IN THE SUPREME COURT OF FLORIDA

RICHARD SUGGS a/k/a TIMOTHY BOMAR a/k/a DENNIS BOMAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,529

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of Case and Facts as contained in his initial brief on the merits. The petitioner also would add the following **complete** quotation from the transcripts of the jury selection, portions of which were omitted by the state in its answer brief:

> MR. JEWETT [defense counsel]: Your Honor, we'd ask that the state give reasons as to why Mr. Green was struck, the only black juror we've gone through?
>
> MR. FADDIS [prosecutor]: Judge, at least at this point I don't feel that the strike has risen to a level which would indicate --
>
> THE COURT: I'll determine that. You give your reasons.
>
> MR. FADDIS: One of his responses was to Mr. Jewett's announcing that -- well, I don't have a reason, Judge, to be honest with the court. I don't have a reason. I just have a bad feeling about

him. I'm making an election to strike him.

THE COURT: Why?

MR. FADDIS: When Mr. Jewett announced that his client has some priors and was on probation, and he asked him how he felt about that. He said I'm going to have to look at the evidence a little bit more carefully.

THE COURT: It would seem to me that Mr. Jewett would want to strike him and not you from what you are telling me.

MR. FADDIS: That's the response I didn't like. But he's stricken the only other minority member.

THE COURT: That came up yesterday. What anyone else does is not a defense. I need you to give me some reason why you struck him, and you said you don't have a reason.

MR. FADDIS: Well, I gave a reason. That doesn't rise to the level of -- almost a cause challenge if the court makes the finding that I have used this in a racially biased manner. But there's still blacks on the panel, and I haven't stricken any other blacks. And Mr. Jewett has stricken at least one minority so far.

THE COURT: You see, you're dancing. All I want to know -- it's a real simple question. I want to know so I can make a determination. I need to know, and I'm going to ask you again. Why did you strike Mr. Green?

MR. FADDIS: Based on his response to Mr. Jewett's question about the client having a prior record. Once he found that out.

THE COURT: Mr. Jewett, any response?

MR. JEWETT: Nothing. I don't know anything is required, Your Honor.

> THE COURT: Okay. The mere fact that one is stricken, I don't think, shows any type of pattern, and I'm not distinguishing between blacks and hispanics. I'm looking at any type of discriminatory use of peremptory challenges. I don't think it should be any type of race, anything, discriminatory selection of a fair and impartial jury. I don't think the defense has sustained its burden, and I'm going to allow the strikes.

(R 42-44) As shown by the above-quoted material, the trial judge required the state to give its reasons for striking Juror Green and the state, at least initially, admitted that it had no reasons. Upon further inquiry, the state gave a reason which the trial court interpreted to be one which would not justify the state to strike the juror, but which may have caused the defense some dissatisfaction with the juror. (R 42-43)

SUMMARY OF THE ARGUMENT

The opinion of the District Court of Appeal, Fifth District, improperly establishes new requirements for obtaining review of the state's use of a racially-motivated peremptory challenge, to-wit: the defense must move to strike the entire, otherwise acceptable, jury venire in order to preserve the issue for appeal. However, the issue should be adequately preserved for appeal where the defense has objected to the state's challenge. Here, the defendant timely and properly objected to the state's backstrike on the black juror. The burden then shifted to the state to justify the peremptory challenge on race neutral grounds. The state clearly failed to carry this burden; the state's explanation of its peremptory challenge of the sole black juror from the jury box was clearly insufficient. The court's overruling of defendant's objection to the challenge violated the defendant's federal and Florida constitutional rights to a fair, impartial jury.

ARGUMENT

DEFENSE COUNSEL PROPERLY PRESERVED FOR REVIEW THE STATE'S USE OF A PEREMPTORY CHALLENGE TO THE ONLY BLACK JUROR ON THE POTENTIAL PANEL WHERE THE REASON GIVEN BY THE PROSECUTOR WAS INSUFFICIENT AND PRETEXTUAL.

The state claims in its answer brief that the defendant did not properly preserve the issue of the state's improper use of peremptory challenges since the defendant "acquiesce[d] in whatever action the trial court [took]," and "expresse[d] satisfaction with the jury panel chosen by the parties." (Appellee's answer brief, pp. 6-7) However, these statements ignore the fact that the defendant here properly objected to the use of the challenges and, after the court overruled the objection and allowed the challenge, took exception to the court's ruling:

> THE COURT: Okay. How about the jury panel.
>
> * * *
>
> MR. JEWETT [defense counsel]: That's acceptable, your Honor, **other than our prior objection to the striking of Number One.**

(R 45)(emphasis added) The issue was therefore properly preserved. (See also Petitioner's initial brief on the merits, pp. 6-13)

Additionally, the state contends that the defendant failed to show a strong likelihood that the strike was based on race and therefore an inquiry was not required. (Appellee's answer brief, pp. 8-9) This Court recently ruled in State v.

Johans, 18 FLW S124 (Fla. February 18, 1993), that prospectively an inquiry is required when an objection is raised that a peremptory challenge was used in a racially discriminatory manner. However, this Court's analysis of the sufficiency of the showing of "substantial likelihood" in that case under the existing law clearly shows that the burden was met in the instant case by the defendant. In Johans, supra, the Court ruled, "the State struck the only African-American venire member initially examined by both parties without any certainty that any African-Americans would be seated on the jury panel, thus creating, at best, doubt as to whether the threshold had been met." 18 FLW at S125. So, here, too, the "strong likelihood" standard was met. (See Petitioner's initial brief on the merits, pp. 6-7, 13-14)

Once the court required the state to give its reasons for the challenge here, it is clear that the state did not have any sufficient race-neutral reasons. At first, the state even admitted that it had no reason for the challenge. Then, when pressed, it gave a reason that even the trial court found to be spurious. The state's attempt to characterize the reason given as legitimate by contending that the trial court could view the potential juror's demeanor and could interpret the comment differently than a reading of the record would, is totally contradicted by the trial court's comment that this reason would perhaps have caused the defendant concern with the juror, but not the state. (R 42-43; see R 36) (See also Petitioner's initial brief on the merits, pp. 14-17)

The state, by its indication first that it had no reason, and then by giving as a reason one that should not have caused the state concern, but instead the defense, failed to rebut the inference of discrimination. It failed to offer a clear and specific, racially neutral reason for the use of its peremptory challenge, as required under State v. Neil, 457 So.2d 481 (Fla. 1984), and State v. Slappy, 522 So.2d 18 (Fla. 1988). The reason must be deemed a pretext for discrimination based on defense counsel's objection.

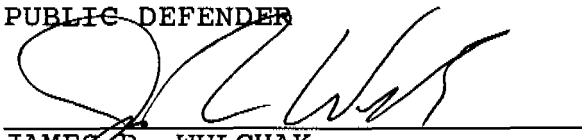
The state thus failed to give an adequate reason, once required by the court to do so. The court erroneously indicated that the defendant had not met his burden, when, in fact, by that time the burden had properly shifted to the state and the reason was wholly pretextual and unreasonable. This Court must vacate the opinion of the district court and grant a new trial.

CONCLUSION

BASED ON the cases, authorities, and policies cited herein and in the initial brief, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, reverse the petitioner's judgment and sentence, and remand for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Mr. Richard Suggs, a/k/a Dennis Bomar, a/k/a Michael Brown, #339516, P.O. Box 4900, Malone, FL 32445, this 24th day of February, 1993.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER