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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

WILLIAM HENRY LOWREY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 89,371

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, William Lowrey, has summarized the facts on the certified question in two sentences on page 5 of his brief. Respondent, State of Florida, supplements those facts.'

Lowrey was charged with carrying a concealed firearm and corruption by threat. (V1, 13-14) A jury was selected to try him on May 8, 1995. (V3, 1) One of the jurors selected was [redacted] (V3, 155) The following colloquy took place during voir dire:

- When [redacted] was 18, someone "pulled a gun" on him and discharged it. The incident happened near a bar. [redacted] was drunk and "bull headed." As his buddy was trying to get him into the truck, a guy came toward him. [redacted] remembered hearing the gun fire. (V3, 40)

- [redacted] committed a crime against his child on impulse once due to his temper. The moment the act was completed, he knew he had "messed up." He was forgiven for it. (V3, 50-51, 71)

- The prosecutor asked, "Any of you, your close friends or family members ever been accused of committing a crime before? Anyone?" (V3, 54) Juror [redacted] first responded that her son was caught selling crack cocaine. (V3, 54-55) [redacted] then responded that his nephew was in prison for robbery. He believed he was treated "more than fair." (V3, 55-56)

- Defense counsel asked whether the jurors believed the defendant was **guilty** merely because he had been accused. (V3, 86) Three jurors answered in the negative, two stating that he was innocent until proven guilty. (V3, 86) Defense counsel then asked, "How about you, Mr. [redacted]?" [redacted] answered, **"The last few months I have learned that all you've got to be done is accused of something, and then you've got to prove you're innocent." (V3, 87)** No follow-up questions were asked.

- When asked whether there was anything in his background that would prevent him from giving the defendant a fair trial, [redacted] shook his head. (V3, 92-93)

'The record on appeal, consisting of five volumes, will be referred to by volume and page number.

- After additional jurors were brought into the box, the lawyers continued with voir dire. The prosecutor asked, "Anyone ever been accused of a crime, committing a crime before, yourself?" The veniremen shook their heads. (V3, 127) The prosecutor again asked, "Anybody else been accused of a crime or a close friend or family member been accused of committing a crime?" There was no audible response. (V3, 128) When asked whether there was anything else that should be disclosed, [redacted] answered negatively. (V3, 132)

On January 4, 1995, Juror [redacted] was charged with two counts of battery, the victims being [redacted] and [redacted]. (V1, 112-113) The complaint filed by [redacted] alleged:

> A white male service man with Adams Gas was standing in the doorway of the mobile home as I started to enter, he was behaving in a very familiar way, made comment "With all these beautiful women, I'll never leave here." I took a seat at the kitchen table - he wanted to know everyone's name and he also rubbed my leg - uninvited - right before he went to show [redacted] where to leave a check. (V1, 111)

A deferred prosecution agreement was executed on May 18, 1995. (V1, **115)** The clause stating that the defendant admitted his guilt was struck through and initialed by two persons. (V1, 115)

On May 9, 1995, the jury returned a guilty verdict on possession of a concealed firearm and not guilty on corruption by threat. (V5, 316) Prior to sentencing, Lowrey filed a "Motion to Set Aside Jury Verdict on Count I or, Alternatively, Amended Motion for New Trial." (V1, 108) The motion alleged that defense counsel had discovered posttrial that Juror [redacted] was under prosecution in the Third Judicial Circuit when the verdict was rendered and though asked had not disclosed this information during voir dire. As authority for the motion, Lowrey relied on the statute which disqualifies persons with pending criminal charges from jury service. (V1, 108-110)

The motion was heard on June 13, 1995. (V2, 1) No witnesses were present, and nothing was said about Juror [redacted] testifying. The prosecutor made the following factual representations:

- "[T]he juror, [redacted] was never arrested. It was a summons that was issued for his appearance to answer to these battery charges." V2, 13)[2] [redacted] was told at some point in time that if he passed a polygraph test, the charges would be dropped. (V2, 20) On January 11, 1995, Clarence Kirkland, polygraph examiner, informed Juror [redacted] in writing that he had passed the polygraph examination. (V2, 13) Another polygraph examiner reviewed the test results. He disagreed with the first examiner, which lead to the pretrial intervention agreement. (V2, 13, 20)

- Juror [redacted] signed the deferred prosecution agreement on the date that the prosecutor saw him in front of the courthouse. (V2, 7) This was about ten days after Lowrey's trial. (V2, 5) The prosecutor in Juror [redacted] misdemeanor case did not learn that [redacted] had served on Lowrey's jury until after the pretrial intervention agreement was signed. (V2, 14-15) [redacted] "didn't in any way, shape or form ever make it known to me [prosecutor in Lowrey's case] OK Mr. Siegmeister [prosecutor in [redacted] case] that he was on the jury." (V2, 15)

- About ten days after the jury verdict, the prosecutor in Lowrey's case had a conversation with [redacted] outside the front of the courthouse: "He approached me, Juror [redacted] and came up and -- 1 didn't recognize -- I recognized his face, but not who he was, not that he had sat on a jury. And then he started to talk to me about the jury verdict some, and I listened. And then he -- as we were leaving, he said something about a battery. He said: I know what corruption by threat is now after that trial, and I know what battery is. And it didn't make much sense to me. I didn't ask him any further about it. But I had recalled seeing him over at our office earlier that day. And when I saw him up there, I inquired as to why he was there and found that he was there as a result of a battery charge that had been filed against him in county court in this county." (V2, 5-6)

At the request of counsel, the trial court took judicial notice of Juror [redacted] county court file and received in evidence

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[2]Defense counsel represented to the court that [redacted] hired an attorney who filed a notice of appearance in the misdemeanor file. (V2, 16)

the documents the prosecutor had shown defense counsel regarding the polygraph test results, "et cetera." (V2, 23-24)[3]

The trial court denied Lowrey's motion, stating:

> [T]his Court finds no reasonable grounds to believe that this person, Mr. [redacted] had any belief, thought, request, desire, intent to receive more favorable treatment in the prosecution of his own case as a result of being a juror on the William Henry Lowrey case, if that be the test. And I find that there is no grounds to believe that, no reasonable grounds to believe that.
>
> If that is not the test, or if the test is one of a different nature, the Court finds that even if Mr. [redacted] either misapprehended what the question was about, did not understand that he was still under prosecution because of the fact he had been told the case would be dropped or would not go forward based on his polygraph results, for whatever reason. This Court finds there are no substantial grounds to believe that that would have affected his verdict, his discussions or his service as a juror. (V2, 24-25)

On appeal, the First District indicated that had it been writing on a clean slate, it would have held that juror misconduct of this nature is per se reversible error without any need for an evidentiary hearing. Believing that it was bound by State v. Rodgers, 347 so. 2d 610 (Fla. 1977), however, it reluctantly, with Judge Lawrence concurring in the result only, affirmed Lowery's judgment of conviction with a certified question:

> MUST A CONVICTED DEFENDANT SEEKING A NEW TRIAL DEMONSTRATE ACTUAL HARM FROM THE SEATING OF A JUROR WHO WAS UNDER CRIMINAL PROSECUTION WHEN HE SERVED BUT, THOUGH ASKED, FAILED TO REVEAL THIS PROSECUTION?

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[3]It does not appear that these documents were included in the record on appeal.

SUMMARY OF ARGUMENT

The answer to the certified question is "YES." The defendant must show actual bias from the seating of a juror under prosecution. This is so because not every person under prosecution is biased against the defendant and favorably disposed toward the government. In the event the juror has lied about his status and the motive for the lie is unknown, an evidentiary hearing, upon request, should be held. No such hearing having been requested in the case at bar, the judgment should be affirmed.

ARGUMENT

CERTIFIED QUESTION

MUST A CONVICTED DEFENDANT SEEKING A NEW TRIAL DEMONSTRATE ACTUAL HARM FROM THE SEATING OF A JUROR WHO WAS UNDER CRIMINAL PROSECUTION WHEN HE SERVED BUT, THOUGH ASKED, FAILED TO REVEAL THIS PROSECUTION?

Other than peremptory challenges, there are two ways to exclude a juror. The first is the statutory disqualification, and the other is partiality. "[A] juror who fails to meet the statutory qualifications is subject to challenge 'for cause' while a juror who is biased is subject to challenge 'for favor."' 2 C. Wright, *Federal Practice and Procedure: Criminal* 2d § 383 (1982). That distinction is important here because the First District has treated a statutory disqualification as if it were a challenge for favor. It would go a step further, however, and hold that a statutorily disqualified juror is conclusively presumed biased. In other words, the First District would apply the implied bias doctrine, which is rarely ever used anymore, rather than the actual bias doctrine. As will be discussed below, it is not self-evident that a juror facing criminal charges is biased against the defendant. In fact, some defendants believe just the opposite and have fought hard to get persons under prosecution included in the jury pool.

Section 40.013(1), Florida Statutes, disqualifies persons from jury duty who are "under prosecution for any crime" or who have been convicted of certain crimes "unless restored to civil rights." This Court in State v. Rodgers, *347* So. 2d 610, 613

(Fla. 1977) recognized the legislature's authority to statutorily disqualify persons from jury service due to age, residence, voter registration, criminal activity, occupation, and infirmity. As previously noted, however, statutorily disqualified persons are not necessarily biased.

The defendant in Rodgers was convicted of second-degree murder. One of the jurors was a 17-year-old girl who had lied about her age, education, and work experience during voir dire. *Id., at 611.* Despite the statutory disqualification due to her age and false testimony, the defendant's conviction, nevertheless, was affirmed. This Court held that "the seating of an unqualified or disqualified juror will not result in a reversal of a guilty verdict in the absence of a showing that such qualification deficiency affected the verdict or prevented a fair trial." *Id.,* at 613. That holding is eminently correct and controls the outcome in this case..

The primary problem in Rodaers, like that in the case at bar, was the juror's failure during voir dire to disclose statutorily disqualifying information. The remedy for juror misconduct of this nature is a posttrial hearing, at which the defendant will have the opportunity to prove actual bias or prejudice.

Smith v. Phillips, 455 U.S. 209, 215 (1982) is instructive. There, during the course of the trial, one of the jurors applied to the prosecutor's office for a job as an investigator. The prosecutors became aware of the application during the trial, but it was not until a verdict was returned that defense counsel and

the judge became aware of it. Subsequent to a posttrial hearing, at which the juror and the prosecutors testified, the judge concluded that the defendant had not been prejudiced.

The Supreme Court refused to impute bias in the verdict or to hold that a posttrial hearing was an inadequate remedy for the alleged due process violation:

> [Respondent Phillips] contends that a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question. Given the human propensity for self-justification, respondent argues, the law must impute bias to jurors in [Juror] Smith's position. We disagree. This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.
> ***
> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir* dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer [v. United States, 347 U.S. 227 (1954)] and* held in this case. *Id., at 215-217.*

See also, Thompson v. State, 300 So. 2d 301, 303 (Fla. 2d DCA 1974) (J. Grimes) (case remanded for an evidentiary hearing to determine whether "there was a reasonable possibility that juror Lawhon was prejudiced against appellant because of the pending prosecution").

In federal court, as in state court, convicted felons and persons who have felony charges pending against them are ineligible for jury service. See 28 U.S.C. § 1865(b)(5). This provision "does not implement a constitutional bar to jury service, but establishes a statutory impediment." U.S. v. Uribe, 890 F. 2d 554, 561 (1st Cir. 1989).

On more than one occasion, criminal defendants have challenged, albeit unsuccessfully, the constitutionality of the exclusion from jury pools of persons charged with felonies. See e.g., U.S. v. Barry, 71 F. 3d 1269 (7th Cir. 1995); U.S. v. Greene, 995 F. 2d 793, 795-798 (8th Cir. 1993); U.S. v. Arce, 997 F. 2d 1123, 1127 (5th Cir. 1993) (convicted felon); U.S. v. Foxworth, 599 F. 2d 1, 4 (1st Cir. 1979); U.S. v. Lewis, 472 F. 2d 252, 256 n. 4 (3rd Cir. 1973). According to the Barry Court, persons charged with crimes are excluded from jury duty because of the possibility that they have disregarded the law themselves, and if so, they might do so again, in favor of one side or the other. Id., at 1273.

What the above cases signify is that a juror with charges pending is not automatically considered biased against the defendant. As pointed out by the Barry court at 1274, "sometimes one person's view of fairness is another's view of injustice," and by the Greene court at 796, "it is rational to assume that persons currently facing felony charges may be biased against the government." See also, Thomson v. State, 300 So. 2d at 303 ("the purpose of disqualifying a person who has a pending

prosecution is to avoid the possibility that that person might vote to convict in the hope of getting more favorable treatment from the prosecution in his own case. On the other hand, where, as in the instant case, the juror was charged with assault and battery and the appellant's conviction arose from the result of an affray, one might suspect that the juror would have had empathy with the appellant"); U.S. v. Uribe, 890 F. 2d at 562 (1st Cir. 1989) ("The district court found not the slightest basis to conclude that the juror's prior conviction, sentence, or subsequent dealings with the court rendered him more prone to convict a defendant in an unrelated case. We agree"); U.S. v. De Leon, 462 F. 2d 170, 172 (5th Cir. 1972) ("Finally, de Leon argues that the trial judge erred in refusing to grant his motion for judgment of acquittal when it was discovered after the verdict that one of the jurors was under indictment. See 28 U.S.C. Sec. 1865(b)(5). This contention would not entitle de Leon to a new trial much less a judgment of acquittal").

Two cases out of the District of Columbia Circuit directly and in great detail address the issue facing this Court: U.S. v. Bnney, 977 F. 2d 624 (D.C. Cir. 1992) (Boney I) and U.S. v. Boney, 68 F. 3d 497 (D.C. Cir. 1995) (Boney II). Boney was convicted of narcotics offenses. The foreman of his jury was previously convicted for grand theft in California. He lied on his juror qualification form, and he did not reveal his prior felony at *voir dire.* Boney learned of the juror's felon status after his trial but before sentencing. He asked for a new trial,

which was denied without an evidentiary hearing. On appeal, Boney argued that he had been denied his constitutional right to be tried by an impartial jury. He asked the Court to construe the Sixth Amendment in light of 28 U.S.C. §§ 1865-67. The Court held that "felon status, alone, does not necessarily imply bias" and remanded the case for an evidentiary hearing for the purpose of proving actual bias. Boney I, 977 F. 2d at 632-635. A hearing was held, following which the trial court found no actual bias. Boney appealed, contending that the hearing was inadequate. The appellate court agreed with Boney and explained in great detail the deficiencies of the hearing. It ordered another evidentiary hearing. Boney II, 68 F. 3d at 488-499. Boney II addresses the First District's concern about the difficulties in proving actual bias.

The First, Circuit is in accord with the D.C. Circuit. See U.S. v. Uribe, 890 F. 2d at 562 ("The fact that a juror technically should have been disqualified, and was not, does not automatically require a new trial. Rather, even if the problem had been unknowable at an earlier date, appellants would still have to shoulder the burden of establishing harm").

The First District in the case at bar stated, "[W]e believe that the seating of a juror under prosecution is INHERENTLY PREJUDICIAL to the fairness of a criminal proceeding." Lowery v. State, 21 Fla. L. Weekly D2346 (Fla.1st DCA October 30, 1996) (e.s.). The Court's invocation of the implied bias doctrine is

reminiscent of the approach it took in Williams v. State, 440 So. 2d 404, 405 (Fla. 1st DCA 1983):

> The juror's statement that he can be impartial is not conclusive of that determination by the court, however, and we conclude 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," and that the "denial of appellant's challenge was an abuse of discretion resulting in a manifest error which requires reversal of appellant's conviction." *Irby v. State, supra,* at 1048. (e.s.)

This Court quashed the First District's decision and disapproved of Irby as well. State v. Williams, 465 So. 2d 1229, 1231 (Fla. 1985) ("The person in the best position to determine this ACTUAL **BIAS** is the trial judge. The trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him") (e.s.).

The First District implied that it is too difficult to ascertain the state of mind of a juror; that is, is the juror partial or impartial? To embrace this idea is to eliminate jury trials. Jurors, as human beings, come equipped with biases. The legal test is not whether a juror is "biased" (e.g., opposed to death penalty), but whether he can set aside his bias and be fair. Farina v. State, 679 So. 2d 1151, 1153 (Fla. 1996); Smith v. Phillips, supra. .

The First District equated the role of the jury with that of the judge; that is, both must be impartial. The Court, however, went too far when it stated, "We must not sanction even the

appearance of impropriety in the administration of justice," and "Even if these events were completely coincidental and innocent, they nevertheless created an appearance of impropriety." *Id.,* at 2346.

Judges must avoid even the appearance of impropriety, and that is why they are not allowed to defend themselves on the merits when a party moves to recuse them. Jurors, on the other hand, do get to explain their biases and to show that they can be fair in spite of them. See e. ., Farina v. State, 680 So. 2d 392, 396-398 (Fla. 1996) (opinion on death penalty); Lusk v. State, 446 so. 2d 1038 (Fla. 1984) (employment as prison correctional officer); State v. Williams, supra (same); Patton v. Yount, 467 U.S. 1025 (1984) (opinion on defendant's guilt based on pretrial publicity); Grav v. Mississippi, 481 U.S. 648 (1987) (opinion on death penalty). In each of these cases, the juror either did serve, or should have served, despite his bias.

The First District would grant Lowrey a new trial solely because **ten days posttrial,** the juror's pending case was disposed of in his favor, and he fortuitously talked to the prosecutor about the defendant's case and indirectly referred to his own case. *Id., at 2346.* The First District goes too far. The juror had every right to talk to the prosecutor and was told so by the judge at the end of the trial: "[Y]ou are at liberty to speak with anyone about your deliberations." (V5, 318) Moreover, the record is silent on when the deferred prosecution agreement was

signed.[4] All we know from the record is that the agreement was signed the same day the conversation took place. What if the agreement had already been signed, or what if [redacted] was on his way to sign the agreement when he encountered the prosecutor, or what if the deal had been struck days or weeks earlier with nothing left to do but to consummate it? Finally, one cannot ignore the fact that the jury found Lowrey not guilty on one count, and on the other, Lowrey did not dispute the fact that hospital personnel took a gun away from him. (V5, 230)[5]

In support of his position that he is entitled to a new trial, Lowrey cites three cases: Thompson v. State, 300 So. 2d 301 (Fla. 2d DCA 1974) (evidentiary hearing ordered to determine whether prejudice resulted from the seating of a juror facing criminal charges); Johnson v. State, 616 so. 2d 1 (Fla. 1993) (legislature's violation of single subject requirement was fundamental error); and Thomas v. State, 796 S.W. 2d 196 (Tex. 1990) (the seating of a statutorily disqualified juror is per se reversible error). Thompson supports the State's position, and Johnson is irrelevant. Thomas supports Lowrey's position, but the better view is found in the cases cited by the State.

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[4]Placement in a pretrial intervention program does not disqualify a person from serving on a jury. Willacy v. State, 640 so. 2d 1079, 1082-1083 (Fla. 1994).

[5]Q. Did you at some point in time become aware that the hospital had taken a gun from you that night? A. On the way home. Q. Did you ever make an effort to try to retrieve your gun, get your gun back? A. Yes, sir, I did. (V5, 230)

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm Lowrey's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Jamie Spivey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 24th day of February, 1997.

Carolyn J. Mosley

Carolyn J. Mosley
Attorney for the State of Florida

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