.S. Supreme Court cases upholding a defendant's right to a representative venire as a "fundamental" component of the right to a jury trial having independent Sixth and Fourteenth Amendment bases. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942); Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880).

The constitutional requirement of a representative venire was first recognized by the U.S. Supreme Court as an essential element of equal protection clause of the Fourteenth Amendment. Strauder, 100 U.S. at 308-309. Even in this early case, the Supreme Court recognized that not only were defendants harmed by the exclusion of blacks from jury pools, but that the members of the excluded class were injured as well. Strauder thus anticipated in 1880 the future Supreme Court cases that would make the fair cross-section requirement an absolute right that when violated would require no showing of prejudice for a defendant to prevail and would not require the defendant to be of the same race as the members of the excluded class.

Extension of the principle so as to allow any defendant to challenge the arbitrary exclusion of his own or any other class from jury service was accomplished in Glasser v. United States, 315 U.S. at 83-87.

In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court recognized the fair cross-section requirement as an essential feature of the Sixth Amendment guarantee of jury trial. This Sixth Amendment guarantee was imposed, by means of the Fourteenth Amendment, on the states in Taylor v. Louisiana, 419 U.S. at 697, 702 (1975). "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment." Id. at 697. However, as early as

1953, the Supreme Court had stated:

> Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

Brown v. Allen, 344 U.S. 443, 474; 73 S.Ct.397, 416; 97 L.Ed. 469 (1953).

The due process clause of the Fourteenth Amendment was held in Peters v. Kiff, supra, to provide yet another constitutional basis for challenging the exclusion from the venire any identifiable class of citizens. Id. 92 S. Ct. at 2169. This basis, discussed in greater detail infra, was held to be independent of the Sixth Amendment and Fourteenth Amendment equal protection clause guarantees discussed above.

Thus, there are three independent federal constitutional bases mandating that juries be selected from a representative cross-section of the community:

1. The jury requirement of the Sixth Amendment made applicable to the States by the Fourteenth Amendment.

2. The equal protection clause of the Fourteenth Amendment.

3. The due process clause of the Fourteenth Amendment.

Relief under these bases cannot be limited to direct appeal only; Peters v. Kiff, supra, for example, was a habeas corpus case. Habeas corpus is a collateral attack

of a conviction indistinguishable (for purposes of granting relief from an illegal conviction) from the collateral, i.e. post conviction challenge presented in the instant case. Moreover, the State "has a duty to grant the relief that federal law requires." Yates v. Aiken, 484 U.S. 211, 216; 98 L.Ed.2d 546, 553 (1988).

In Yates, the U.S. Supreme Court held that where a defendant relies upon a recent Supreme Court decision that is "merely an application" of established constitutional principles, the defendant may, in collateral proceedings, rely on the new decision. Yates,484 U.S. at 216. In effect, the defendant is doing nothing more than relying on "principles that were well settled at the time of conviction." Id.

Consequently, the Supreme Court continued, the retroactivity analysis traditionally used to limit the retroactive effect of a "new rule" cannot be used to deny a defendant the benefit, in collateral attack proceedings of "'new' holdings (that) are merely applications of principles that were well settled at the time of conviction." Yates, 885 U.S. at 216-17.

At the state court level, decisional law also establishes the fair cross-section requirement as a long standing, indeed, a fundamental element of the right to trial by jury. In State v. Neil, 457 So.2d 481 (Fla. 1984), the Fourth District apparently completely overlooked this Court's language, relying on U.S. Supreme Court precedent, accepting

that "distinctive groups cannot be systematically excluded from venires because petit juries must be selected from a representative cross-section of the community." Neil, 457 So.2d at 487. Moreover, the Court in Neil, unlike the District Court in the present case, had no difficulty distinguishing the established right to a representative venire from the separate considerations involved in peremptory challenge cases, of which Neil was one, that deal with the composition of individual petit juries. "No one is entitled to a jury of any particular composition." Id. at 487.

At the District Court level, infringement of the Sixth Amendment right to a jury trial was held to "constitute fundamental error" in Nova v. State, 439 So.2d 255 (Fla. 3d DCA 1983). The fair cross-section requirement is itself fundamental, Bass v. State, 368 So.2d 447, 449 (Fla. 1st DCA 1979), and such fundamental error may be raised post conviction, Nova, supra at 261. Independent Sixth and Fourteenth Amendment grounds for the cross-sectional requirement were also recognized in Jordan v. State, 293 So.2d 131 (Fla. 2d DCA 1974).

Thus, the District Court opinion in Moreland, the present case, that the constitutional cross-section requirement recognized by this Court in Spencer is merely a "new or different standard for procedural fairness," Moreland, 564 So.2d at 1166, simply cannot be reconciled with either the decision in Spencer itself, or the legal

bases for that decision set down in both federal and state case law. Nor is District Court's opinion consistent with the relevant portions of this Court's opinion in Neil. The District Court erroneously relied upon the peremptory challenge ruling in Neil, which the Supreme Court of Florida itself distinguished from the cross-sectional requirement. Peremptory challenge rulings cannot be used to deny a defendant established constitutional rights.

Though, superficially, the exclusion of blacks from the jury pool (the venire) may seem analogous to such exclusion by means of peremptory challenges from petit juries, the two are controlled by entirely different rules and standards, albeit for similar constitutional reasons, namely, the assurance to both the defendant and the State of an impartial petit jury.

These two issues, the constitutionally mandated representative venire and the possibility of a representative petit jury, were recently the subject of extensive and enlightening discussion in Holland v. Illinois, 493 U.S.___, 107 L. Ed. 2d 905, 106 S.Ct. 1785 (1990), which holding declined to extend the scope of the Sixth Amendment guarantee of a fair cross-section venire requirement to petit juries. Justice Scalia's majority opinion can cast considerable light upon and expand defendant's argument that peremptory challenge/ petit jury cases are distinguishable from the case at bar and cannot be used as a basis for circumscribing or justifying the denial of defendant's right to a jury drawn

from a venire that represents a fair cross-section of the community.

Inasmuch as the District Court has apparently attached some significance to the fact that the defendant is white, the Supreme Court's prefatory ruling on standing should dispel any doubts as to whether defendant's race has any relevance in the case at hand:

> The threshold question is whether petitioner, who is white, has standing to raise a Sixth Amendment challenge to the exclusion of blacks from his jury. We hold that he does.

Holland, 107 L.Ed.2d at 914 (emphasis added). The Court explained that while the decision in Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), involved a correlation between the defendant's race and that of juror's excluded from the petit jury by prosecutor's peremptory challenges,

> We have never suggested, however, that such a requirement of correlation between the group identification of the defendant and the group identification of excluded venire members is necessary for Sixth Amendment standing. To the contrary, our cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross-section of the community, whether or not the systematically excluded groups are groups to which he himself belongs.

Holland, Id. The decision makes clear that the above is merely a reassertion of established principles dating back to 1975, and which are, therefore, controlling in the present case on the issue of standing.

The Supreme Court then proceeded to explain that while the Constitution requires that the venire must represent a fair cross-section of the community (the constitutional right denied the defendant herein) the composition of the petit jury, for similar constitutional reasons cannot be required to be representative:

> "It has long been established that the racial groups cannot be excluded from venire from which the jury is selected. That constitutional principle was first set forth ... under the Equal Protection Clause. Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880).
>
> ...
>
> Our relatively recent cases, beginning with Taylor v. Louisiana, hold that a fair-cross-section venire is imposed by the Sixth Amendment, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed..." The fair-cross-section venire requirement is obviously not explicit in this text, but is derived from the traditional understanding of how an "impartial" jury is assemble . That traditional understanding includes a representative venire, so that the jury will be, as we have said, "drawn from a fair cross section of the community." Taylor, 419 U.S. at 527, 42 L.Ed.2d 690, 95 S.Ct. 692 (emphasis added).
>
> ...

> The Sixth Amendment requirement of a fair cross section of the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does). Without that requirement, the State could draw up jury lists in such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the jury pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.
>
> But to say that the Sixth Amendment deprives the State of the ability to "stack the deck" in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors."

Holland, 107 L.Ed.2d at 918-19 (emphasis added). In the case at bar the State had the deck unconstitutionally stacked against the defendant. The defendant never had the opportunity to compete against the State "on an equal basis" with respect to the composition of the jury. This is not mere speculation. Reference to the defendant's original Motion Relating to

Composition of Petit Jury Panel demonstrates that the defendant merely desired that his case "be set for trial on a week when a county-wide pool of jurors is already scheduled for use in drawing both a grand jury and trial juries." Tr. 1129-30. The State opposed the motion. Id. at 13-14. The State, thus, exercised control over the initial jury selection process, that is, control over the nature of the jury pool. Unlike the situation with peremptory challenges, where both parties have the same opportunity to remove prospective jurors from the petit jury, the defendant herein was hostage to the State's tactical pre-trial maneuvers.

To add insult to injury, the State then claimed during the proceedings below, that, in effect, it was in the defendant's best interests to have blacks excluded from the venire. This, despite the fact that defendant's trial counsel explained to the trial court and testified during the post-conviction hearings that because of defendant's poverty he would be better served if the jury could be selected from a more heterogeneous pool than from the over-whelmingly white and affluent jury pool that was the result of the unconstitutional exclusion of blacks. Tr. 14. Starting with a constitutionally drawn venire, a fairly dealt hand in Justice Scalia's words, trial counsel could then have eliminated any biased minority jurors during voir dire.

The present case paradigmatically presents the situation prohibited by the Sixth Amendment since at least 1975. Additionally, the Fourteenth Amendment right permitting "any defendant to challenge the arbitrary exclusion from jury service of his own or any other class" dates to 1942. Peters v. Kiff, 92 S.Ct. 2163, 2167 n.9, 2167-68. Therefore, defendant is not seeking the benefit of a "new rule" of constitutional law whose retroactivity may be severely circumscribed under certain circumstances as set forth in Witt, supra.

Significantly, the Supreme Court in Holland also reiterated the current definition of "new rule" as "a rule producing a result 'not dictated by prior precedent'." Holland, 107 L.Ed.2d at 920 (citation omitted). Both, the Florida Supreme Court's holding in Spencer, supra, and the trial court's ruling in the instant case are "dictated by prior precedent." In Yates, the Supreme Court favorably cited Justice Harlan on the issue:

> First it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established principle to govern a case which is closely analogous to those which have been prviously considered in the prior case law ... One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year but whose meanings are altered slowly and subtly as generation

> succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases.

Yates, 484 U.S. at 216 (citing Desist v. United States, 394 U.S. 244, 263-64; 22 L.Ed.2d 248, 89 S.Ct. 1030). This reasoning, the Court held is controlling in cases where the defendant seeks the benefit of new decisions that merely apply existing principles.

Analogously, since Spencer is an application of long established constitutional principles, the defendant in the instant case should not be denied its benefit.

Florida Rule of Criminal Procedure 3.850 by its express terms provides for relief from judgments entered in violation of constitutional law. Although the case law generally holds that the constitutional error must be fundamental, this requirement applies only to cases where the constitutional issue in question has not previously been properly preserved or even raised. See e.g. Nova v. State, 439 So.2d at 261 (fundamental error may be raised for first time in a Rule 3.850 motion.) Nevertheless, the case law discussed above amply demonstrates the fundamental nature of the fair cross-section requirement. This fact is not undermined by the trial court's determination of the "fundamental significance" of the cross-section requirement in the context of the retro-activity analysis set forth in Witt v. State, supra.

The Court will find additional support for reinstating the trial court's order granting defendant a new trial in

Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988). In that case, the Eleventh Circuit granted federal habeas corpus relief to a State prisoner, previously denied similar State relief, on the grounds that the prisoner's showing that a distinctive group was systematically excluded from the jury pool established a violation of the Sixth and Fourteenth Amendments.

In the first instance, the Court held that where there is no dispute as to the evidence of underrepresentation, the reviewing court is presented with only a question of law as to whether the underrepresentation complained of is unfair and unreasonable in violation of the Sixth Amenment's fair cross-section requirement. In the present case, there is also no dispute as to the underrepresentation of blacks in the West Palm Beach jury district. Thus, this Court is only presented with a question of law, which it already answered in the defendant's favor in Spencer and which it is free to answer again in favor of the defendant in the present case.

Relying on U.S. Supreme Court precedent the Court held:

> The defendant is entitled to a jury drawn from a source in which the representation of distinctive groups is "fair and reasonable" in relation to their representation in the community. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668.

Berryhill, 858 F.2d at 637. In discussing what degree of deviation may be acceptable in a given case, the Court observed:

> A given degree of deviation might be constitutionally permissible in a case where the state took every reasonable step to ensure representation of all groups yet constitutionally impermissible in a case where the state neglected to take such steps.
> ...
> Given the relative ease with which the underrepresentation could have been corrected in this case, we simply cannot conclude that the representation of women on the master jury list was fair and reasonable.

Berryhill, 858 F.2d at 638, 639. The Court went on to hold that the State was required to retry the defendant.

In the present case, there is no evidence that efforts were taken in setting up the two district systems in Palm Beach County to achieve a representative cross-section in both districts. The purpose of the two districts was for the convenience of jurors and the simplicity of drawing one straight line down the county, dividing it into eastern and western districts. Spencer, 545 So.2d at 1353, R. 293-313. The defendant's right to a jury drawn from a cross-section of the community cannot be thus subordinated to incremental increases in convenience. Spencer itself indicated that a fair cross-section in both districts could be achieved by simply adjusting the boundary line between the two districts.

Therefore, where, as in the case at bar, there have been no efforts or inadequate efforts to assure the defendant of a jury drawn from a pool that reflects a fair cross-section of the community, the Court must, "based on the bare showing

of underrepresentation, ... hold as a matter of law that the exclusion of the group was unfair and unreasonable." Berryhill, 858 F.2d at 638.

Finally, on equal protection grounds alone, the District Court's decision should be reversed and the trial court's decision reinstated. The use of the unconstitutional jury districting system has been shown to be spotty and inconsistent. Statement of Facts, supra at 3, 5-6. Not all judges consistently used the system, numerous defendants were afforded juries representative of the county as a whole, and only defendants in the Belle Glade district were given the choice of whether to be tried in the Glades district (52.080% black) or the West Palm Beach district (93.607% white). R. 298-300, 208.

As with the objections to the denial of a representative venire, the defendant has consistently raised and preserved his objections to the denial of equal protection. This constitutional right holds 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. C.f. Caldwell v. Mann, 26 So.2d 788 (Fla. 1946). The denial to the defendant of a right granted to numerous similarly situated defendants requires that he be granted a new trial.

b. DENIAL OF THE FUNDAMENTAL RIGHT TO A REPRESENTATIVE VENIRE REQUIRES AN INDEPENDENT FOURTEENTH AMENDMENT ANALYSIS WHICH PRESUMES PREJUDICE TO THE DEFENDANT AND COMPELS A RETRIAL OF THE CASE.

Irrespective of other constitutional bases for relief and the issue of retroactivity, the due process clause of the Fourteenth Amendment provides an additional and independent ground for reinstating the trial court's grant of a new trial.

The issue raised is whether the circumstances surrounding defendant's trial were so unfair as to have deprived the defendant of due process of law. In Peters v. Kiff, supra, the U.S. Supreme Court held that the due process right to a competent and impartial tribunal precludes the systematic exclusion of an identifiable class of citizens. Id. 92 S.Ct. at 2169. The Court observed that long before the Sixth Amendment jury trial requirement was expressly imposed on the states, the due process clause protected defendants not just from actually biased jurors, but from circumstances that, even absent a showing of actual bias, created the likelihood or appearance of bias:

> Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

Peters v. Kiff, 92 S.Ct. at 2168. On this basis and because the exclusion of a class of citizens injures not just the defendant but the excluded class as well, the Court ruled that there need be no showing of harm to raise the exclusion

of a group from the venire. As the Court explained:

> The exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement particular issues or particular cases ...
> ...
> It is in the nature of the practices that proof of actual harm, or lack of harm, is virtually impossible to adduce ... In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants,rather than giving it to too few.
> Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Peters v. Kiff, 92 S.Ct. 2169. The Supreme Court continued and addressed the necessary disposition of cases where the exclusion of a class, such as blacks, was established. An exclusionary system, the Court stated, cannot be justified. If blacks were excluded from defendant's grand or petit juries, then he was convicted by a tribunal that failed to satisfy "the elementary requirements of due process" and the conviction could not stand. Id. at 2170.

Given the undisputed exclusion of blacks from the venire from which defendant's trial jury was selected, defendant Mervyn Moreland's conviction must be vacated on due process grounds alone.

Moreover, though Peters v. Kiff, supra, prohibits harmless error analysis in the present circumstances, actual prejudice to the defendant has been established. Trial counsel's testimony that the defendant would have benefitted from the possibility of greater diversity on his jury panel was unrebutted. Additionally, in a circumstantial case as close[2] as the one at bar, it cannot be concluded beyond a reasonable doubt that a jury drawn from a representative venire would have convicted the defendant.

[2] This characterization is stated in terms which are most favorable to the State. See Statement of Fact, supra, at 8-13.

c. THE DISTRICT COURT FUNDAMENTALLY ERRED IN REVERSING THE TRIAL COURT AND FINDING THAT THE APPLICATION OF WITT V. STATE, 387 So.2d 922 (Fla. 1984), REQUIRES THAT DEFENDANT BE DENIED THE BENEFIT OF THIS COURT'S DECISION IN SPENCER V. STATE, 545 So.2d 1352 (Fla. 1989).

The Supreme Court of Florida in Witt v. State[3] set forth the standards and general principles to be applied on a case-by-case basis to determine whether a new rule of law should be applied retroactively in post conviction proceedings.

While nothing in Witt expressly precludes a court from utilizing its analysis so as to apply retroactively a decision such as Spencer, which is merely an application of long-standing constitutional principles, to a case wherein those constitutional issues were properly preserved, when a reviewing court seeks to limit retroactive application of a subsequent decision -- the express language in Witt confines its application to "new constitutional doctrines" and "belatedly acquired rights which were not recognized at the time of their conviction. "Witt, 387 So.2d at 925, 927 n.13. As the First District Court of Appeal stated, Witt holds:

> Only those which are major constitutional changes of law resulting in fundamentally significant developments may be raised initially on a motion for post conviction relief.

3 Witt was based at least in part on the U.S. Supreme Court's retroactivity analysis in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). The U.S. Supreme Court recently completed its shift away from the Linkletter analysis and adopted the analytical framework for retroactivity in collateral review of Justice Harlan. Teague v. Lane, 489 U.S.___, 103 L.Ed. 2d 334, 109 S.Ct.___.

State v. Austin, 532 So.2d 19 (Fla. 5th DCA 1988). The District Court's extension of Witt to limit or curtail the enforcement of established constitutional rights in post conviction proceedings is inconsistent with the traditional manner in which Witt is applied.

In utilizing the analysis in Witt, the trial court sought to avoid holding that the constitutional defect in the present case was fundamental. Such an express finding, the court feared, would "open the floodgates" to other cases where the cross-section requirement was not preserved. Treating Spencer as setting forth a new rule (though the court conceded in its order that this did not appear to be the case), allowed the court to give the decision limited retroactive effect that is in full accord with Florida case law.

The decision in Witt cannot be properly raised without taking into account the Florida Supreme Court's expressly stated concern for fairness in individual cases:

> Considerations of fairness and uniformity make it "very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So.2d at 925, (citation omitted). With this caveat, the Florida Supreme Court articulated the general standards for deciding issues of retroactivity: a new rule of decisional law must (a) issue from the United States or Florida Supreme Court, (b) be constitutional in nature, and (c) constitute a

development of fundamental significance rather than an evolutionary refinement in the law. In the present case the first two are not in dispute. That the decision in Spencer concerns a development of fundamental significance is answered in the affirmative by reference to the extensive U.S. Supreme Court case law cited above. To reiterate, the fair-cross-section is "fundamental to the jury trial guaranteed by the Sixth Amendment" and is made applicable to the States through the Fourteenth Amendment. Taylor, 95 S.Ct. at 697, Berryhill v. Zant, 858 F.2d 63 (11th Cir. 1988).

The present case cannot be reasonably distinguished from Spencer. Both defendants objected to precisely the same unconstitutional system on the same grounds. The only difference is that the crime in this instance was not considered so heinous as to warrant the death penalty. It is sadly ironic that had the defendant received the death penalty, which the State aggressively pursued, his case, arising as it did while Spencer was before the Supreme Court, would have reached the Supreme Court on appeal following Spencer, and would have been dealt with in the same manner as Amos v. State, 545 So.2d 1352 (Fla. 1989), the companion case to Spencer, in which the Court summarily reversed the conviction and death sentence of Spencer's codefendant by reference to its decision in Spencer v. State.

As was stated earlier, the limited retroactivity which

the trial court applied in this case is fully supported by Florida case law. In Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), the Florida Supreme Court afforded a defendant seeking collateral relief a limited form of retroactivity indistinguishable from that afforded the defendant in the present case.

The defendant in Jackson, convicted of first degree murder, petitioned the Florida Supreme Court for a writ of habeas corpus and appealed the trial court's denial of her motion for post conviction relief. Jackson's conviction and death sentence for the killing of a police officer had been affirmed previously by the Florida Supreme Court on direct appeal, with the Court expressly rejecting as harmless error her objection to certain testimony at trial by the county sheriff concerning the impact of the murdered officer's death on the morale of the sheriff's department.

Some time after the Florida Supreme Court's affirmance of Jackson's conviction, the United States Supreme Court ruled in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), that victim impact evidence presented to a jury in a capital case violated a defendant's Eighth Amendment rights.

Prior to Jackson, the Florida Supreme Court had already considered and rejected retroactivity of the rule in Booth in Grossman v. State, 525 So. 2d 833 (Fla. 1988), a case that was before the Court on direct appeal. The Court held that the error complained of, introduction of victim impact

evidence, was not so fundamental as to require retroactivity in all cases. Grossman, 525 So.2d at 842.

In addressing the situation in Jackson, the Florida Supreme Court, relying on its decision in Witt, held:

> Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness requires the decision to be given retroactive application. We recognized in Grossman v. State, 525 So.2d 833 (Fla. 1988), however, that no language in the Booth decision suggests that Booth be applied retroactively to cases in which there was no objection to the victim impact evidence. In this case trial counsel did institute a timely objection to the introduction of the sheriff's testimony in the lower court and also moved for a mistrial at the close of the testimony. Additionally, this issue was addressed on direct appeal. Therefore, Jackson is not procedurally barred from claiming relief under Booth.

Jackson, 547 So.2d at 1199. (emphasis added)

Holding that Jackson's objection to the sherrif's testimony was, in effect, an objection to victim impact evidence, the Florida Supreme Court vacated defendant's sentence. Jackson, 547 So.2d at 1199. The decision in Jackson demonstrates that this Court recognizes a limited form of retroactivity that allows defendants in collateral attack proceedings the benefit of an entirely new rule of constitutional law, provided the defendant made a timely objection at trial raising essentially the same issue addressed by the new rule.

In the case at bar, just as in Jackson, the defendant, asserting his constitutional right -in this case- to a jury drawn from a pool reflecting a cross-section of the community, made a timely objection at the trial level and raised the issue on appeal. Again, as in Jackson, defendant was denied relief at both the trial level and on direct appeal. Now that the Court has vindicated the defendant's position by ruling in Spencer, on the same statistical evidence the defendant presented below, that the West Palm Beach jury district did, in fact, systematically and unconstitutionally exclude a significant concentration of black persons, defendant must, in all fairness, be afforded the benefit of that decision.

The decisions in Jackson and Grossman also demonstrate that the term fundamental error may, depending on the circumstances, refer either to an error that requires full retroactivity, or to one that allows only limited retroactivity.

* * * *

CONCLUSION

The trial court properly granted defendant a new trial since his original jury trial had been vitiated by the systematic exclusion of blacks from the venire. The Fourth District Court of Appeal erred in reversing the trial court's order and its decision stands in direct and express conflict with the decisions of this Honorable Court and of the district courts of appeal on the applicable issues of law. Therefore, this Court should quash the opinion of the Fourth District in the instant case and reinstate the decision and order of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing has been furnished by U.S.Mail to Assistant Attorney General Carol Coburn Asbury, 111 Georgia Ave., Suite 204, West Palm Beach, Florida 33401 on this 22nd day of March, 1991.

VIKTORIA L. GRES, ESQ.