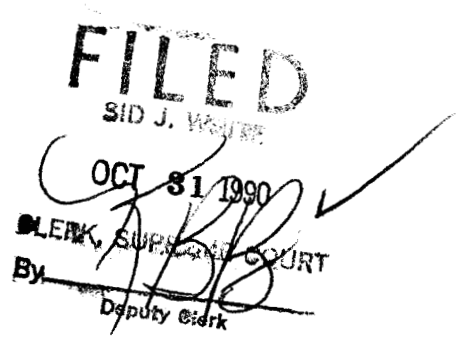
IN THE SUPREME COURT OF FLORIDA



CASE NO. 4TH DCA 89-2263

76-752

MERVYN MORELAND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Respondent adoopts Petitioner's preliminary statement and notes in addition that the symbol "A" will be used to denote Respondent's Appendix.

STATEMENT OF THE CASE AND FACTS

The Respondent does not accept the Statement of the Case and Facts as set forth in the Petitioner's Brief as they are not a recitation of the objective facts. State v. Overfelt, 457 So.2d 945, (Fla. 4th DCA 1983), quashed in part (on other grounds) and approved in part, State v. Overfelt, 457 So.2d 1385 (Fla. 1984).

The Petitioner was charged with Murder in the First Degree by indictment on January 14, 1987. (R 265). The Petitioner is a white male who allegedly made racial slurs and shot and killed Thomas Finkley, a black male, on December 21, 1986. The Petitioner filed a Motion for a County-wide Jury Panel on March 10, 1987. (R 293-313). The Motion for a County-Wide Jury was denied by the Honorable Carl Harper, Circuit Court Judge. (R 14). Jury selection in the Eastern District of Palm Beach County began on April 20, 1987. The Petitioner was found guilty of Murder in the First Degree by the jury on April 23, 1987. (R 331). The Petitioner was sentenced to life in prison with no parole for 25 years. (R 334-335).

An appeal from the conviction and sentence was taken to the Fourth District Court of Appeals. The denial of the Petitioner's Motion for a County-Wide Jury was specifically raised as an issue on appeal. (R 371). The Fourth District Court of Appeal per curium affirmed the conviction and sentence. The Mandate was received on June 27, 1988. (R 377-379).

The Petitioner filed a pro se Rule 3.850 Motion for Post Conviction Relief on February 3, 1989. (R 380-382). The State filed a response to Petitioner's Motion for Post Conviction Relief on March 7, 1989. (R 393-394). The Petitioner filed a Pro Se reply to State's Response on March 22, 1989. (R 395-396). Victoria Gres was appointed to represent the Petitioner on April 20, 1989. An "Addendum to Motion for Post Conviction Relief and Memorandum of Law in Support" was filed by the Petitioner on June 9, 1989. (R 397-411). An "Addendum to Issues II and III of the Defendant's Motion for Post Convcition Relief and Memorandum of Law in Support" was filed by the Petioner on June 22, 1989. An evidentiary hearing was held on all issues raised by the Petitioner on July 27-28, 1989 and August 4, 1989. (R 1-260).

The Honorable Thomas E. Sholts entered an Order Granting a New Trial on August 17, 1989. (R 414-415). The trial court found, in paragraph 5 of its order, that the Petitioner had "properly raised and preserved the issue of the unconstitutionality of the jury districts in Palm Beach

County." (R 414). In paragraph 6 of the court's order the trial court stated that because Spencer v. State, supra, was decided after the Petitioner's judgment and sentence became final, it is "...necessary for this Court to decide whether or not the Supreme Court's holding in Spencer should be applied retroactively." (R 415). The trial court went on to specifically find, as announced in Witt v. State, 387 So.2d 922 (Fla. 1980), 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 requiring a retrial of the Petitioner's case. (R 415). The trial court went on to state that all other issues raised were, therefore, rendered moot. (R 415).

The State filed an Appeal to the Fourth District Court of Appeal contesting the trial court's Order Granting a New Trial pursuant to Florida Rule of Criminal Procedure Rule 3.850, giving retroactive application to the Florida Supreme Court's decision in Spencer v. State, 545 So.2d 1352 (Fla. 1989). (R 414,415).

The Fourth District Court held that ".... the Spencer holding was, like Neil, a new or different standard for procedural fairness, Witt v. State, and, as the Supreme court did in Glenn, we rule in favor of decisional finality." Therefore, reversing the trial court's order granting a new trial to Petitioner.

Petitioner filed a Motion for Rehearing and Suggestion of Direct Conflict and/or Question of Great Public

Importance July 26, 1990. Both were denied on August 29, 1990. Petitioner then filed a Motion to Stay Mandate Pending Review on September 8, 1990, which has not been decided as of this date.

SUMMARY OF ARGUMENT

The decision of the Fourth District does not expressly and directly conflict with the decision in Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989); Bass v. State, 368 So.2d 447 (Fla. 1st DCA 1979); Jordan v. State, 293 So.2d 131 (Fla. 2nd 1974); Nova v. State, 439 So.2d 255 (Fla. 3rd DCA 1983); Spencer v. State, 545 So.2d 1352 (Fla. 1989).

The issue at bar is the retroactivity of the Spencer issue. None of the cases cited by Petitioner involved that issue, not even Spencer, supra. In fact, none of the cases cited by the Petitioner involve retroactivity except for Jackson, supra.

In Jackson this Court affirmed the retroacive application of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) involving victim impact evidence offered jury capital sentencing. Jackson is a totally unrelated issue as that at bar and can only be used to affirm the use of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L. Ed.2d 612 (1980) as the standard of review in determining the retroactive application of newly inacted standards.

Once a case has been fully adjudciated and has become final, relief will be granted pursuant to Fla.R.Crim.P., Rule 3.850, based on a change in the law only in those limited cases were there has been a fundamental and major constitutional law change which casts serious doubt on the veracity and integrity of the original trial proceeding. The decision in Spencer is no more fundamental or more major a constitutional law change than the decisions in State v. Neil, 457 So.2d 481 (Fla. 1984) or Allen v. Hardy, 106 S.Ct 2878 (1986), which were held not to warrant retroactive application.

The Fourth District Court's ruling that the Spencer decision should not be retroactively applied in collateral relief proceedings, under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), and does not conflict with any case cited by Petitioner and, therefore, the instant petition for review should be denied.

REASONS FOR DENYING THE WRIT

Petitioner seeks review through "conflict" jurisdiction pursuant to Article 5, Section (3)(b)(3), Florida Constitution (1988), and Rule 9.030(a)(2)(A)(iv), Florida Rules of Criminal Procedures. However, no expressed and direct conflict exists between the instant decision and any of the cases cited by the Petitioner.

Nova v. State, 439 So.2d 255 (Fla. 3rd DCA 1983) does not involve jury selection at all. In 1982, defendnat moved under Florida rule of Criminal Procedure 3.850 to vacate his first-degree murder conviction and sentence imposed thereon. The essence of his complaint was that he agreed to be tried by a jury composed of six instead of twelve persons in exchange for the State's agreement that his maximum punishment if convicted would be twenty years and that this agreement was dishonored when, upon his conviction he was sentenced to life with a minimum mandatory of 25 years. Thus, the issue is a waiver issue, not a jury selection issue. The factual and legal issues involved in Nova and this case cannot be compared.

Bass v. State, 368 So.2d 447 (Fla. 1st DCA, 1979) involves a direct appeal and not a 3.850. In Bass in order to get additional jurors when the selected jury pool ran out the court called upon the white churches and the court clerk's all white acquaintances. Again this case does not involve the retroactive application of a subsequent change in the law. Nor are the facts of the case similar.

Jordan v. State, 293 So.2d 131 (Fla. 2nd DCA, 1974) involved the ability of the Jury Commissioners to choose which precincts from which it would choose the jury pool. Thus, the Jury Commissioners could choose all white precincts from which to draw the names for the master jury list. This violated the Fifth and Fourteenth Amendments, the Sixth Amendment to the U.S. Constitution guarantees of an impartial jury drawn from a fari cross-section of the community. This case did not rule on the retroactivity of a change in constitutional law as this was a direct appeal and not a motion for post-conviction relief. Again this case does not reach the issue upon which the Fourth District Court of Appeal ruled. The factual and legal issues are totally separate.

Likewise, this Court's decision in Spencer, supra., which is also a direct appeal and not a 3.850, did not rule on the retroactive application of the Spencer decision.

Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989) does not even involve the jury selection process. Therefore, the Fourth District Court of Appeal's decision cannot be in conflict with a decision that does not even involve the same issue.

Moreover, Spencer involved an Administrative Order creating two special districts from which jurors were selected. This Court ruled that the use of special districting process to select jurors resulted in the unconstitutional systematic exclusion of a significant

portion of the black population from the jury pool for the district from which jury for black defendant's trial was drawn. Since Spencer decision was directed solely to this Administrative Order which applied to West Palm Beach County only then this decision of the Fourth District Court cannot conflict with any other district court decision since no other district court could or has ruled on this issue. Nor are there any other counties in Florida with a similar Administrativ Order which has been ruled unconstitutional.

However, the similarity between State v. Neil, and the instant case are startling as each involve the systematic exclusion of black on the jury panel. If Neil's new test to prevent the intentional exclusion of black jurors is not such a change in the law as to warrant retroactive application or to warrant relief in collateral proceedings, then the decision in Spencer, implementing but one additional method to achieve the very same end, does not warrant retroactive application or relief in collateral proceedings either.

Therefore, the cases cited by Petitioner are not in express and direct conflict. Petitoner has improperly sought to invoke jurisdiction in this case. This Honorable Court should refuse to accept jurisdiction in this case.

CONCLUSION

Respondent requests that this Court recognize that there is no conflict in the instant case and deny Petitioner's request for jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/courier to VIKTORIA L. GRES, 1205 St. Lucie Boulevard, Stuart, Florida, 34996 this 29th day of October, 1990.

Of Counsel