IN THE SUPREME COURT OF FLORIDA

WILLIAM HENRY LOWREY,

Petitioner,

v. : **CASE NO. 89,371**

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the appellant below and the defendant in the trial court. He will be referenced as "Petitioner" or "Mr. Lowrey" in the following brief. A three-volume record on appeal, including the transcript of voir dire, will be referenced by "R", followed by the appropriate page number in parenthesis. A two-volume transcript of jury trial will be referenced by "T." A one-volume transcript of the hearing on Appellant's motion to set aside the verdict will be referenced by "S." All proceedings below were before the Honorable PAUL S. BRYAN.

STATEMENT OF THE CASE

By information filed February 20, 1995 Appellant was charged with Count I: carrying a concealed firearm per Section 790.01(2); Count II: possession of a firearm by a convicted felon per Section 790.23; and Count III: corruption of a public official by threat per Section 838.021, Florida Statutes (R 13). Count II was severed by written order on April 20, 1995 (R 69). The cause proceeded to jury trial on May 9, 1995 whereupon the jury returned a verdict of, Count I: "guilty, as charged"; and Count II: "not guilty." (R 95) A sentencing guidelines scoresheet was prepared in Level Four reflecting 29.8 points for a permitted range of 22.3 to 37.2 months in prison (R 128). The cause proceeded to sentencing on June 13, 1995 whereupon Appellant was adjudicated guilty and sentenced to 3 years prison, followed by two years probation (R 131-136, 138-141).

Appellant filed a timely notice of appeal on June 21, 1995 (R 144). The Public Defender was appointed to represent Mr. Lowrey on June 28, 1995 (R 158). The First District Court of Appeals issued its opinion on October 30, 1996, affirming the judgement of the trial court, but certifying the issue to this Court as a matter of great public importance. See, Appendix 'A.'

STATEMENT OF THE FACTS

Everette Pennington testified he was a registered nurse employed at the emergency room of the Lake Shore Hospital, in Lake City, on the evening of February 13, 1995 (T 114). Appellant was presented to Pennington via the emergency room physician who asked Pennington to help Appellant (T 115). When helping Appellant up to an examination table, he felt a gun beneath his shoulder (T 117). He could not see the gun, however, as Appellant was wearing a jacket which completely covered it (T 116). Pennington explained that, before they could provide him any treatment, the gun would have to be secured, elsewhere (T 118). Appellant removed the gun, still in its holster, and handed it to Pennington with the assurance that he had a permit to carry it. Pennington identified State's Exhibit 1 as the gun Appellant was carrying (T 119). Appellant said he needed to carry the gun because he was afraid the police would try to hurt him (T 120). While Appellant spoke in a calm voice and was cooperative throughout, the ER staff gave him a sedative because he appeared emotionally upset (T 121).

Over objection by Defense Counsel, Pennington said that upon asking Appellant what they might do to help, he responded that they could, "Put Sheriff Trammel in front of me and give me back my gun." (T 136) Appellant also mentioned a judge's name in this threat, but Pennington could not recall it (T 136). Pennington

believed Appellant was suffering from depression (T 145).

Officer Lavaughn Wynn of the Tallahassee Police Department identified State's Exhibit 1 as the semi-automatic pistol he retrieved from the safe at Lake Shore Hospital (T 156). It contained a magazine with 14 rounds of live ammunition. He further testified that he test-fired the weapon and it was in good operating condition (T 156). By researching the firearm permit files, Wynn determined Appellant did not have a permit to carry the weapon (T 160).

The State announced rest and Appellant moved for a judgement of acquittal which motion was denied (T 200-202).

Appellant testified in his own defense he received threats from the Columbia County Sheriff's Office, (presumably in retaliation for alleged threats by Appellant against the sheriff, himself) and that on February 13, 1995 he received an anonymous phone call threatening himself, his wife and his children (T 228). In response to this latest threat, Appellant decided to take his family out of town for a few days. Before he could leave, however, he began having "seizures." (T 228) While he remembered going to the hospital, he did not remember walking inside it, nor did he remember carrying the firearm, in question (T 229). He did not realize the firearm had been taken from him until he was on the way home from the hospital (T 230).
The Defense announced rest and the case was argued to the jury

without objection (T 266). The jury returned a verdict of, Count I: "guilty, as charged" ; and Count III: "not guilty."

Prior to sentencing, it was discovered that Juror [redacted] was concurrently being prosecuted by this state attorney's office and failed to disclose this fact during voir dir. Defense Counsel filed a motion for new trial on this error which motion was denied (R 108-110, S 24, 25).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Article V, Section 4(b) (4) of the Florida Constitution, and Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

Juror [redacted] was not eligible for service on the jury because he was, contemporaneously, under prosecution by this same state attorney's office. See Section 40.013, Florida Statutes (1993). Because it is unlikely that prejudice could ever be proven in this situation, and because the error plainly constitutes an impediment to a fair trial, the error should be deemed a fundamental violation of due process. See, Johnson v. State, 616 so. 2d 1 (Fla, 1993). The proper remedy is a new trial. See Thompson v. State, 300 So. 2d 301, 303 (Fla. 1974) .

ARGUMENT

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?

Petitioner's conviction was affirmed by the First District Court of Appeals on authority of State v. Rogers, 347 So. 2d 610 (Fla. 1977) which states, in part:

> [W]e are of the opinion 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 614. However, the lower court distinguished this case from the situation in Rogers.

> Nonetheless, we perceive a difference between seating a juror who is unqualified due to being a few months short of majority and seating a juror who is disqualified due to a pending criminal prosecution. Unlike jurors with deficiencies in qualifications such as age, residence, voter registration, or even past criminal activity, a juror with a pending criminal prosecution casts doubt upon the fairness of the defendant's trial. Indeed, "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." Thompson v. State, 300 So. 2d 301 (Fla. 2d DCA 1974).

Lowrey v. State, 21 Fla. L. Weekly D2346 (Fla. 1st DCA, October 30, 1996). Specifically, the lower court was concerned about the practicality of requiring a defendant to prove actual harm, as

follows:

> The impracticalities of the appellant having to prove actual harm are obvious. Even if questioned, it is doubtful that a juror who hoped to curry favor with the prosecution by his verdict of guilty would actually admit to that fact before the judge.

Ibid. The lower court went on to find the seating of a juror under prosecution "inherently prejudicial to the fairness of a criminal proceeding." *Id.*, at D2346. Section 40.013, Florida Statutes, provides that "[n]o person who is under prosecution for any crime . . . shall be qualified to serve as a juror." Appellant submits the seating of Juror [redacted] in contravention of this rule, was a fundamental violation of his right to a fair trial. Hence, Appellant met his burden.

Even under the Rogers analysis, however, it is plain that the seating of a juror who is under the thumb of the prosecuting attorney constitutes "a showing that such qualification deficiency affected the verdict or prevented a fair trial." *347* So. 2d at 614. In this case, not only was Juror [redacted] under prosecution by this state attorney's office, but also, he entered into a deferred prosecution agreement a few days thereafter whereby his charges, eventually, would be dropped (S 6, 7).

Petitioner further agrees with the lower court that requiring the appellant to prove prejudice is a burden, more appropriately reserved for objections to the seating of jurors for cause. See, Thomas v. State, 796 S.W. 2d 196 (Tex. Ct. Crim.

App. 1990) (en banc).

Because proving prejudice in these circumstances is inherently impractical and because any juror, so biased, constitutes a clear impediment to a fair trial, Appellant submits the error should be deemed a fundamental violation of substantive due process. See Johnson v. State, 616 So. 2d 1 (Fla. 1993). The appropriate remedy is a new trial, Thomwson, supra.

CONCLUSION

Based on the foregoing reasoning, caselaw and other citation of authority, Petitioner requests this Honorable Court reverse the judgement and sentence below and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolun Mosley, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to appellant, on this 8 day of January, 1997.

JAMIE SPIVEY