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IN THE SUPREME COURT OF FLORIDA

MERVYN MORELAND )  
Appellant-Petitioner )  
vs. )  
STATE OF FLORIDA, )  
Appellee-Respondent. )

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

REPLY BRIEF OF APPELLANT

✓  
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PRELIMINARY STATEMENT

Appellant-Petitioner is referred to as the defendant,  
and the Appellee-Respondent is referred to as the State.

The following symbols will be used:

- "R."        Record on appeal.
- "Tr."       Original trial transcript.
- "P.Br."     Initial Brief of Appellant-Petitioner.
- "R.Br."     Answer Brief of Appellee-Respondent.
- "App."      Appendix to Appellant's Reply Brief.

ADDITIONAL STATEMENT OF THE CASE AND FACTS

The State now maintains that the underlying facts are indeed irrelevant. R.Br. 4. Thus, it appears to concede that harmless error is not an appropriate analysis in a case, as the one at bar, that raises Sixth and Fourteenth Amendment challenges to the systematic exclusion of blacks from the venire. See. e.g., Peters v. Kiff, 407 U.S.493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). The defendant has consistently argued precisely this point. R. 303; App. 5,23; P.Br. 8,33.

Nevertheless, the State continues to refer to "racial slurs" allegedly uttered by the defendant. The allegations comprise certain objectionable and patently untrustworthy hearsay. R. 388-89. They were made by State's key witness, Timothy King, a convicted felon with an extensive criminal history including crimes of dishonesty. Tr. 399-400. During the post conviction evidentiary hearing below, the State, in a rather unusual move, called a police detective to testify and impeach King's credibility and rebut his statement that he was threatened and coerced into changing his story so as to implicate the defendant and thus preclude being charged with the murder himself. R. 184-196.

As was stated in defendant's Motion to strike, regarding the Respondent's Brief on Jurisdiction, the State did not present the case to the jury as one involving a racially motivated killing. Rather, the State, in a case

based entirely on circumstantial evidence, maintained that the victim died as the result of a love triangle that turned violent. Tr. 740-41, 790-96.

Since the State now apparently agrees that the underlying facts are irrelevant, such highly selective references serve no useful purpose and unfairly attempt to smear a sick old man who stubbornly maintains his innocence.

## SUMMARY OF THE ARGUMENT

The State appears to concede or to fail to address the dispositive issues on appeal. It argues erroneous appellate procedure and incorrectly alleges that defendant raises numerous new issues on appeal.

Throughout the case, the defendant argued that his Sixth and Fourteenth Amendment rights to a jury drawn from a fair cross section of the community were violated. The defendant has consistently raised the equal protection, due process and other bases in support of the right to a representative venire and to the new trial mandated by the trial court.

Because the Fourth District's decision reversing the new trial afforded defendant conflicts with the decisions of this court and those of other district courts, that decision must be quashed and the trial court's order reinstated.

## ARGUMENT

### POINT I

THE STATE'S CONCESSION OF REVERSIBLE ERROR IN DEFENDANT HAVING BEEN DENIED HIS CONSTITUTIONAL RIGHTS TO A JURY DRAWN FROM A FAIR CROSS SECTION OF THE COMMUNITY AND THE FAILURE TO RAISE A SINGLE COGNIZABLE LEGAL BASIS TO SUPPORT PROCEDURALLY BARRING DEFENDANT FROM THE RELIEF PROVIDED BY LAW, REQUIRES REVERSAL OF THE FOURTH DISTRICT COURT OF APPEAL'S DECISION AND RE-INSTATEMENT OF THE TRIAL COURT'S ORDER MANDATING A NEW TRIAL.

The right of an accused to trial by jury is one of the most fundamental rights guaranteed by our system of government, and is the cornerstone of a fair and impartial trial, and any infringement of that right constitutes fundamental error. Nova v. State, 439 So.2d. 255, 262 (Fla. 3rd DCA 1983).

The State concedes the point and argues that defendant should have continued the direct appeal of his case to this Court following the Fourth District's affirmance. R.Br. 9-11. The State suggests:

The proper procedure after the receiving (sic) 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.

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.

R.Br. 10,11. After recognizing that defendant's Sixth



and Fourteenth Amendment rights to a jury drawn from a fair cross section of the community were violated, the State offers two arguments in support of affirming this violation. First, that, despite the conceded and properly preserved constitutional error, defendant is somehow procedurally barred from being granted relief. Second, the State attempts to maintain, in the face of formidable case law to the contrary, that the constitutional error is too insignificant to warrant relief on collateral review. The State is wrong on both points; it also errs on the applicable appellate procedure.

In the first instance, this Court did not "grant" jurisdiction in Spencer v. State, 545 So.2d 1352 (Fla. 1989). It had appellate, as opposed to discretionary, jurisdiction since Spencer was a death penalty case. Discretionary jurisdiction, the only kind applicable to defendant's non-death penalty case requires an express conflict in order to even be considered for review by this Court.

When a notice of seeking discretionary review is filed, the clerk's office will determine whether a district court of appeal has written an opinion in the case. If there is no opinion, the case is automatically dismissed.

Fla. R.App.P. 9.030 (2)(B)(iv). The Supreme Court of Florida Manual of Internal Operating Procedures, Section II A.1; Fla. R.App.P. 9.210 1980 Committee Note (DCA decisions without opinion not reviewable). The decision in defendant's direct appeal was a per curiam affirmance without opinion. The defendant could not seek further review, nor was he, an

indigent, appointed counsel to even make the attempt.

Of course, a defendant deprived of an appeal due to either counsel's failure to file a timely notice, or the State's failure to provide counsel, is entitled to belated appellate review. State v. Meyer, 430 So. 2d 440 (Fla. 1970). This Court, by its own rules, is free to treat the matter before it as a belated appeal:

Where a party seeking Supreme Court Review has filed an appeal, a petition for discretionary review, a petition for habeas corpus, or other pleading which the Court considers to have merit, but the pleading incorrectly sets forth the legal ground for relief, the Court will treat the case as if the proper legal remedy had been sought.

The Supreme Court of Florida Manual of Internal Operating Procedures, Section II H (emphasis added). However, the argument is framed, to deny the defendant the relief to which he is constitutionally entitled is to impermissibly elevate form over substance.

The State's argument in support of further direct appellate review, particularly its express concession that this Court would grant relief on direct review, completely undermines the State's subsequent attempt to radically distinguish the present case from Spencer, stating that Spencer "did not involve the right of a defendant to a jury selected from a representative cross-section of the community." R.Br.11. The cross section is simply another way of stating, as this Court did in Spencer, that an "unconstitutional systematic exclusion of a significant portion of the black population

from the jury pool for the West Palm Beach district" vitiates the defendant's conviction. Spencer, 545 So.2d at 1355. Moreover, the same law firm, of Nelson Bailey, Esq., represented both Spencer and Moreland, submitted virtually the same motion for relief in both cases, and argued the cross sectional constitutional requirement issue before this Court in Spencer. Brief of Appellant Leonard Spencer at 31-39.

The State's argument that defendant is procedurally barred is also unprecedented in that it attempts to foist on defendant's shoulders the errors committed by the State, which means in this case the District Court below, and concludes that, therefore, defendant has forfeited, in the State's own words, "the well settled Sixth Amendment guarantee of a fair cross-section venire requirement." R.Br.9. Procedural bars usually take effect only after the party seeking relief has somehow failed to preserve or pursue its rights. Defendant has properly preserved all the relevant issues and cannot be denied the relief expressly provided for in Fla.R.Crim.P. 3.850. It is well established that fundamental error may be raised even for the first time in a Rule 3.850 motion. Nova v. State, 439 So.2d at 261. Even when the error is not so fundamental it may be raised in a Rule 3.850 motion if it had been preserved below. Jackson v. Dugger, 547 So.2d 1197, 1199 (Fla. 1189).

The State's assertion that the present case does not involve fundamental error is completely unsupported by the case law. See, e.g., Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.690 (1975) (cross section requirement

is "fundamental"). The State maintains that the cross section requirement is unrelated to the integrity of trial proceedings, R.Br.16, yet the United States Supreme Court held, without qualification, that:

Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process.

Peters v. Kiff, 407, U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). More recently, the principles articulated in Peters were reaffirmed, by a rather differently constituted Supreme Court, in Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

With respect to the State's analysis of the case allegedly pursuant to Witt, it should be observed that the State submitted no evidence to the trial court of a "floodgate of litigation." Common sense dictates that most defendants have long since served their sentences. Additionally, as was made clear in defendant's Initial Brief, defendants were regularly granted countywide juries despite the districting system. P.Br.5. The Witt analysis is otherwise fully addressed in the Initial Brief, in Point I c., as is the inapplicability of peremptory challenge rulings to cases raising the fair cross section venire requirement. P.Br.21-25.

While not asking the Court to overturn Spencer, the State, nevertheless, attempts to reargue much of the case. The 10% discrepancy that the State cites as being acceptable in U.S. v. Rodriguez, 776 F.2d 1509 (11th Cir. 1985), is inapplicable to Spencer or the instant case as explained in Berryhill v.

Zant, 858 F.2d 633 (11th Cir. 1988). First, unlike the case Berryhill, Spencer, and the present one, the defendant in Rodriguez did not allege a discrepancy between the venire and the voter registration lists. Rather, the defendant alleged that the voting lists underrepresented minority groups in the underlying population. These numbers are presumably considerably harder to assess and update for use in drawing up jury pools than voter registration lists. Second, the Eleventh Circuit explained in Berryhill, at 636-37, that a given discrepancy becomes irrelevant once the defendant demonstrates the unreasonableness of the discrepancy with respect to the ease with which it could be eliminated. The 10% figure entitles defendants to a presumption of unreasonableness if they are otherwise unable to establish it.

This Court effectively held in Spencer, and the defendant herein has consistently argued, that an arbitrary division of Palm Beach County into two districts for the convenience of jurors without regard to preserving the fair cross section requirement is unreasonable, particularly given the ease with which representative districts could be set up.

POINT II

THE STATE BY ITS SILENCE MUST BE  
SEEN AS ALSO CONCEDED THE EQUAL  
PROTECTION ISSUE RAISED BY THE  
DEFENDANT.

This Court held in Spencer, 545 So.2d 1355, that the Palm Beach County jury districting system was also unconstitutional on independent equal protection grounds in that it set up two jury districts, one 52% black, and the other 93% white, and provided only those defendants who committed crimes in the western district a choice of which district to be tried in.

Thus, just as the defendant Spencer, whose crime like the present defendant's, was committed in the eastern district, was found to have had his equal protection rights violated, thus requiring a new trial on this ground alone, so too must the defendant herein be granted a new trial. The State's failure to even address this issue must be seen as a concession on this point.

The fact that the District Court below did not address defendant's equal protection claims does not prevent this Court from doing so since it is presented with issues of law only, and affirmance "on other grounds" is a well established appellate practice. See, e.g., Arizona v. Fulminante, 5 FLW Fed. S149, (United States Supreme Court Case No. 89-839, decided in March 1991).

POINT III

THE ISSUES AND ARGUMENTS PRESENTED  
ON THIS APPEAL ARE IDENTICAL TO THOSE  
PRESENTED TO THE COURTS BELOW.

The State, in its brief, selectively quotes a few passages from defendant's brief in the Fourth District, and alleges:

Petitioner (the defendant) 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. ...This is a different argument as the one presented below, as well as the one presented on direct appeal.

R.Br.7. Elsewhere, the State maintains that essentially all the issues in defendant's brief were not raised below. R.Br. 20. This is inaccurate and misleading. It is patently false. Since this Court does not have the benefit of defendant's brief to the Fourth District, a copy is provided in the Appendix to Appellant's Reply Brief.

Defendant expressly argued:

A close reading of the case (Witt) indicates that the Court was primarily concerned with entirely new constitutional doctrines and the circumstances in which defendants "might have belatedly acquired rights which were not recognized at the time of conviction." Witt, 387 So.2d at 922 fn 13.

...  
Treating the decision in Spencer as articulating a new rule -- that the jury districting system in Palm Beach County violates the constitutional requirements of a representative venire by systematically excluding a significant

number of black persons from the West Palm Beach Jury District, it follows that its purpose is clearly to restore to defendants a long established fundamental right to a jury drawn from a pool that mirrors the diversity of the community, in this case, the county.

App. 15-16. Thus qualified, Spencer was then subjected to the analysis set forth in Witt demonstrating that the trial court's finding that defendant must be afforded a new trial based upon fundamental error, a finding made in the context of the Witt retroactivity analysis, was in full accord with the applicable (as well as the slightly inapplicable) case law and facts. This analysis is repeated, though in lesser detail and apparently unbeknownst to the State, in Point I c. of defendant's Initial Brief of Appellee. Compare P.Br. at 33-39 with App. 14-24.

The Court does not have before it defendant's brief from his direct appeal to the Fourth District, which is also mentioned by the State. However, defendant's underlying Motion Relating to Composition of Jury Panel is in the record. R. 293-313. The Motion clearly establishes that the fair cross section requirement was presented to the courts below, as well as the equal protection argument and due process argument of Peters v. Kiff. Thus, though the order in which they are discussed may differ, the issues on this appeal are the same as those raised below. And as indicated above, this Court may rely on any or all of the independent legal bases raised to reverse the Fourth District's decision.



CONCLUSION

Defendant's conviction was obtained in violation of his Sixth and Fourteenth Amendment rights to be tried by a jury drawn from a fair cross section of the community. The Fourth District 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. The Court should, therefore, quash the opinion of the Fourth District 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; Allen Geesey, Esq., 315 3rd Street, West Palm Beach, Florida 33401, on this 7th day of May, 1991.



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