IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,752

MERVYN MORELAND,

Appellee/Petitioner,

vs.

STATE OF FLORIDA,

Appellant/Respondent.

****

MERITS BRIEF OF RESPONDENT

****

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Bureau Chief
Senior Assistant Attorney General

ALLEN GEESEY
Special Assistant Attorney General

CAROL COBOURN ASBURY
Assistant Attorney General
Florida Bar No. #393665
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Mervyn Moreland was the defendant in the trial court and is the Petitioner before this Court, therefore, he will be referred to herein as "Petitioner". The State of Florida was the prosecution in the trial court and is the Respondent before this Court, and therefore, will be referred to as the "Respondent" or "State", herein.

Respondent was the prosecution and Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit Court, in and for Palm Beach County, Florida, the Honorable Thomas E. Sholts, Circuit Judge, presiding.

The following symbols will be used.

"R"	Record on Appeal
"AB"	Defendant's 3.850 Appeal Brief
"Pet"	Petitioner's Merits Brief

STATEMENT OF THE CASE AND FACTS

This is an appeal by the Petitioner from the Fourth District Court's order reversing the trial court's order granting the Petitioner a new trial on his motion for post conviction relief, which gave retroactive application to the Florida Supreme Court's decision in Spencer v. State, 545 So.2d 1352 (Fla. 1989). The Fourth District Court declined to apply Spencer retroactively stating that Spencer merely represented a new or different standard for procedural fairness.

The Petitioner was charged with Murder in the First Degree by indictment on January 14, 1987. (R 265-266). 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 parol 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 on the same grounds as Spencer did. (R 371). The

Fourth District Court of Appeal per curiam affirmed the conviction and sentence. The Mandate was received on June 27, 1988. (R 337-379).

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). Viktoria 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 Petitioner's Motion for Post Conviction Relief and Memorandum of Law in Support" was filed by the Petitioner on June 15, 1989. An "Amendment to Motion for Post Conviction Relief and Memorandum of Law in Support" was filed by the Petitioner on June 22, 1989. An evidentiary hearing was held on all issues raised by the Petitioner on July 27, 1989, July 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 defendant'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 defendant's case. (R 415). The trial court went on to state that all other issues raised were therefore rendered moot. (R 415).

The State timely filed its Notice of Appeal. Briefs were filed and oral arguments were heard. The Fourth District Court of Appeals held that the Spencer decision merely set for the a new test, abandoning a previously used test, for the determination of procedural fairness.

Respondent does not accept the Petitioner's statement of the underlying facts as they are argumentative, selective, incomplete, and a distortion of the facts proved at trial, as well as not being presented in the light most favorable to the State. In addition the facts of the case are irrelevant to the issue presented before this Court.

SUMMARY OF THE ARGUMENT

The Petitioner was found guilty of First Degree Murder by the jury and sentenced to life in prison with no parole for 25 years. The mandate affirming the conviction was received June 27, 1988. No further appeal was taken. Therefore the Petitioner's judgment and sentence became final on June 27, 1988 prior to the Supreme Court issuing its opinion in Spencer v. State, 545 So.2d 1352 (Fla. 1989), on June 15, 1989.

Once a case has been fully adjudicated 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 where 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 Spencer decision should not be applied retroactively to collateral relief proceedings where the judgment and sentence have become final.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN REFUSING TO GIVE RETROACTIVE APPLICATION OF TO THE FLORIDA SUPREME COURT'S DECISION IN SPENCER V. STATE IN A CASE THAT WAS FULLY ADJUDICATED AND WHERE THE CONVICTION HAD BECOME FINAL

Petitioner argues that the Fourth District Court erroneously reversed the trial court's ruling granting him a new trial based on this Court's decision in Spencer v. State, 545 So.2d 1352 (Fla. 1989). Petitioner claims that this Court's decision in Spencer did not set forth a "new constitutional doctrine" nor did it address rights not recognized at the time of conviction. (Pet. 15,16). According to Petitioner, Spencer involves the well settled principal upholding a defendant's right to a representative venire as guaranteed by the Sixth Amendment. Consequently, Petitioner argues, he is permitted to rely on Spencer in collateral proceedings since he is doing nothing more than relying on "principles that were well settled at the time of conviction." Yates v. Aiken, 484 U.S. 211, 216, 98 L.Ed.2d 546, 553 (1988). (Pet. 19).

Interestingly, the Petitioner has shifted his argument away from what he argued in his Fourth District Court Brief. In the brief to the Fourth District Court the Petitioner states as grounds for affirming the trial court's granting of a new trial as follows:

> The decision in Spencer was presented to the court below as

> representing both a major change in law and as supporting a finding of fundamental error in a case where it is undisputed that defendant was denied his right to a jury drawn from a representative cross-section of the community. (R 205,18,14). Fla.R.Crim.P. Rule 3.850 allows for relief on both grounds ... Consequently the decision in Spencer readily lent itself to analysis under the criteria set for in the Florida Supreme Court decision in Witt v. State, 387 So.2d 922 (Fla. 1980), the trial court applied the standards therein to the facts of the present case and concluded that the defendant should be accorded a new trial.

(AB 14). The Petitioner not only argued the applicability of Witt to this new decisional law but that it represents a "development of fundamental significance." Thus, permitting a review on a Motion for Post-Conviction Relief. Petitioner now abandons the argument that Witt applies stating that Spencer does not involve new issues of law. (Pet. 15). Petitioner now argues that Spencer and this case involves issues well settled at the time of conviction. That is the right of a defendant to a jury venire chosen from a representative cross-section of the county population. (Pet. 19). This is a different argument as the one presented below, as well as the one presented on direct appeal.

The Fourth District Court of Appeals agrees with Petitioner that the Spencer decision did not involve new decisional law. However, the Fourth District Court of Appeals disagreed with the fundamental significance of Spencer. According to the Fourth District Court the Spencer decision was merely an evolutionary

refinement in the law which set forth a new test or standard for procedural fairness. Respondent, of course, agrees with the Fourth District Court of Appeals.

The issue is one of finality. The importance of finality in a criminal justice system can not be overstated. Because of the unavoidable delay in deciding cases and the frequency of Florida law changes, finality would be illusory if each convicted defendant is allowed the right to relitigate his first trial upon any subsequent change in the law relating to his case. The Florida Supreme Court has therefore declared its adherence to a limited role for post-conviction relief proceedings under Rule 3.850 as an avenue to challenge a once final judgment and sentence based upon a changed in decisional law rendered subsequent to final appeal. Witt v. State, 387 So.2d 922, 925, and 927 (Fla. 1980).

The main purpose for Rule 3.850 is to provide a method of reviewing a conviction based upon a major constitutional change in the law which constitutes a development of fundamental significance, or where unfairness is so fundamental in either process or substance that the doctrine of finality has to be set aside. Witt, supra, at 927; State v. Glenn, 558 So.2d 4, 6 (Fla. 1990). The Florida Supreme Court has stated that it has rejected the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections in the absence of fundamental constitutional law changes which "cast serious doubt on the veracity or

integrity of the original trial proceedings" id., 929. The Florida Supreme Court emphasized that only major constitutional changes of law will be cognizable under Rule 3.850.

Not every change in decisional law requires retroactive application. As this Court noted in Glenn, quoting Witt, 558 So.2d at 6.

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent right in these categories, or the retraction of former rights of his genre do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

This Court need not decide whether its decision in Spencer is a major constitutional change in decisional law or merely an evolutionary refinement since the Petitioner now concedes that Spencer does not represent a major change in constitutional law. In fact, Petitioner agrees with the Fourth District Court that Spencer does not involve a change in the law at all. Petitioner rather concedes that the principal he relies on is the well settled Sixth Amendment guarantee of a fair cross-section venire requirement to petit juries.

Rule 3.850 "does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." If the principal relied upon by the Petitioner in his direct appeal really was the Sixth Amendment right to a fair cross-section of the county's population then the proper procedure after the receiving the Fourth District Court's ruling on direct appeal affirming Petitioner's conviction and sentence was an appeal to the Supreme Court of Florida based on the federal constitutional claim. Spencer neither changes this paramount right nor did it address that issue. However, collateral review is an improper procedural tool to address a well established principal such as the one Petitioner now sets forth in his brief.

Petitioner relies on the United State's Supreme Court's decision in Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) to support its contention that this matter can be heard on collateral appeal. However, the Supreme Court in Yates did not address the retroactively question since the principal of law relied on existed prior to the defendant's trial and South Carolina's Supreme Court did not place any limit on the issues that it will entertain in collateral proceedings. The Supreme Court stated that since the South Carolina Supreme Court did address the merits of the federal claim in the collateral proceedings than it had a duty to grant the relief that the federal law requires. Yates, 484 U.S. at 271. Sub judice,

Florida does place limits on the issues that it will entertain in collateral proceedings and issues that are well settled principals of law at the time the defendant's trial took place is not to be considered on motions for post-conviction relief. Moreover, this issue was never addressed in these terms either on direct appeal or in the motion for post-conviction relief. The only issue addressed was the denial of Petitioner's motion for County-Wide jury panel, alleging, as did Spencer, that the jury districts failed to preserved the population mix of the county as a whole. Had the Petitioner appealed the Fourth District Court's affirmance of Petitioner's conviction and sentence to the Supreme Court of Florida this Court probably would have accepted jurisdiction since it had already accepted jurisdiction in Spencer.

The Petitioner skirts around this issue by attempting to have this Court's decision in Spencer retroactively applied. The issue in Spencer did not involve the right of a defendant to a jury selected from a representative cross-section of the community but rather the implementation of Section 40.015, Florida Statute (1987) through Palm Beach County's Administrative Order No. 1.006-1/80, "In Re: Glades Jury District-Eastern Jury District." This Court in Spencer states that procedural fairness is not accomplished by a strict division of the county into east/west jury districts, thereby, excluding a significant concentration of the black rural population of Palm Beach County. However, procedural fairness is met when a jury district contains

the same population mix of blacks as does the county as a whole. Thus, Spencer does not change the law, but rather interprets statutory provisions providing a guideline for creating such jury districts where none previously existed.

The statute only requires that the jury districting seek to avoid any exclusion of any cognizable group. The two districts created in Palm Beach County were created by drawing a straight line more or less arbitrarily dividing the county in two. In this manner the authorities sought to avoid any exclusion of any cognizable group, reduce the substantial travel time for jurors and alleviate unnecessary expense to the State. This Court noted that the effect of the Administrative Order was to exclude a significant concentration of the black rural population of Palm Beach County, specifically the approximate 5,000 registered black voters in the more rural western district were not subject to jury duty in the urban eastern district. Spencer, Note bottom of page 1355. Under Spencer a racially neutral motive for creating jury districts is not enough. The jury district must reflect the same population mix as the whole county.

This court specifically notes Judge Cohen's decision in State v. Alix Joseph, No. 87-619 CF A02 (Fla. 15 Cir.Ct. March 27, 1987) wherein Judge Cohen noted that:

> ....Therefore, if a system is designed to draw a fair cross representation of the county, it should draw jury pools containing approximately 7½ percent blacks and 92½ percent non-blacks. Notwithstanding this, in the Glades District, when

> jurors are drawn only from within that district, the "jury district" system is designed to draw from a voter registration list is 52.08 percent black and 47.92 percent non-black.

Judge Cohen then quoted Jordan v. State, 293 So.2d 131 (2nd DCA 1974):

> Apart from the due process and equal protection guarantees for the Fifth and Fourteenth Amendments, the Sixth Amendment to the U.S. Constitution guarantees the accused a trial by an impartial jury. This comprehends that in the selection process there will be a fair possibility for obtaining a representative cross section of the community. Williams v. Florida, 399 U.S. 78, 100 ... Where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drawn from a fair cross section of the community requires that the jury be drawn from the whole county and not from some political sub-units thereof to the exclusion of others. Preston v. Mandeville, 479 F.2d 127 (5th Cir. 1973). **A white defendant who was charged with a crime allegedly perpetrated against a black could be similarly aggrieved if the jury list from which his venire were drawn came only from those precincts having a disproportionately high number of blacks**. Jordan v. State, supra, 134. (emphasis added)

It seems that Judge Cohen was more concerned about Glades District than he was in the eastern district since he specifically mentions not only the 52.08 percent of Blacks in the western district but that in Jordan the Court noted that a white defendant could be prejudiced to the same degree as a black defendant if his venire were drawn from precincts having a

disproportionately high number of blacks as the Glades Jury District did. Judge Cohen suggested that:

> ...it would not be impossible to divide Palm Beach County into an eastern and western district and still preserve the integrity of each district by preventing racial discrimination. For example, the boundary line between the present Glades District and present Eastern District could be moved east from Twenty Mile Bend to the Florida Turnpike, for example, adding communities such as Royal Palm Beach, Loxahatchee, Wellington, Breakers West, etc. to a Western District....

(See Judge Cohen's Order attached hereto for the convenience of the Court and which was attached to Petitioner's direct appeal initial brief, as it was attached to Spencer's initial brief before this Court.)

Interestingly, this division would have kept the same 4,947 registered black voters in the western district from serving on a jury in the eastern district and, therefore, Spencer would still not have the benefit of those black voters. Nevertheless, such a division would have diluted the percentage of black voters available for jury duty in the western district as well as adding more affluent urban white voters to the jury pool in the western district. The net result would have been a percentage of black voters in this newly created western district more like the percentage of black voters in the county as a whole and also to maintain a population mix between rural and urban voters more like that found in the county as a whole. The newly created eastern district would probable have the same number of black

voters but less white voters, therefore, the percentage of black voters to white voters would increase. In taking judicial notice of Judge Cohen's order this Court must have agreed with the suggested cure cited in the order itself. This contention is supported by this Court's finding that Section 40.015 is constitutional.

The issue in Spencer was whether Spencer was entitled to have the clerk draw the jury pool from the county at large. This court held that Spencer was entitled to have a jury selected from the entire county. Many cases over the past ten years have been tried utilizing jurys selection based on the division of Palm Beach County into jury districts. In determining the issue of the jury districts the trial courts had looked to the intent behind the division creating the jury districts not whether the jury district included the same population mix between rural and urban and/or the same percentage of black voters as the county as a whole. The Spencer decision changed the standard to be used for determining procedural fairness in drafting jury districts in Florida. It represents the type of evolutionary refinement found in State v. Neil, 457 So.2d 481 (Fla. 1984) and Allen v. Hardy, 106 S.Ct. 2878 (1986).

The United States Supreme Court states that a decision announcing a new standard "is almost automatically non-retroactive" where the decision "has explicitly overruled past precedent." Allen, at 2880. In this instant case the decision in Spencer has overruled past precedent. Evidence the many years

Palm Beach County has been divided into jury districts, the statutory authorization for jury districts, and the Fourth District Court of Appeal's affirmance of the defendant's conviction. The fact that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity. Allen, at 2880. A new standard weighs in favor of retroactivity where the standard "goes to the heart of the truth finding function" Id. at 2880. The present case is not a fundamental and constitutional law change which casts serious doubts on the veracity or integrity of the original trial proceedings. There is no evidence that rural black jurors (the jury veniremen allegedly excluded via the jury districting disapproved in Spencer) are more acquittal prone than affluent white jurors. Or for that matter that rural jurors are more acquittal prone than urban jurors. This is especially true under the facts of the instant case where Mr. Moreland, a white defendant, made racial slurs before committing the homicide of his black victim. Moreover, not all invasions of constitutional rights are fundamental errors. Nova v. State, 439 So.2d 255, 262 (Fla. 3rd DCA 1983). Although this Court found in Spencer "an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool for the West Palm Beach district", a difference of 1.1 percent between the eastern district's 6.4% black voters as opposed to the 7.5% of black voters in the whole county does not constitute fundamental error as contemplated by the United States federal case law which

addressed laws patently excluding blacks from jury duty or other recognizable groups from jury duty. Spencer at 1354.

The U.S. Supreme Court has never held that the Sixth Amendment is violated when a larger jury district is divided into smaller jury districts where the smaller jury districts do not reflect the exact same percentage make-up of blacks (or how about women, Hispanics, elderly, etc.) as the large jury district or where the urban/rural population mix has not been maintained even though there was no conscious intent to racially discriminate. A defendant is not entitled to a perfect cross section of the community, but to a "fair" cross section. Some deviation is inevitable. Assessing the fairness of a group's representation requires a comparison between the percentage of the "distinctive group" on the qualified jury wheel and the percentage of the group among the population eligible for jury service in the division. The Eleventh Circuit has consistently held that a prima facia case of under representation has not been made where the absolute disparity between these percentages does not exceed ten (10%) percent. U.S. v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985); U.S. v. Maskeny, 609 F.2d 183, 190 (11th Cir. 1980). Consequently, the disparity of 1.19% between the proportion of blacks eligible for jury service in the whole county (7.5%) versus the eastern jury district (6.49%) is not constitutionally significant to warrant retroactivity.

In Allen the prosecutor used nine of the State's 17 peremptory challenges to strike seven black and two Hispanic

veniremen. The defense counsel moved to discharge the jury on the ground that the State was using peremptory challenges to undercut the defendant's right to an impartial jury selected from a cross-section of the community by systematically excluding minorities from the petit jury. Nevertheless, the Supreme Court held in Allen that the Batson v. Kentucky, 476 U.S. 79 (1986) only announced a new evidentiary standard which would not be applied retroactively on collateral review of convictions that had reached finality before Batson was announced. Although the jury was not made up of minorities for which the defendant in Allen would have desired the Supreme Court in Allen held, "Accordingly, we cannot say the new rule has such a fundamental impact on the integrity of fact finding as to compel retroactive application." Allen, at 2881.

The principle is equally true in the instant case. The Spencer decision has the same impact on the truthfinding function of the jury as did the decision in Allen. Similarly, the decision in Spencer serves other values as well, the same values as the rule announced in Batson: to ensure that the State does not discriminate (unintentionally as was found in Spencer) against citizens who are summoned to sit on a jury, and to strengthen public confidence in the administration of justice. The same concerns were addressed and resolved in a like manner in State v. Neil, 457 So.2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising peremptory challenges.

The effect of retroactive application upon the administration of justice is so great that this Court has rarely found that a change in decisional law requires retroactive application. Glenn, 558 So.2d at 7. Sub judice, the State justifiably relied upon the special districting process authorized by Section 40.015, Florida Statutes (1985), as implemented in the Fifteenth Judicial Circuit by Administrative Order No. 1.006-1/80, entitled "In re: Glades Jury District--Eastern Jury District". The purpose was a properly motivated attempt to reduce substantial travel time for jurors, and to alleviate unnecessary expense to the State Treasury. Any resulting discrimination was unintentional. Spencer, at 1354. Numerous trial were held in the Eastern District of Palm Beach County over the last ten years in reliance upon the aforementioned statute and administrative order. Many final convictions would, therefore, be subject to being vacated if the decision in Spencer is applied retroactively. Resulting trials will necessarily be hampered by the obvious problems of lost evidence, faulty memory and missing witnesses. These factors must also be weighted heavily against any retroactive application. The decision in Spencer should not be applied retroactively to any fully adjudicated case where the conviction has become final. This Court, as did the Fourth District Court of Appeal, should decide in favor of the strong policy interest of decisional finality. Granting collateral relief to Moreland and others similarly situated would have a strong impact upon the administration of justice.

The instant case was not in the "pipeline" as that term is discussed in State v. Safford, 484 So.2d 1244 (Fla. 1986), but is a final judgment, wherein the original trial and appellate processes were completed before Spencer became effective.

Petitioner request that this Court could apply Spencer to a limited number of cases where the defendant preserved the Spencer claim in pre-trial motions. However, should this Court determine this issue based on the larger independent federal constitutional claim as the Petitioner now wants, and is being presented to this Court for the first time, but which was not addressed in the Spencer decision, this Court would be opening the doors to a flood-gate of litigation precisely for the reasons stated in Petitioner's brief. (Pet. 31-33). The failure to comply with due process as federally mandated, a matter which could of and should have been brought up on direct appeal, effects all the defendants similarly situated, not just those who objected.

To decide in such a manner would be a much larger issue simply not addressed in Spencer, nor addressed in any of the Petitioner's pre-trial motions or direct appeal. The issue addressed in Spencer was the right to have a jury pool drawn from the whole county or from the eastern jury district created by administrative order as permitted under the constitutionally enacted statute. As the District Court held, "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." This Court should do no more or less.

Respondent respectfully submits that this Court does not have jurisdiction to rule on this matter. Petitioner requested that this Court accept jurisdiction based on either direct conflict and/or question of great public importance. This Court can only accept jurisdiction based on a question of great public importance if the question was certified, and only if the question was certified, by the Fourth District Court of Appeal. The Fourth District Court of Appeal specifically and expressly declined to certify the question. Therefore, this Court can only accept jurisdiction if the Fourth District Court's opinion directly and expressly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the **same question of law**. Fla.R.Crim.P., Rule 9.030(2). Since no District Court or the Supreme Court has ever ruled on the retroactivity of Spencer there is not conflict jurisdiction. None of the cases cited by Petitioner involved **the same question of law** presented to this Court. This Honorable Court should refuse to accept jurisdiction in this case.

CONCLUSION

The Fourth District Court of Appeal did not err by refusing to give retroactive application to the Florida Supreme Court's decision in Spencer v. State and in reversing the trial court's granting of collateral relief in a case where judgment was final and the original trial and direct appellate process was completed before Spencer was decided. Respondent would request that this Court affirm the Fourth District Court's ruling and deny jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CAROL COBOURN ASBURY
Assistant Attorney General
Florida Bar No. 393665
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

ALLEN R. GEESEY
Special Assistant Attorney General

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: **VIKTORIA L. GRES, ESQUIRE**, Attorney for Petitioner, 1205 St. Lucie Blvd., Stuart, Florida 34996 this 12th day of April, 1991.

Of Counsel

/mmc