

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 7 1997

JAMES GANYARD, :
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 Petitioner, :
 :
 V. :
 :
 STATE OF FLORIDA, :
 :
 Respondent, :
 :
 _____/

CLERK, SUPREME COURT
By _____
Deputy Clerk

CASE NO. 89,759

REPLY BRIEF OF PETITIONER

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NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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JAMES GANYARD,

Petitioner,

v.

CASE NO. 89,759

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R ____" - Record on Direct Appeal to this Court. Pagination in the lower right hand corner.

"T. ____" - Transcript of proceedings, Vol. I and II, the trial. Pagination in upper right hand corner.

"S. ____" - Transcript of the Sentencing held April 20, 1995. Pagination in the lower right hand corner, consecutive to that of the "Record."

"J. ____" - Transcript of Jury Selection held March 27, 1995 (Supplement).

"PA. ____" - Petitioner's answer brief filed March 12, 1996.

All other citations will be self-explanatory or will otherwise be explained.

STATEMENT AND FACTS OF THE CASE

Respondent complains that Petitioner's factual statement is long and irrelevant. However, Petitioner states again, "The record here was set out in detail... so that this Court might better understand the prejudice. As J. Webster pointed out in his dissent," (Initial brief at 18), this case was basically a swearing match between two individuals. (See DCA Opinion at 13)

Respondent's statement of facts is misleading and argumentative as shown by the following:

Respondent states, "the defendant accepted or tendered the jury without challenge or strike. TR55-57" (PA.1-2). This is false. The Petitioner/defendant's attorney accepted or tendered the jury without challenge or strike -- not the defendant.

Respondent states, "defense counsel argued that the victim had brought the sexual battery charges because she was a social snob who did not wish it known that 'in a moment of lust' she had engaged in sexual intercourse with a social inferior." (PA.2). This appears to be a faulty and offensive interpretation of defense counsel's closing argument found at T.203-204. Common sense would dictate that if the victim "did not wish it known..." she would not have brought charges. Defense counsel did note of the victim and witnesses: "they sort of looked down on Mr. Ganyard. He's a little older, all he was a security guard." But he also noted that it was the victim's roommate, not necessarily the victim, who gave that impression. However, it was not a question of Mr. Ganyard being a "social inferior" as the state argues, but

the question of a moment of lust, an indiscretion, which may have cause the victim to delay her charges, not bring them.

Respondent also misstates the grounds for the "golden rule" objection. (PA.2). It states the prosecutor only "argued that sexual battery is the most under reported crime... that crime victims think nothing of reporting thefts and other similar crimes but hesitate to report sexual crimes involving bodily penetration. TR209-212." (PA.2). However, the argument was not the basis for the objection. The objection **was** to the language: "But if someone had penetrated your sexual organ without your consent in a situation like this, would you--" (T.209). Additionally, the alleged statement of facts is pure argument where respondent states, "the trial court cured the reference with an instruction." (PA.2).

ARGUMENT

ISSUE I (QUESTION CERTIFIED)

DOES CONEY V. STATE, 653 SO.2D 1009 (FLA.),
C E R T . / 114 S. CT. 315,
133 L. ED.2D 218 (1995), PROVIDE A BASIS FOR
REVERSAL OF A CONVICTION WHEN THE DEFENDANT'S
COUNSEL EXERCISED NO PEREMPTORY CHALLENGES?

Petitioner relies upon the arguments and law presented in his initial brief. The certified question should be answered yes.

ISSUE II:

THE STATE VIOLATED THE "GOLDEN RULE" IN HIS CLOSING ARGUMENT, WHICH WHEN COMBINED WITH OTHER ERRORS, WAS SO PREJUDICIAL AS TO VITIATE THE ENTIRE TRIAL.

Petitioner relies upon the arguments and law presented in his initial brief. When reviewing a certified question, this Court may review any issue raised below.

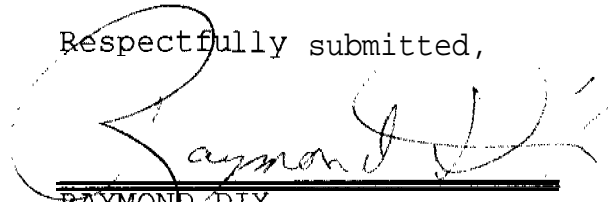
CONCLUSION

Petitioner, James Ganyard based on all of the above, respectfully requests this court to answer the certified question, YES, and to reverse his conviction and remand the case to the lower court for a new trial, and to grant all further relief as this Court may find equitable and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by delivery to Mr. James Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. James Ganyard, on this' 7th day of April, 1997.

Respectfully submitted,



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