IN THE SUPREME COURT OF FLORIDA
CASE NO. SC02-531

DWAYNE CURTIS DORSEY,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

This cause is before the Court on a petition for discretionary review on the grounds of express and direct conflict of decisions. References to the record transmitted by the Third District Court of Appeal are indicated parenthetically by the letter "R" followed by the page number. References to the separately bound transcripts are indicated by the letter "T." References to the appendix to the initial brief are indicated by the letter "A."

SUMMARY OF ARGUMENT

The Respondent's Brief mistakes both the facts before the Court, and the law that governs the Court's decision. The State suggests that the prosecution and defense simply had different perceptions of Ms. George's demeanor. This ignores the fact that the **record** contradicted the prosecutor's claim that Ms. George was inattentive, a fact the defense brought to the trial judge's attention. The State also asserts that the judge adjudicated the credibility of the prosecutor's explanation. In fact, the trial judge simply "took her at her word."

The State offers a handful of federal decisions in support of its position. The question before the Court, however, is controlled by Florida law in the first instance. As demonstrated in the initial brief, the district court's opinion is wrong as a matter of Florida law. The State offers no reply to the Petitioner's arguments. The Petitioner submits that this is because the State has no reply. In any event, the federal cases cited in the Respondent's brief do not support the State's position, and the Third District Court of Appeal's decision must be reversed.

ARGUMENT

I. THE RESPONDENT'S BRIEF MISCONSTRUES THE RECORD BEFORE THE COURT.

A. The Prosecutors Reasons Are Contradicted by the Record

The State pretends that the parties merely had a difference of opinion on how to interpret Ms. George's demeanor. Respondent's Brief on the Merits at 13.[1] In fact, the prosecutor's reasons are contradicted by the record. The prosecutor explained her reason for striking Ms. George as follows: "That's the reason. To me, she appeared disinterested. She did not — wasn't listening to anything." (T. 135; A. 13). Defense counsel pointed out that, to the contrary, Ms. George had been attentive. (T. 135; A. 13). Moreover, the defense pointed out that the record contradicted the prosecutor's claim:

> … And here, because the reason it's been produced by the State and what [the prosecutor] says, her only reason, **is simply not supported by the record**.
>
> Her statement that the juror is disinterested affirmatively rebutted by the fact that this is the only juror who actually said she wanted —

[1]"In the instant case, the issue stemmed from the interpretation of Ms. George's demeanor. The prosecutor interpreted her demeanor as disinterest. Defense counse, however, thought that Ms. George was happy to be there."

> I'm sorry what she said, she was happy when she got her jury document notice. I mean —

(T. 136: 14) (emphasis supplied).

B. The Trial Court Failed To Rule On The Issue Before It.

According to the State: "[T]he critical factor is that the court did not simply accept the prosecutor's reason." Reply Brief at 15. To the contrary, that is precisely what the trial judge did.

> THE COURT: [Prosecutor], I didn't notice it but are you telling me as Officer of the Court that that was your observation of this juror and that is why you wish to have her excused?
>
> [Prosecutor]: Exactly.
>
> THE COURT: I'm going to take [the prosecutor] at her word. I'm going to allow the challenge.

(T. 136; A. 14). The judge simply took the prosecutor at her word.

To take someone at his or her word is to accept what that person says without further proof or analysis. The American Heritage Dictionary of Idioms defines the phrase as follows:

> take someone at his or her word – Also, take someone's word for. Accept what someone says on trust, as in Since he said he'd agree to any of my ideas, I'll take him at his word, or She said she wanted to help out and I took her word for it. This idiom appeared in Miles

> Coverdale's translation of the Bible: He said ... he is my brother. And the men took him shortly at his word (I Kings [20:22-]33). It is still so used. [1535]

CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS (1997).

Contrary to what the State claims, the judge did not "find the prosecutor credible." Reply Brief at 13. The trial court erred in simply accepting the prosecutor's reason rather than determining whether it could be genuine.

II. THE RESPONDENT'S BRIEF IGNORES THE DECISIONS THAT CONTROL THIS CASE.

The State proceeds on the assumption that this case is controlled by a collection of federal circuit court opinions. Respondent's Brief, 11-14. Florida law, however, is not chained to a federally-defined floor where racial discrimination in peremptory challenges are concerned. Even before *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court recognized that article I, section 16 of the Florida Constitution required the examination of peremptory challenges for racial bias. *See State v. Neil*, 457 So. 2d 481 (Fla. 1984). In *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), the Court restructured the procedure for evaluating *Neil* challenges, using *Purkett v. Elem*, 514 U.S. 79 (1986), as a model. The Court did **not**,

however, use *Melbourne* to jettison all Florida law on the subject.[2] The Court specifically stated that *Melbourne* was intended to "encapsulate existing law," and the Court receded from *State v. Slappy*, 522 So. 2d 18 (Fla. 1988), only "To the extent that *Slappy* and its progeny require a 'reasonable' rather than a 'genuine' non-racial basis for a peremptory strike …" *Melbourne*, 679 So. 2d 764, 765.

The State's faulty assumption causes it to ignore the numerous Florida decisions on point. The Initial Brief argues that *Melbourne* did not silently overrule the record-basis requirement of *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990) and *Wright v. State*, 586 So. 2d 1024, 1029 (Fla. 1991). The Answer Brief ignores the existence of *Floyd* and mentions *Wright* only in its statement of facts. The State also ignores each of the Florida decisions that has applied the record-basis requirement after *Melbourne*.[3] The Petitioner submits that this is because the State can find no support for its position in Florida law.

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[2]For example *Melbourne*, unlike *Elem*, does not require a prima facie showing of discrimination in "step one."

[3]These include: *Rimmer v. State*, 825 So. 2d 304, 320-21 (Fla. 2002), *quoting with approval Floyd*, 569 So. 2d 1229-30; *Floyd v. State*, 27 Fla. L. Weekly S697 (Fla. August 22, 2002); *Francis v. State*, 808 So. 2d 1110 (Fla. 2001); *Daniel v. State*, 697 So. 2d 959 (Fla. 2d DCA 1997) (Quince, J.) (reversing strike based on prosecutor's feeling juror had an "amicable relation" with defense counsel); *Georges v. State*, 723 So. 2d 399 (Fla. 4th DCA 1999); *Randall v. State*, 718 So. 2d 230 (Fla. 3d DCA 1998).

The federal cases the State relies on likewise fail to support its position. For example, the State relies on *McCurdy v. Montgomery County, Ohio,* 240 F.3d 512 (6th Cir. 2001), which approved a strike based on inattentiveness. The court upheld the strike "… because the district court did not merely credit the explanation of the County, but itself found that Williams was passive and disinterested …" 240 F.3d 521. The court also noted that:

> "While body language and demeanor are permissible race-neutral justifications for the exercise of a peremptory, district courts nevertheless must 'explicitly adjudicat[e] the credibility of the non-moving or challenging party's race neutral explanations.'"

240 F.3d 521 (internal quotations and citations omitted). This is precisely what the court failed to do. Instead of adjudicating the prosecutor's credibility, it "took her at her word."

Similarly, *United States v. Cooper*, 19 F.3d 1154 (7th Cir. 1994), provides no support for the Respondent. That decision addressed the exclusion of three jurors. The prosecution explained that it struck jurors Bolton and Reames because of their hesitance in expressing an ability to impose the death penalty, as well as their demeanor. 19 F.3d 1160-61. The government said it struck juror Simmons because of her demeanor and the fact that she had a child the same age as the defendant. 19 F. 3d 1161. The court rejected Cooper's argument that these

reasons were "wholly subjective" and should be rejected at step two of the *Batson* analysis. *Id.* The court also pointed out that the trial judge "noted in his observance of juror Simmons's demeanor that the prosecutor's interpretation of her statement was reasonable." *Id.* Thus, the circuit court approved strikes based on record evidence of the jurors' responses as well as the jurors' demeanor, which was at least partially confirmed by the trial court. It is difficult to see how this result applies to the strike of Ms. George based solely on the prosecutor's feeling that George was disinterested – a feeling contradicted by the record.

United States v. Jenkins, 52 F.3d 743 (8th Cir. 1995), is also distinguishable. *Jenkins* did approve a strike based on inattentive behavior not directly observed by the judge. "[T]he government described specific behavior by jurors 18 and 33, such as scowling, that its attorneys and agents had observed and interpreted as disinterest." 52 F.3d 746. Unlike Mr. Dorsey's attorney, defense counsel in *Jenkins* merely argued "that they had seen no scowling." *Id.* Consequently, *Jenkins* appears similar to *Bowden v. State*, 787 So. 2d 185 (Fla. 1st DCA 2001) or *English v. State*, 740 So. 2d 589 (Fla. 3d DCA 1999). *See* Initial Brief, 16-18. The circuit court pointed out that had Jenkins wished to disputed the government's claims it could have sought to call the agents or jurors to give evidence on the point. 52 F.3d 746-47. The court also wrote that where strikes are based on

subjective assessments, "The attorneys should fully develop the record concerning the specific behavior by venire members that motivated the peremptory challenge …" 52 F.3d 746. In this case, unlike Jenkins, it was Mr. Dorsey who was able to point to record evidence contradicting the prosecutor's reason. The prosecutor, however, failed to develop any record that would support the striking of Ms. George.

The remaining cases relied upon by the State deal with the deference due a judge's evaluation of the credibility of a prosecutor's reason for striking a juror. Respondent's Brief, 11-15, *citing Batson*; *Elem*, *Hernandez v. New York*, 500 U.S. 352 (1991); *United States v. Williams*, 934 F.2d 847 (7th Cir. 1991); *United States v. Perez*, 35 F.3d 632 (1st Cir. 1994). The State's reliance is misplaced under the facts of this case. The trial judge never made a finding of credibility – it simply "took the prosecutor at her word." This Court should not defer to a nonexistent finding. Even if the Court had adjudicated the issue before it, it would have abused its discretion on this record. The only record evidence showed that Ms. George was an alert and intelligent juror who volunteered information where appropriate, answered the questions put to her, and was genuinely happy to serve her community. Once this was pointed out to the judge, he had no discretion to accept the prosecutor's discredited "feeling" about Ms. George. *See, e.g., Floyd*

v. State, 569 So. 2d 1225 (Fla. 1990); *Daniel v. State*, 697 So. 2d 959 (Fla. 2d DCA 1997).

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Initial Brief on the Merits, the Court should reverse the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Paulette Taylor, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on December 9, 2002.

_____

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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ANDREW STANTON
Assistant Public Defender