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FILED
SID J. WHITE
MAR 31 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WILLIAM HENRY LOWREY,

Petitioner,

v. CASE NO. 89,371

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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RESPONDENT.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner takes this opportunity to accept Respondent's statement of the facts.

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?

Respondent argues prejudice must always be proven, even where the juror was disqualified for being the subject of a criminal prosecution by the same state attorney's office and refused to divulge this information even though he was asked to do so. Petitioner is wrong. To require proof under these circumstances would deny Appellant any remedy to a clear violation of his right to an impartial jury. If a juror who should have been disqualified for cause is permitted to serve on a jury in spite of a defendant's every effort to discover and remove him, then the right to an impartial jury is effectively abolished. Imagine if a juror could hide the fact he was related to one of the parties, or is owed money by one of the attorney's. Respondent's reliance upon an evidentiary hearing to cure these and all such errors would be meaningless. That is, it is extremely unlikely that one who gains service on a jury by hiding such a potential prejudice is going to admit that prejudice the second time he is asked about it, after having rendered a verdict which was consistent with that prejudice. Because it would be impossible to remedy such a

violation of a defendant's right to a fair and impartial jury, this court has no choice but to vacate the jury upon learning of the error.

Appellant respectfully submits this Court's holding in State v. Rodgers, 347 So. 2d 610 (Fla. 1977), means only that bias will not be presumed where none may be inferred, In essence, Appellant did prove prejudice by the fact he showed a disqualified juror snuck onto his jury, despite his best efforts to thwart him, thus depriving him of the right to exercise a challenge for cause. Juror [redacted] prevented a fair trial because he possessed a potential bias which disqualified him from service. We can never truly know the reasons for his verdict, nor should we; but we know we would have never allowed him to sit on our jury. It was our right to strike him and he deprived us of that right.

In Rogers, for example, bias could not be inferred from the fact the juror was underage. Had the case dealt with a juvenile's suit to repeal the laws against underage drinking, however, we're sure there would have been a different result. The juror's age would have evinced a potential bias in that case. Likewise, neither disqualification for residence, voter registration nor citizenship could infer prejudice, unless those qualifications were relevant to the issues at trial.

Respondent's claim that prejudice can only be proven by the juror's admission he was biased ensures there will be no

remedy. Once we prove a juror was the prosecutor's girlfriend, will we require her admission of bias before finding that prejudice has been proven? This is not the kind of proof Rogers suggests is required to show prejudice.

Respondent's reliance on U.S. v. Boney, 977 F. 2d 624 (F.C. Cir. 1992) (Boney I) and U.S. v. Bonev , 68 F. 3d 497 (D.C. Cir 1995) (Boney II) is misplaced. Because Boney was not currently facing prosecution, there was no incentive for him to vote to convict to curry favor with his prosecutor. Rather, Boney's disqualification, a hidden felony record, would likely have worked in Boney's favor. Hence, Boney failed to show prejudice.

Similarly, U.S. v. Uribe, 890 F. 2d 562 (1st Cir 199) dealt with prior convictions. Moreover,

> Inasmuch as (1) [the juror] completed the questionnaire truthfully and divulged his prior conviction, and (2) jury questionnaires are available to defense counsel upon motion, prior to empanelment, under the district court's juror selection plan, defendants seemingly waived the point.

Id., at 561.

Respondent's cite to State v. Williams, 465 So. 2d 1229 (Fla. 1985) also misses the point. In Williams, this Court was addressing the trial court's role in determining whether a juror should be excused for cause, based upon a non-statutory claim. In this case, Appellant had a statutory right to

exclude juror [redacted] but was denied that right by Juror [redacted] himself. Moreover, it was only a strike for cause. At least Williams knew about the juror in question and was free to use a peremptory, if he had any. Not so, in Appellant's case.

Finally, Respondent finds fault with the First District Court's assertion that "We must not santion 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." See Answer Brief of Respondent, pp. 12, 13. She distinguishes the standard for jurors from that for judges and says, "Jurors, on the other hand, do get to explain their biases and to show that they can be fair in spite of them." See Answer Brief of Respondent, p 13. Appellant would submit that jurors get to explain their suspected biases, only, when they reveal them. Juror [redacted] did not reveal his special relationship with the State Attorney's office, and this fact permits an inference that he may be biased. Because Appellant was denied his statutory right to strike him, he was denied a fair trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, 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 31 day of March, 1997.

JAMIE SPIVEY