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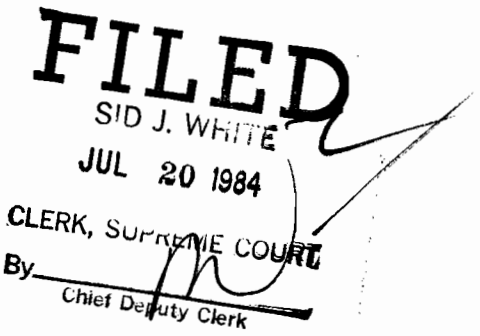
IN THE FLORIDA SUPREME COURT



STATE OF FLORIDA,

Petitioner,

v. CASE NO. 64,618

LARRY WILLIAMS,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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ATTORNEY FOR RESPONDENT

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_____	:	

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the First District Court of Appeal. Petitioner was the prosecution and the appellee respectively. The parties will be referred to as they appear before this Court.

Petitioner's Brief on the Merits will be referred to as "PB" followed by the appropriate page number in parentheses. References to the transcript of the voir dire examination will be made as "TV" followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

While the statement of the case and facts set out in petitioner's brief are somewhat accurate to the extent stated, respondent does not accept them because it fails to set out the facts in the light most favorable to respondent, and also omits certain facts which respondent feels are highly relevant to the issues involved in this appeal. Accordingly, respondent tenders the following as the proper statement of the case and facts:

Respondent is an inmate at the Union Correctional Institution and was found guilty, after a jury trial, of battery on a correctional officer at UCI.

During the beginning of the jury selection, the trial court inquired whether there was anything about the particular charge which would cause the prospective jurors difficulty in being a fair and impartial jury. One prospective juror, Mr. Lobenthal, responded, "Yes sir. I'm a correctional officer. I feel I am personally involved." The trial court excused Officer Lobenthal (TV-5). The trial court also excused Ms. Woodall who indicated that her husband was a law enforcement officer and that she was possibly prejudiced (TV-24).

Respondent's counsel moved to challenge for cause two other correctional officers who were called from the venire as prospective jurors. Prospective juror Addison stated that he was a correctional officer, had seen respondent and knew the victim, Mr. Chastain (TV-18-19). In response to questioning by defense counsel, Addison stated that he worked

in administrative confinement at U.C.I. and had "occasionally" come in contact with respondent in his official capacity. He was not on duty when the incident arose and had not spoken to any officers about respondent or the case (TV-21).

When prospective juror McCann was called, the trial court inquired of him and Mrs. Seiberling:

> [H]as anything come to either of you which makes you think you would not be a suitable juror in this case?
>
> MR. McCANN: I work at R.M.C. as a correctional officer.

(TV-29). McCann went on to state that he could be fair and impartial (TV-29). He further acknowledged that three years before, he had been the victim of an attempted battery on a law enforcement officer by a prisoner (T-32). The trial court denied respondent's challenges for cause, forcing him to exhaust all six peremptory challenges. Defense counsel then requested an additional challenge, which the court denied, and unsuccessfully moved to back-strike juror Harvey, who was a maintenance and construction supervisor at a related penal institution. Respondent also moved to back-strike the complete jury panel in order to insure respondent a jury free of suspicion of bias or partiality. Juror Harvey remained on the jury (TV-39-40).

On appeal, respondent argued that suspicion of bias or prejudice against a defendant is aroused when a correctional officer serves on a jury trying the defendant inmate for battery on a correctional officer. The District

Court of Appeal agreed, noting that the disputed issues at trial turned on the credibility of the correctional officers involved in the incident with respondent and the credibility of respondent and his fellow inmates. Quoting Irby v. State, 436 So.2d 1047 (Fla. 1st DCA 1983), review denied, State v. Irby, Case No. 64,435, the court concluded:

> "[T]he circumstances of the present case raise both an appearance and a substantial probability of inherent juror bias in a trial for an alleged offense against a person in the course of employment involving unusual personal risks identical to those shared by the challenged jurors," and that the "denial of appellant's challenge was an abuse of discretion resulting in manifest error which requires reversal of appellant's conviction."

Williams v. State, 440 So.2d 404, 405 (Fla. 1st DCA 1983).

AGRUMENT

ISSUE I

THIS COURT SHOULD DENY REVIEW BECAUSE PETITIONER HAS FAILED TO SHOW EXPRESS AND DIRECT CONFLICT BETWEEN THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, AND A DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

The basic premise of petitioner's argument, and the sole basis for this Court's jurisdiction, is that a prospective juror is not disqualified as a matter of law on account of his employment status. Lusk v. State, 446 So.2d 1038 (Fla. 1984); Morgan v. State, 415 So.2d 6 (Fla. 1982); McCollum v. State, 74 So.2d 74 (Fla. 1954). Relying on these cases, petitioner asserts that the inherent juror bias doctrine "is foreign to sound principles of established law" (PB 6) and the opinion below has "injected a dangerous concept that casts doubt on the legal integrity of two death cases decided by this Court (PB 16). As will undoubtedly become clear in the arguments on the merits of this appeal, this case does not involve the qualifications of a juror on the basis of his occupation, nor has the inherent bias doctrine been repudiated by this or the federal courts.

For the reasons set forth in Respondent's Brief on Jurisdiction, which is incorporated herein by reference, respondent submits that petitioner has failed to establish that direct and express conflict exists. Based on the authority

of Ciongoli v. State, 337 So.2d 780 (Fla. 1976) and Holloway v. State, 379 So.2d 953 (Fla. 1980), respondent requests that this Court deny discretionary review in this appeal.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S CHALLENGES FOR CAUSE TO EXCUSE TWO CORRECTIONAL OFFICERS FROM JURY SERVICE, WHERE RESPONDENT WAS BEING TRIED FOR BATTERY OF A CORRECTIONAL OFFICER.

Respondent does not dispute that one's status as a correctional officer in and of itself is insufficient to require disqualification as a juror in a criminal case. This case, however, presents a much narrower question: whether a correctional officer, because of his occupational relationship to the victim and the crime, should be removed because of the likelihood of bias. Petitioner skews the issue by asserting that under the district court's holding below, "The only thing that will have to be established is that the prospective juror is a correctional officer and the accused is an inmate who allegedly committed a crime while in prison" (PB 10). Contrary to this assertion, the district court correctly perceived the problem and held that

> the circumstances of the present case raise both an appearance and a substantial probability of inherent juror bias in a trial for an alleged offense against a person in the course of employment involving unusual personal risks identical to those shared by the challenged jurors.

Williams v. State, 440 So.2d 404, 405 (Fla. 1st DCA 1983),

quoting, Irby v. State, 436 So.2d 1047, 1048 (Fla. 1st DCA 1983) [Emphasis added].

Respondent submits that Lusk v. State, 446 So.2d 1038 (Fla. 1984), and Morgan v. State, 415 So.2d 6 (Fla. 1982), have no bearing on the instant appeal. Those cases both involved the stabbing death of a prison inmate and the defendant on appeal alleged error in the denial of his challenge for cause of a prospective juror who was a prison correctional officer. [1] This Court rejected the argument that Section 40.013(2), Florida Statutes, automatically disqualifies state prison employees from jury service. While the Court declined to hold that all correctional officers were intended to be included within the statutory classes of persons disqualified from jury service, this Court has never held that correctional officers could not be excused from jury service. [2]

1/ Because neither Lusk nor Morgan exhausted their peremptory challenges, this Court never reached the issue addressed here, whether it is error to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges.

2/ In Cawthon v. State, 115 Fla. 801, 156 So. 129 (1934), this Court held that the purpose of the statute prohibiting sheriffs and their deputies from serving as grand and petit jurors was not only to preserve the fairness and impartiality of such jurors in fact, but also to assure an accused that the jurors would be free from any suspicion of bias or prejudice against him on account of their official relationship with prosecutors. This rationale necessarily applies to all individuals, regardless of their statutory qualification to sit as jurors, who are infected by opinion, bias or prejudice by virtue of the knowledge of or relationship to the parties and the crime. While Section 40.013, Florida Statutes, specifies classes of potential jurors who are removable for cause, that statute is not all inclusive. See Section 913.03, Florida Statutes.

Petitioner asks this Court to now adopt that broad rule, regardless of the nature of the case and the relationships of the parties involved.

This case involves more than the mere fact of occupational status as the ground for disqualification. Lusk and Morgan dealt with the broad question of whether a correction officer, because of occupational relationship to the case, should automatically be removed for cause. Here, the question is whether a correction officer, because of his occupational relationship to the victim and chief prosecution witness, should be removed for cause. Officers Addison and McCann were being required to decide respondent's guilt or innocence as to a crime against a fellow correction officer. Clearly, their identification with the position of the victim raises more than a suggestion of bias or prejudice, especially when one of the prospective jurors was in fact the victim of an attempted battery on a correction officer. The likelihood of prejudice arising from the relationship between the jurors' occupation and the nature of the charge was so great that the officers should have been subject to removal for cause. [3]

3/ See Sims v. United States, 132 U.S.App.D.C. 111, 405 F.2d 1381 (1968), where the court held that taxicab drivers and their relatives should be excluded from the jury on a retrial of a case involving a felony murder of a cab driver.

Petitioner's entire argument ignores the crucial factor that the disputed issues at trial turned on the credibility of the correction officers involved in the altercation with respondent and the credibility of respondent and his fellow inmates. Respondent was not only accused of committing a crime while in prison; he was accused of committing a crime against a correction officer. That single factor alone removes this case from the ambit of Lusk and Morgan.

Other courts have prudently held that a law enforcement officer's unique relationship both to the parties and the crime alleged carries too great a potential for bias so as to justify removal for cause, even in the absence of a statutory disqualification. In People v. Culhane, 33 N.Y. 90, 305 N.E.2d 469 (1973), co-defendants were charged with the felony murder of a deputy sheriff during an attempted escape. The defendants' challenge for cause of two correction officers were denied. One of the prospective jurors, Mr. Davis, had been a correction officer for fifteen years; he had read about the case in the newspapers, but denied having formed any opinion as to the guilt or innocence of the defendants. The other prospective juror, Mr. Krisel, was a correction and rehabilitation officer; he denied that his official capacity would affect his decision in the case, although he admitted having formed an opinion about the case based on what he had

read. Upon questioning by the court, he stated that he could set aside that opinion. In reversing the convictions, the Court of Appeals recognized:

> Although the veniremen did not sit on the jury, because the defendants exercised peremptory challenges, this is of no consequence. It is well settled that an erroneous ruling by the court, denying a challenge for cause, constitutes reversible error when the defendant peremptorily challenges the prospective juror and his peremptory challenges are exhausted before the jury selection process is complete. [Citations ommitted].

305 N.E.2d at 473. The court further noted that certain statutory disqualifying relationships

> carry with them no more potential bias than does the situation now under consideration. There is a compelling logic to the appellants' contention that 'where a peace officer has been been killed and a peace officer is the principal prosecution witness, no other peace officer should be allowed to sit in judgment.' For even if the officers called as jurors were in fact impartial that would not dispel the lingering appearance of justice denied. Surely the prospect of a jury composed, in whole or in part, of correction officers would present a nightmarish specter to those two convicts on trial for their lives. Conversely if Officers Davis and Krisel were being brought up on charges of having brutalized prisoners, they would not want members of the Fortune Society to be the fact finders in the case.

Id. at 478.

Similarly, in Commonwealth v. Jones, 383 A.2d 874 (Pa. 1978), the defendant, on trial for murder, conspiracy, aggravated robbery, assault and battery, unsuccessfully challenged for cause a proposed juror who was a Philadelphia policeman. The juror was ultimately removed by one of the defendant's peremptory challenges, all of which were exhausted before the eleventh juror was empanelled. On direct appeal, the Pennsylvania Supreme Court first noted that one's status as a law enforcement officer in and of itself is insufficient to require disqualification as a juror in a criminal case. In order to determine whether a police officer could serve as a juror in a criminal case, the court adopted a two-tiered analysis: (1) if the police officer has a "real relationship" to the case, he must automatically be excluded from serving on the jury; (2) if he does not have a "real relationship" to the case, the police officer must be viewed in light of the traditional test for qualifications of jurors. The court found that a real relationship existed between the proposed juror and the case, reasoning:

> In the instant case, venireman Richards was a Philadelphia police officer. All police officers who testified were on the Philadelphia police force. Appellant never took the stand in his own defense. The focus of his defense was on the alleged involuntary nature of his confession. On this issue, the credibility of the testifying officers

> was a critical factor. Therefore, under the facts of the instant case, we believe that a "real relationship" existed that required the removal of Richards from the jury panel. We believe the trial court erred in refusing appellant's challenge for cause and, since appellant used all of his peremptory challenges before the entire jury was empanelled, a new trial must be granted.

383 A.2d at 877. See also, State v. Butts, 349 Mo. 213, 159 S.W.2d 790 (1942), where the Missouri Supreme Court held that a challenge for cause should have been granted where the challenged juror was a member of the same police force as many material witnesses in the case.

That a "real relationship" existed between the correction officers and the case could not be more apparent than here: Officer Addison worked in the institution where the battery occurred and knew both respondent and the victim; Officer McCann was a correction officer and had been the victim of an attempted battery. Futhermore, as stated by the court below, both officers shared with the victim unique personal occupational risks which were the very subject of the case being tried.

The potential prejudice of having officers sit in judgment of a man accused of battering or murdering a fellow officer is no less real than where a murder victim's mother is a member of the venire. No matter how sincere her assertions of impartiality may be, the likelihood of prejudice must be presumed. Commonwealth v.

Stewart, 449 Pa. 126, 295 A.2d 303 (1972)(father of victim being member of panel from which jury was selected held to be inherently prejudicial). The unconscious prejudice involved in such a situation is just as great, if not greater, than the acknowledged prejudice of one having extrajudicial knowledge and preconceived opinions about the crime and the accused.

The United States Supreme Court has repeatedly recognized that in certain situations actual bias is virtually impossible to prove. Peters v. Kiff, 407 U.S. 493, 504 (1972).

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

Crawford v. United States, 212 U.S. 183, 196 (1909). Similarly, in Irvin v. Dowd, 366 U.S. 717, 728 (1961), the Court stated that although a juror may be sincere when he says he was fair and impartial to the defendant, the

> psychological impact requiring such a declaration before one's fellows is often its father.

More recently, in Smith v. Phillips, 455 U.S. 209, 221-222 (1982), Justice O'Connor, in a concurring

opinion observed:

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it . . . .
>
> * * *
>
> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

Petitioner relies on ~ dicta in Lusk v. State, supra, and Smith v. Phillips, supra, for the proposition that the inherent bias doctrine has been repudiated under both state and federal law. Contrary to petitioner's bald assertions, the opinion in Lusk did not repudiate the inherent bias doctrine, but rather the court refused to allow a per se rule of exclusion for state prison employees. Moreover, Lusk reaffirms the continued viability of Singer v. State, 109 So.2d 7 (Fla. 1959), wherein it was stated:

> [A] juror's statement that he can and will return a verdict according to the evidence submitted and the

> law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so. [Emphasis added].

109 So.2d at 34. Accord, Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981).

In Smith v. Phillips, supra, the court declined to impute bias to a juror who submitted an employment application to the district attorney's office during the trial proceedings, relying on Dennis v. United States, 339 U.S. 162 (1960). Dennis, like Lusk, refused to disqualify a government employee on the basis of inherent bias. The court in Smith v. Phillips did not purport to foreclose the use of implied bias in appropriate circumstances, and, indeed, the inherent bias doctrine is firmly ingrained in the federal law. See Irvin v. Dowd, supra; Leonard v. United States, 378 U.S. 544 (1964)(per curiam); Peters v. Kiff, supra. See also, United States v. Nell, 526 F.2d 1223 (5th Cir. 1976) and United States v. Allsup, 566 F.2d 68 (9th Cir. 1977).

If petitioner were correct in positing that a defendant must show actual bias for the removal of a prospective juror, then the murder victim's mother, who affirmatively states she could render a dispassionate, neutral and unbiased verdict, could never be challenged

for cause. Such is not, and never has been, the law. As the Supreme Court noted in Peters v. Kiff, supra at 502:

> [E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias.

In Turner v. Louisiana, 379 U.S. 466 (1965), the Supreme Court reversed a murder conviction, where two key prosecution witnesses,who were deputy sheriffs, doubled as bailiffs during the trial. Noting that the verdict was inevitably determined by the credibility which the jury attached to these two witnesses, the court concluded:

> And even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution.

379 U.S. at 473.

Here, even if the voir dire testimony of Officer Addison and McCann can be accepted at face value, it is difficult to imagine that correctional officers could impartially weigh the testimony of a fellow correctional officer against that of an inmate accused of attacking

the officer.[4] The totality of the circumstances here compels the conclusion that there was a substantial probability of inherent juror bias and the officers should have been removed for cause.

Petitioner misconceives the issue at bar by urging that respondent "could not demonstrate a denial of an impartial jury because neither Addison or McCann served on the jury that convicted him" (PB 6). The First District Court of Appeal expressly rejected this argument:

> The two officers challenged for cause did not actually serve on the jury in this case because they were excused upon appellant's exercise of two peremptory challenges. Appellant exhausted all of his peremptory challenges, however, and was required to go to trial with a jury panel including a maintenance and construction supervisor in a related prison institution in Union County after unsuccessfully challenging that juror for cause. 'It is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges.' Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981). [Emphasis added].

440 So.2d at 405-406. To ensure that an accused is tried by an impartial and indifferent jury, both challenges

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4/ One prospective juror, Mr. Lobenthal, was excused by the court because he stated on voir dire, "I am a correctional officer. I feel I am personally involved" (TV 5). The trial court also excused Ms. Woodall, who stated that her husband was a law enforcement officer and that she was possibly prejudiced (TV 24).

for cause and the full complement of peremptory challenges are crucial. The denial of a challenge for cause on a person who should be removed for cause constitutes a deprivation of a peremptory challenge and is reversible error without a showing of prejudice. Swain v. Alabama, 380 U.S. 202, 219 (1965); United States v. Nell, 526 F.2d 1223 (5th Cir. 1976); Commonwealth v. Jones, 383 A.2d 874 (Pa. 1978); Highlands Insurance Company v. Lucci, 423 So.2d 947 (Fla. 3d DCA 1982); Peek v. State, 413 So.2d 1225 (Fla. 3d DCA 1982); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981).

Petitioner, relying on Rollins v. State, 148 So.2d 274 (Fla. 1963), would require a defendant to show prejudice by demonstrating that he was required to accept an unqualified juror after he exhausted his peremptory challenges (PB 15-16), and takes issue with respondent's failure to challenge juror Harvey for cause (PB 6, 15-16). Rollins does not require that an unqualified juror serve on the jury; rather, Rollins holds that it is not reversible error where the defendant fails to demonstrate that, as a result of his exhaustion of peremptory challenges, a juror served who would have otherwise been stricken. See Wheeler v. State, 362 So.2d 377 (Fla. 1st DCA 1978). Respondent need not show that a juror served who should have been excused for cause. If such were the true test, the issue on appeal would be the serving of

that unqualified juror, not the exhaustion of peremptory challenges on persons who should have been excused for cause.

Assuming arguendo that respondent must show prejudice as a result of his exhaustion of peremptory challenges on Officers Addison and McCann, it is apparent on the face of the record that a juror, who would have otherwise been stricken, did serve on respondent's jury. That respondent did not challenge the juror when the first veniremen were called is of no consequence (PB 7). Perhaps recognizing that he had no basis to challenge juror Harvey for cause merely because of his occupational status, and knowing that other correction officers were seated in the venire, respondent cautiously reserved challenging some objectionable jurors too soon in the selection process. As a result of his having been forced to exhaust his peremptory challenges on persons who should have been excused for cause, respondent had no peremptory challenges remaining with which to remove Harvey; and since the trial court refused to grant additional peremptory challenges, respondent was forced to trial with a juror who would have otherwise been stricken (TV 39).

In Pierce v. State, 604 S.W.2d 185, 186 (Tex.Cr.App. 1980), the Texas appellate court said:

> The appellant argues that because he was constrained to strike venireman

> Crenshaw with a peremptory challenge, he was deprived of the use of that peremptory challenge to exclude a prospective juror he found objectionable. The appellant exhausted all of his peremptory challenges. His challenge of venireman Elliott English for cause was overruled, and his immediate request for additional peremptory strikes was denied. The appellant's written motion for additional peremptory strikes was also denied. Venireman English was ultimately seated on the jury. These facts are sufficient to entitle the appellant to a reversal, provided he can show the challenge for cause of venireman Crenshaw should have been granted.

The court went on to hold that the challenge for cause to Crenshaw should have been granted, and the judgment and sentence were reversed. The same result was warranted here and the opinion of the district court below should be affirmed. The trial court's erroneous denial of the challenges for cause to prospective jurors Addison and McCann, coupled with his refusal to allow an additional peremptory challenge to remove juror Harvey, abridged respondent's right to an impartial jury.

Petitioner places undue deference on Officer Addison's and Officer McCann's statement that they could be fair and impartial. A prospective juror's claims of impartiality are not immune from scrutiny, especially where a "real relationship" exists between the veniremen and the case at trial. Numerous cases have held that statements of

impartiality, given subsequent to statements of prejudice, bias, or unfairness, are not sufficient grounds to deny a challenge for cause of that juror. See, e.g., Irvin v. Dowd, supra; Singer v. State, supra; Johnson v. Reynolds, 97 Fla. 488, 121 So. 793 (Fla. 1929); Irby v. State, 436 So.2d 1047 (Fla. 1st DCA 1983); Leon v. State, supra. In Irvin v. Dowd, the United States Supreme Court issued a caveat regarding placing undue weight on a juror's subsequent statement of impartiality:

> No doubt each juror was sincere when he said that he would be fair and impartial. . .but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

366 U.S. at 728 [Emphasis added]. This Court, in Singer v. State, supra, expressed a similar opinion:

> Too, a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his comptence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

109 So.2d at 24.

In Johnson v. Reynolds, supra, the prospective juror, after having admitted his unfairness and partiality, finally stated that he "would go into the jury and render a fair and impartial verdict according to the evidence

and evidence alone." 121 So. at 796. The court, noting the prospective juror's initial statements of partiality, queried:

> By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

121 So. at 796.

In Irby v. State, supra, the court held that, notwithstanding each juror's assertion that he would impartially decide the case solely on the facts presented, the denial of the appellant's challenge for cause of these jurors was reversible error. 436 So.2d at 1049. In Leon v. State, supra, the prospective juror ultimately stated that she could "be fair." The Third District Court of Appeals, quoting with favor Irvin v. Dowd and Singer v. State, indicated that the challenge for cause to the juror should have been granted. 396 So.2d at 205.

Whether a prospective juror's impartiality is equivocal, concealed or unconscious, the defendant should be given the benefit of the doubt.

> [I]n criminal cases, whenever, after a full examination, the evidence given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt.

Walsingham v. State, 61 Fla. 67, 77,50 So. 195 (1911).

Accord, Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Singer v. State, supra; Leon v. State, supra. No less may be accorded a defendant to preserve inviolate the constitutionally guaranteed right to trial by an impartial jury. See Peters v. Kiff, 407 U.S. at 504 ("[I]t is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainity." Given "the great potential for harm . . . , and the strong interest of the criminal defendant in avoiding that harm," doubts should be resolved in favor of the defendant).

While it is true that the trial judge has the opportunity of observing the demeanor of the potential jurors on voir dire, petitioner urges that the appellate courts must defer in all situations to the discretion of the trial court, or, in this case, this Court should defer to the reasoning of the one intermediate appellate judge who sat on a trial bench and dissented below (PB 11, 13). Of course, care should be taken in the reviewing court not to reverse the ruling below upon purely questions of fact, except in a clear case. Reynolds v. United States, 98 U.S. 145 (1879). However, deciding whether a juror is qualified is a mixed question of law and fact. Irvin v. Dowd, supra; Singer v. State, supra, at 22. While the initial determination of a juror's competence for cause lies within the discretion of the trial court, that dis-

cretion is not unbridled and unreviewable. The denial of respondent's challenges for cause was an abuse of discretion resulting in manifest error.

Petitioner concedes that an accused is constitutionally entitled to a trial by a fair and impartial jury. All respondent has asked for is the opportunity to be tried by such a jury. This Court should not disturb the holding of the First District Court of Appeal.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent respectfully requests that this Court affirm the decision of the First District Court of Appeal reversing respondent's conviction and remanding the cause for a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and a copy mailed to respondent, Mr. Larry Williams, #042165, Post Office Box 747, Starke, Florida 32091 on this 20th day of July, 1984.

Paula S. Saunders
PAULA S. SAUNDERS