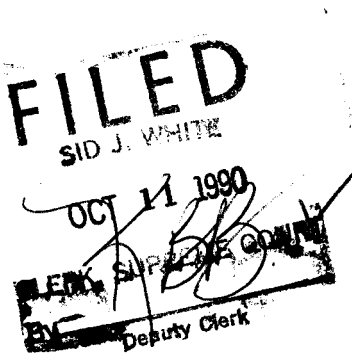
IN THE SUPREME COURT OF FLORIDA



MERVYN MORELAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76-752
4TH DCA NO. 89-02263

PETITIONER'S BRIEF ON JURISDICTION

VIKTORIA L. GRES
Florida Bar No. 0788473
1205 St. Lucie Blvd.
Stuart, FL 34996
(407) 697-0224

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner, Mervyn Moreland, was the defendant in the underlying criminal case, the petitoner in the post-conviction matter in the Criminal Divison of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, Florida, and the Appellee in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellant in the lower courts. The parties will be referred to, respectively, as the defendant and the State.

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

The symbol "Tr." will denote the original trial transcript.

Timely Notice of Discretionary Review was filed by Petitioner on September 27th, 1990.

STATEMENT OF THE CASE AND FACTS

On June 15, 1989, this Court ruled in Spencer v. State, 545 So.2d 1352 (Fla.1989), that the murder conviction and death sentence in that case must be reversed because the Palm Beach County jury district system unconstitutionally and systematically excluded a significant concentration of blacks from the jury pool for the West Palm Beach jury district. 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.

Defendant, Mervyn Moreland, by pre-trial motion timely challenged as unconstitutional the jury district system utilized in Palm Beach County to select the jury in his trial for first degree murder. Objection was made on Sixth and Fourteenth Amendement grounds, to the systematic exclusion of blacks from the West Palm Beach jury district where defendant was tried, 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 that 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 jurors is already scheduled for use in drawing both a grand jury and trial juries." R.312-13. The State opposed the motion. The trial judge, the Honorable Carl Harper 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. Judge Harper denied the motion stating that if the Supreme Court found the jury district system in question to be unconstitutional 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 circumstatial 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 curiam affirmance was issued on June 24, 1988, prior to the Supreme Court's decision in Spencer R.377.

The following year, the defendant was granted an evidentiary hearing under Florida Rule of Criminal Procedure 3.850 at which time defendant's trial counsel testified that the Jury Motion had been submitted in order to obtain a jury drawn from a pool representing a cross-section of the county. R.179. Counsel stated that the defendant would have been better served by a diverse jury than one drawn from the disproportionately white and affluent West Palm Beach jury district. Trial counsel's testimony was unrebutted.

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.

The Honorable Thomas E. Sholts, presiding at the hearing, indicated his reluctance to find fundamental error since "if it is fundamental 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. While noting that it was "debatable whether Spencer sets forth a new rule of law," Judge Scholts, fashioning a narrow decision limited to the facts of defendant's case, utilized the three prong test for retroactivity of new rules set forth in Witt v. State, 387 So.2d 922 (Fla.1980), and held that Spencer constituted a development of fundamental significance that required a retrial

of defendant's case since the venire issue had been raised at the trial and appellate levels.

The State appealed and on July 11, 1990, the Fourth District issued a per curiam opinion reversing the trial court. Holding that this Court's decision in Spencer was not a significant development, the Fourth District equated Spencer with the Supreme Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984), which altered the test for determining the discriminatory use of peremptory challenges and was held not to be retroactive.

Defendant filed a Motion for Rehearing on July 26, 1990, which was denied August 29, 1990.

SUMMARY OF ARGUMENT

The Fourth District held that, despite preseving 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, supra. See Appendix Exh. I.

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).

ARGUMENT

POINT I

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THAT OF OTHER DISTRICT COURTS OF APPEAL

The Fourth District's decision that the defendant is procedurally barred from raising the violations of his constitutional rights in post-conviction proceedings, despite having preserved them, expressly conflicts with this Court's decision in Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989).

Jackson held that even when retroactivity of a new rule of constitutional law had been expressly rejected in a prior decision, where a defendant has properly preserved the issue at trial and on appeal, the defendant is not procedurally barred from claiming post-conviction relief. Id. at 1199.

Additionally, the Fourth District's holding that this Court's 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.

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, 95 S.Ct 692 (1972); Peters v. Kiff, 92 S.Ct. 2163 (1972); Glasser v. United States, 315 U.S. 60 (1942); Strauder v. West Virginia,100 U.S.303 (1880).

The decision in Spencer cannot be equated with the Supreme Court decision in State v. Neil, supra, which set a new standard of review in the unsettled, at the time, and evolving area of law involving peremptory challenges. Only the latter case involved a new rule whose benefit may properly be denied in collateral proceedings. Witt, supra. And even in Neil, this Court, in 1984, recognized as an established rule of constitutional law that "distinctive groups cannot be systematically excluded from venires." Id.at 487. Defendant seeks only the benefit of this established rule. See Fla.R.Crim.P. 3.850(expressly allowing collateral relief for judgments in violation of constitutional law).

The Fourth District's decision also 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 to a defendant's right to trial by jury, Bass v. State, 368 So.ed 447,449 (Fla.1st DCA 1979); and that such fundamental error may be raised in post-conviction proceedings, 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 Fourth District's decision conflicts with decisions of this Court and other district courts of appeal on an issue of law having state wide significance. Fla. R.App.P. 9.030 (a) (iv).

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 grant defendant's petition for discretionary review and quash the opinion of the Fourth District in the instant case.

Respectfully submitted,

VIKTORIA L. GRES
Florida Bar No. 0788473
1205 St. Lucie Blvd.
Stuart, FL 34996
(407) 697-0224

Counsel for Petitioner

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 9th day of October, 1990

VIKTORIA L. GRES, ESQ.