IN THE SUPREME COURT OF FLORIDA

ANTHONY B. BOYKINS,

Petitioner,

versus

CASE NO. SC01-1123
LOWER COURT CASE NO. 5D00-1768

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

# PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Eighteenth Judicial Circuit, in and for Seminole County, Florida. In the Brief the Respondent will be referred to as "the State" and the Petitioner will be referred to both by his name ("Anthony Boykins") and as he appears before this Honorable Court.

In the brief the following symbols will be used:

"R" - Volume I of record on appeal

"T" - Transcript of trial proceedings, volumes II through IV of record on appeal

"S" - Transcript of sentencing proceedings in Volume IV of record on appeal

## STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Seminole County, Florida, with robbery with a firearm. (R 12, Vol. I) He was tried by a jury on May 15, 17, and 18, 2000, and found guilty as charged. (R 60, Vol. I; T 519, Vol. IV) On June 8, 2000, he was sentenced as a prison releasee reoffender to spend his life in prison. (R 162-164, Vol. I; S 34-35, Vol. IV)

Petitioner timely appealed to the Fifth District Court of Appeal and the Office of the Public Defender was appointed to represent him on appeal. (R 166, 174, Vol. I) On April 6, 2001, his conviction and sentence were affirmed and on May 10, 2001, his motion for rehearing was denied. Boykins v. State, 783 So.2d 317 (Fla. 5th DCA 2001). (APPENDIX) Petitioner's notice to invoke this Honorable Court's discretionary jurisdiction was filed in the District Court on May 17, 2001. On November 2, 2001, this Honorable Court accepted jurisdiction.

## STATEMENT OF THE FACTS

During jury selection at his trial for robbery with a firearm, Petitioner Anthony Boykins challenged four jurors for cause. (T 88, 89, 170, 171, 174-175, Vol. III) All of his challenges were denied. (T 171, 172, 175, Vol. III) When he had exhausted his peremptory challenges his request additional challenges was denied. (174-175, Vol. III) The juror whom defense counsel would have next peremptorily excused eventually served as the foreman. (T 176, Vol. III; T 519, Vol. IV)

The challenges were based on the following grounds:

### I. Doubt about ability to sustain personal view of the evidence

### (Basis for conflict jurisdiction)

During jury selection, Petitioner Anthony Boykins' counsel questioned potential jurors on whether they could stand by their conviction regarding guilt or innocence, even if the other jurors disagreed. (T 87, 88, 166, Vol. III) Other jurors told counsel that they would "stand their ground," but Ms. DiBari could not give that assurance:

> [Defense counsel]: And, Ms. Preusch, if you were selected to sit on this panel and you went back to deliberate after all of the evidence is in and you are asked to decide the facts of this case because that's your role and there were five votes against you, the other five felt strongly one way and you felt strongly the other way and you are standing there alone with the greater number against you, would you give in to that greater number?
>
> MRS. PREUSCH: No, I would not.

[Defense counsel]: Ms. DiBari?

MS. DiBari [Challenged Prospective Juror]: Unfortunately, I might give in.

[Defense counsel]: You think that you might?

MS. DiBARI: Because we all see the same facts pretty much and I don't know what I could prove that would hold up against the other people.

* * *

(T 166-167, Vol. III)

Defense counsel sought to have Ms. DiBari excused for cause:

[Defense counsel]: When I had asked her whether or not if she were chosen and went to deliberate and it was her against five whether she would give in, she said that she might give in. I think that she had pretty clearly indicated that she would give in to the greater number.

THE COURT: Argument.

[Prosecutor]: Any juror might give in. That is not a reason.

THE COURT: Not any juror tells you that they might give in. Go ahead.

[Prosecutor][1]: The second is that the Allen Charge[2] says that. Third of all she said that I can't imagine that I would have something that the other wouldn't have gone over or something like that indicating that she would voice her opinion if it came to that and it seemed she presupposed by the question that she didn't have anything further and

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[1] The transcript indicates that defense counsel speaks at this point, but from its content and the context, it appears that this is the prosecutor's argument.

[2] Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896); Fla. Std. Jury Instr. (Crim.) 3.06.

she wasn't viewing the evidence the same way. I don't agree that she would just give in.

THE COURT: I do not find sufficient basis for cause in this case.

(T 170-171, Vol. III)

After the defense had exhausted nine of the ten peremptory challenges allotted for the trial of a life felony, Ms. DiBari came under consideration as the alternate juror. (T 174, Vol. III) Defense counsel requested additional peremptory challenges based on the denial of his challenges for cause, and reiterated:

[Defense counsel]: Again with regards to Ms. DiBari, I think that she had pretty clearly said, according to my notes, that she might give in if she were the lone holdout when they deliberated.

* * *

THE COURT: Goes to the issue of an alternate in place of it. I understand the cause argument. Anything else? No? All right, the motion is denied.

* * *

(T 174-175, Vol. III)

II. Bias in favor of Law Enforcement

When Prospective Juror Saucedo was questioned by the trial court about his attitude toward law enforcement, he said that his relationship with his son who was a member of Florida Highway Patrol would not cause him any difficulty in listening to law enforcement testimony "the same way as the other testimony[,]" but he also stated:

THE COURT: Would you tend to believe a law enforcement officer over another witness?

MR. SAUCEDO: Yes.

THE COURT: If I instructed you that you have to give the same weight to the other witnesses[‘] testimony as you do to law enforcement officers but that credibility is up to you, would you be able to do that?

MR. SAUCEDO: Yes.

(T 29-30, Vol. III) The prospective juror reiterated his disposition when questioned by defense counsel

[Defense counsel]: Do you think that you would give more weight or more credibility to a law enforcement officer’s testimony just by the virtue that they are a law enforcement officer?

MR. SAUCEDO: I say that I will, but I will listen to the judge’s recommendations. I go with that.

[Defense counsel]: You would listen to what the judge had to say?

MR. SAUCEDO: Yes.

* * *

(T 70-71, Vol. III)

Another prospective juror was Mr. Yiznitsky who socialized with law enforcement officers and was the nephew of a retired police officer. (T 96-97, Vol. III) He initially stated that he would give “[p]robably more credibility to the law enforcement[,]” but then said he would follow the judge’s instruction if she told him that was not what he was supposed to do. (T 96-97, Vol. III)

III. Equivocation about the accused's right not to testify

Prospective Juror McIlrath's answers during *voir dire* examination revealed his inability to serve as a fair and impartial juror in this cause. Defense counsel questioned the members of the venire about whether they would have to hear from Anthony Boykins in order to find him not guilty. (T 163, Vol. III) Mr. McIlrath stated:

> MR. McILRATH: No, I would not. If I was accused, though, I would think that I would have to weigh would that be in my best interest though.
>
> [Defense counsel]: Again, can you think of some reasons why as an accused you may not want to take the stand?
>
> MR. McILRATH: Only if I knew down in my heart that I was guilty and the case was going against me.
>
> * * *

(T 163-164, Vol. III)

The trial court denied Petitioner's challenge to Mr. McIlrath based upon his indication that he would think someone was guilty if he did not take the stand in his own behalf:

> THE COURT: That might be one of the reasons. I think it was one of the reasons rather than the only reason. He asked what was one of the reasons someone might not take the stand because that he might be guilty.
>
> [Prosecutor]: That's a valid reason.
>
> THE COURT: I don't find a sufficient basis for cause.

* * *

(T 171-172, Vol. III)

The defense exercised its final peremptory challenge in order to excuse Prospective Juror DiBari (who might "give in" to the other jurors in deliberations) and defense counsel stated that the defense wished also to peremptorily challenge Mr. Kern, except that the trial court's ruling had obliged him to exhaust his peremptory challenges. (T 176, Vol. III) Mr. Kern served as the foreman of the jury that convicted Anthony Boykins. (T 519, Vol. IV)

## SUMMARY OF ARGUMENT

Four prospective jurors' answers during *voir dire* in this case raised reasonable doubts about their ability to serve as fair and impartial triers of fact. One juror's expressed doubt about her ability to withstand the opinion of the other jurors and abide by her own view of the evidence and what it had proved should have been excused for cause. The fact that she would "give in" to the other jurors raised the likelihood that, if she served, Petitioner would be tried by a jury of five rather than six, and his guilt or acquittal determined by less than a unanimous panel.

Two other jurors who eventually stated that would "follow the law" should have been excused on the basis of their initial acknowledgment that due to their association with law enforcement officers they would give more credence to the testimony of a policeman than to that of other witnesses. A fourth prospective juror should have been excused for cause on the basis of his belief that an accused might not take the stand at trial "Only if I knew down in my heart that I was guilty and the case was going against me."

## ISSUE PRESENTED

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S CHALLENGE TO POTENTIAL JURORS WHOSE ANSWERS RAISED A REASONABLE DOUBT ABOUT THEIR ABILITY TO RENDER A FAIR AND IMPARTIAL VERDICT.

## Standard of Review

A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Kearse v. State, 770 So.2d 1119, 1128 (Fla. 2000). The competency of a challenged juror is a mixed question of law and fact and is to be determined by the trial judge in his discretion. Singer v. State, 109 So.2d 7, 22 (Fla.1959).

## Argument

It is the responsibility of the trial court to assure that a jury is as impartial as possible so that a defendant receives a fair trial. A juror must be excused when any reasonable doubt exists as to whether that juror possesses the state of mind necessary to render an impartial judgment. Hill v. State, 477 So.2d 553 (Fla.1985). Close calls on the issue of juror competency should be resolved in favor of removal. Martinez v. State, 26 Fla.L.Weekly D2358 (Fla. 3d DCA October 3, 2001).

In this case, the defense sought to excuse for cause two prospective jurors who expressed a bias in favor of the testimony from law enforcement officers; one prospective juror who would expect the accused to testify; and a fourth prospective

juror who voiced doubt about her ability to maintain her position regarding guilt or innocence if she were in the minority. Each challenge was denied. (T 89, 168, 170-172, Vol. III)

I. Uncertainty about ability to maintain personal view of the evidence

(Basis for Conflict Jurisdiction)

When asked whether she might give in if her view of the evidence was different from the majority of the jurors, Prospective Juror DiBari responded, "Unfortunately, I might give in . . . Because we all see the same facts pretty much and I don't know what I could prove that would hold up against the other people." (T 166-167, Vol. III) Judge Alley found this answer to be an insufficient basis to excuse Ms. DiBari for cause. (T 170-171, Vol. III)

In its decision affirming Anthony Boykins' conviction and sentence, the Fifth District Court of Appeal wrote:

> On appeal, appellant relies on Shannon v. State, 770 So.2d 714 (Fla. 4th DCA 2000). There, the court ordered a new trial where one juror said during voir dire that he had previously sat on a jury where he had succumbed to pressure from other jurors and expressed an inability to maintain his view of the evidence if pressured by other jurors.
>
> Despite the similarities, Shannon does not control the outcome of this case. The juror in Shannon was explicit about his weakness, his prior experience and previous failure to follow his oath. Ms. Dibari merely said that she might not be able to be persuasive and might give in to the reasoning of others since they all were privy to the same evidence. We note that Shannon cites no cases in support of its conclusion that a juror who cannot commit to withstand the reasoning of other jurors is subject to a challenge for cause. Section 913.03, Florida

> Statutes (1999) identifies twelve grounds for a challenge for cause. None of these statutory grounds applies to the facts before us. Accordingly, we find no error in failing to allow this challenge for cause.

Boykins v. State, 783 So.2d 317, 318 (Fla. 5th DCA 2001). (APPENDIX)

In effect the District Court's decision in this case holds that a prospective juror who doubts her ability to abide by her own conviction need not be excused for cause if she is not certain about her uncertainty. She is not incompetent to serve on today's jury if she has not yet failed to follow her juror's oath in another person's trial. The District Court finds that Prospective Juror DiBari's answers do not disqualify her from service on this jury because they raise "merely" a reasonable doubt about her competency. But see, e. g., Hill v. State, 477 So.2d 553 (Fla.1985) (A juror must be excused when any reasonable doubt exists as to whether that juror possesses the state of mind necessary to render an impartial judgment).

Requiring a criminal defendant to accept a juror who "might" give in to the other jurors' opinions during deliberations is tantamount to extracting, in advance, a waiver of the accused's right to a unanimous, six-person verdict on his case. An accused may agree to accept a jury of less than six persons but the state cannot compel him to do so. See, e. g., Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) (conviction before a five-person jury violates the Sixth Amendment); and Blair v. State, 698 So.2d 1210 (Fla.1997) (defendant can validly waive his right to a jury of six persons). The question, of whether a defendant can waive his right to a

unanimous verdict and accept the verdict of a simple majority of the jury members, has been certified to this Honorable Court by the Fourth District Court of Appeal as being one of great public importance in Nobles v. State, 786 So.2d 56 (Fla. 4th DCA 2001), review pending, Case Number SC01-1327. See also Rule 3.440 ("No verdict may be rendered unless all of the trial jurors concur in it."); and Fla. Std. Jury Instr. (Crim.) 2.05 ("6. Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict."). In this case, Anthony Boykins did not wish to waive his rights to a six-person jury and a unanimous verdict and, in order to preserve those safeguards, he was forced to exercise one of his peremptory challenges against a prospective juror whose answers created a reasonable doubt about her ability to serve as the sixth juror.

The District Court's decision is based further on the Legislature's list of grounds for a challenge for cause, stating that none of the twelve statutory grounds applies to the facts in this case. Boykins, 783 So.2d at 318 (APPENDIX); §913.03, Fla. Stat. (1999). Petitioner asserts that the threat to the Sixth Amendment right to a six-person jury posed by Prospective Juror DiBari's answers illustrates that the statutory list is or should not be viewed as exhaustive of all possible grounds for disqualifying a potential juror. In addition, her state of mind regarding the case before her was such that would have prevented her from acting with impartiality. See

§913.03(10), Fla. Stat. (1999)[3].

Petitioner's challenge to Prospective Juror DiBari should have been granted. When one juror cannot decide, the jury cannot decide. Williams v. State, 792 So.2d 1207, 1212 (Fla. 2001) (Justice Anstead specially concurring). Art. I §§9 and 16, Fla. Const.; Amends. VI and XIV, U. S. Const.

II. Bias in favor of Law Enforcement

When Prospective Juror Saucedo was questioned by the trial court about his attitude toward law enforcement, he said that his relationship with his son who was a member of Florida Highway Patrol would not cause him any difficulty in listening to law enforcement testimony "the same way as the other testimony[,]" but he also stated that he would tend to believe a law enforcement officer over another witness. (T 29, Vol. III) Judge Alley asked if he would be able, if instructed by the court, "to give the same weight to the other witnesses[']testimony as you do to law enforcement officers but that credibility is up to you," and Mr. Saucedo said "Yes." (T 30, Vol. III) When questioned by defense counsel, however, the prospective juror reiterated his disposition, i.e., that he would "give more weight or more credibility to a law

[3] "The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;"

enforcement officer's testimony just by the virtue that they are a law enforcement officer." He said, "I say that I will, but I will listen to the judge's recommendations. I go with that." When this juror was challenged for cause, the prosecutor argued that he had indicated that he would "listen to the judge and follow the law[,]" and the motion was denied. (T 89, Vol. III)

Another juror was Prospective Juror Yiznitsky who socialized with law enforcement officers and was the nephew of a retired police officer. (T 96-97, Vol. III) He initially stated that he would give "[p]robably more credibility to the law enforcement[,]" but then said he would follow the judge's instruction if she told him that was not what he was supposed to do. (T 96-97, Vol. III) The defense's challenge to this prospective juror was likewise denied. (T 168, Vol. III)

A juror who expresses a bias in favor of the testimony of a law enforcement officer should be excused for cause. Polite v. State, 754 So.2d 859 (Fla. 3d DCA 2000). A juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes. Williams v. State, 638 So.2d 976, 979 (Fla. 4th DCA 1994). Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed

with some skepticism. Club West, Inc. v. Tropigas of Fla., Inc., 514 So.2d 426, 427 (Fla. 3d DCA 1987). "[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality." Hill v. State, supra, 477 So.2d at 556. Both jurors who were challenged for their law enforcement bias eventually stated that they would follow the law; but both had initially admitted that their close association with and relationship to law enforcement officers caused them to give greater credibility to a law enforcement officer's testimony. (T 29, 97, Vol. III) Their agreement with the court's subsequent questions does not remove the reasonable doubt that their original answers raised about their ability to be fair and impartial. The challenges to Mr. Saucedo and to Mr. Yiznitsky should have been granted.

III. Equivocation about the accused's right not to testify

Prospective Juror McIlrath's answers during *voir dire* examination revealed his inability to serve as a fair and impartial juror in this cause. Defense counsel questioned the members of the venire about whether they would have to hear from Anthony Boykins in order to find him not guilty. (T 163, Vol. III) Mr. McIlrath stated:

> MR. McILRATH: No, I would not. If I was accused, though, I would think that I would have to weigh would that be in my best interest though.
>
> [Defense counsel]: Again, can you think of some reasons why as an accused you may not want to take the stand?
>
> MR. McILRATH: Only if I knew down in my heart that I was

guilty and the case was going against me.

* * *

(T 163-164, Vol. III) [Emphasis supplied.]

The trial court denied Petitioner's challenge to Mr. McIlrath based upon his indication that he would think someone was guilty if he did not take the stand in his own behalf:

> THE COURT: That might be one of the reasons. I think it was one of the reasons rather than the only reason. He asked what was one of the reasons someone might not take the stand because that he might be guilty.
>
> [Prosecutor]: That's a valid reason.
>
> THE COURT: I don't find a sufficient basis for cause.

* * *

(T 171-172, Vol. III)

Mr. McIlrath had tempered his original remark about guilt constituting a reason to not testify by saying that he did not "have a problem" if Mr. Boykins "didn't take the stand[.]" (T 164, Vol. III) This response, however, did not dispel the prospective juror's initial statement that the only reason for the accused's not taking the stand at his trial would be "if I knew down in my heart that I was guilty and the case was going against me."

Mr. McIlrath's remark that he could understand an accused's not taking the stand "only if I knew down in my heart I was guilty" parallels the response given by

a juror challenged in Overton v. State, 26 Fla. L. Weekly S962 (Fla. September 13, 2001). The juror in Overton stated that he "always believed" that defendants should testify if they have "nothing to hide." This Honorable Court concluded in Overton that the juror should have been excused for cause, despite his subsequent statements that he would follow the law.

The prosecutor opined in this case that Mr. McIlrath was referring only to what would be *his* reason for not testifying, and Judge Alley stated that an inference of guilt was not the *only* reason the juror would require the defendant to testify. Both theories, however, were speculation and not rehabilitation of the juror. See, e. g., Bryant v. State, 601 So.2d 529, 532 (Fla. 1992) (It is not defense counsel's obligation to rehabilitate a juror who has responded to questions in a manner that would sustain a challenge for cause but rather the duty of either the prosecutor or the judge to make sure the prospective juror can be an impartial member of the jury); and Taylor v. State, 26 Fla.L.Weekly D2177 (Fla. 2d DCA September 7, 2001) (same). His initial remarks demonstrated that Mr. McIlrath should have been excused for cause.

The trial court should have granted Petitioner's challenges to any and all of these four jurors. Instead, Petitioner was forced to exhaust his peremptory challenges to remove them and, when his request for additional peremptory challenges was denied, he was unable to excuse another juror to whom he objected and who ultimately served as the foreman. (T 174-176, Vol. III; T 519, Vol. IV) The trial

court's error requires a new trial in this case. Art. I §§9 and 16, Fla. Const.; Amends. VI and XIV, U. S. Const.

## CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the District Court's decision and direct that this cause be remanded to the trial court for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Arthur Boykins, 10650 S. W. 46th Street, Jasper, Florida 32052, this 27th day of November, 2001.

ATTORNEY

## CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

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