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SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 9 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

KEVIN NELMS,

Petitioner

Vs.

CASE NO. 77,602

STATE OF FLORIDA,

Respondent

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

POINT INVOLVED

FUNDAMENTAL FAIRNESS REQUIRES THAT PETITIONER RECEIVE A NEW TRIAL BECAUSE HIS REQUEST FOR A COUNTYWIDE JURY WAS DENIED

ARGUMENT

FUNDAMENTAL FAIRNESS REQUIRES THAT PETITIONER RECEIVE A NEW TRIAL BECAUSE HIS REQUEST FOR A COUNTYWIDE JURY WAS DENIED

Petitioner cannot agree that he did not preserve the issue here. His challenge to the grand jury panel asked for a countywide jury. His trial attorney testified without contradiction that his reference to his pretrial motion referred to that very motion when he complained about the limited number of blacks available on the jury venire. The proportional underrepresentation of blacks on the venires in the Eastern District is precisely what lead this Court to strike the system in Spencer v. State, 545 So.2d 1352 (Fla. 1989). Even if Petitioner never used the magic word "unconstitutional", he covered the same ground as Spencer and deserves to be treated the same.

Because there is nothing in the record to show what was argued on appeal, the State has attached a copy of Petitioner's brief from his initial appeal as an appendix. That is a dubious approach. It may be possible to reconstruct the written arguments in this fashion, but not what was said in Court.

If there is an issue as to what was argued on appeal in the Fourth District, it is a fact issue. This Court is ill-equipped to decide such issues, State v. First District Court of Appeal, 569 So.2d 439 (Fla. 1990). It should simply reverse the District Court's erroneous refusal to apply Spencer retroactively and let that Court reconsider in light of Moreland v. State, 582 So.2d 618 (Fla. 1991). If the Fourth District does not know what was argued on the initial appeal, and the record does not show what was argued on the initial appeal, it may also have to reverse the erroneous determination that Spencer does not apply and order a further hearing.

The written brief appended to the State's brief is not part of the record on appeal. If this Court intends to consider matters de hors the record, it will observe that Petitioner did challenge the Palm Beach County Jury District system as Point IV of his initial appeal. Petitioner submits that this was adequate to preserve the issue for future challenge, just as Moreland's challenge was sufficient to grant him relief by Rule 3.850 Fla.R.Crim.Pr.

If this Court disagrees with the adequacy of the challenge on appeal, Petitioner would again urge that counsel should have foreseen Spencer, supra, because it was foreshadowed by prior rulings. This Court should follow Yates v. Aiken, 484 U.S. 211 at 216 (1988) and hold that relief is available even though (or perhaps because) counsel did not preserve a point so clearly foreshadowed.

To that extent the State argues the jury system did not produce a great disparity percentagewise, it is rearguing Spencer. That very claim was presented and rejected.

The State claims justifiable reliance on the Administrative Order creating the Jury Districts and raises the spectre of opening the prison gates for everyone convicted in Palm Beach County if Petitioner is granted relief. Neither argument bears close scrutiny.

The fact that the Glades District is different than the Eastern District is well-known in Palm Beach County. Just as reasonably competent defense counsel should have recognized the inevitability of Spencer, a reasonably competent prosecutor should not have relied on the flawed jury districts. And, the State did not entirely rely on the jury district order. Judges like Judge Cohen (State v. Alix Joseph, Case No. 87-619, Cir. Ct. Fifteenth Circuit as memorialized in Spencer, supra) granted a countywide jury upon request.

Granting fundamental fairness to Petitioner will hardly open the floodgates. What with countywide juries being empanelled for grand juries or when a Judge like Judge Cohen orders it, not all persons convicted in Palm Beach County were denied this basic right. With gain time being what it is in recent years, there cannot be that many left in jail at this time.

This Court need not decide in this case that everyone ever convicted in the Eastern Jury District and still in custody should get a new trial. It need only decide that those like Petitioner who challenged the Jury District system and filed a pretrial motion with a prayer for a countywide jury should get relief. Fundamental fairness requires no less.

CONCLUSION

Petitioner submits that he did request a countywide jury, and has preserved the issue sufficiently so that the decision of the District Court affirming denial of relief must be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to DON M. ROGERS, ESQUIRE, Assistant Attorney General, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 7th day of October, 1991.

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