IN THE SUPREME COURT OF FLORIDA

DONALD LENNETH BANKS,

Appellant,

v. **CASE NO. SC08-1741**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Banks relies on his preliminary statement as found in his initial brief.

ARGUMENT

ISSUE I:

THE COURT ERRED IN REFUSING TO GRANT BANK'S CAUSE CHALLENGES TO PROSPECTIVE JUROR CONSTANTINO WHICH FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

In reviewing issues dealing with jury selection in non capital cases, appellate courts correctly give the trial court a large amount of freedom in granting or denying challenges. This type of issue involves judgments on a prospective juror's demeanor or other trait that the "cold record" on appeal simply cannot capture. And, for the routine theft, robbery, or even sexual battery trial, that law has ready application.

In a capital trial, involving a death sentence, that discretion must be more tightly controlled by this Court. In this situation, the juror must not only pass on the defendant's guilt or innocence for the most serious crime in our society but also recommend whether the defendant should live or die. In the unique setting of a capital trial, there is a heightened concern that only the most impartial and fair jurors sit. Because "death is different," the decisions trial judges make in selecting jurors in capital trials must receive closer and more critical scrutiny. When jurors engage in the unique duty of recommending if a person should live or die, this Court must much more closely review and control the trial court's discretion.

Mistakes made in seating a jury can have unfair, deadly consequences. This Court should, therefore, more readily find a reasonable doubt about a prospective juror's impartiality in a capital case.

Thus, for example, prospective juror Constantino's assurance of fairness should not be the end of any judicial inquiry. See, Meade v. State, 867 So.2d 1215 (Fla. 3d DCA 2004). It has some bearing, but in light of the totality of his situation and what he said, it does not necessarily preclude a challenge for cause. The other facts, while perhaps by themselves, would not justify a cause challenge, when viewed in the light of this death penalty voir dire, should have prompted the court to grant Banks's challenge.

First, Mr. Constantino's daughter had been robbed, not with a knife or by strong-arm, but with a gun. "My daughter was held up at gunpoint and robbed." (8 R 92-03) Other than murder and perhaps sexual battery, there is no other more violent crime than robbery with a gun. That must have had a strong emotional impact on him.

Second, that violent offense happened six weeks before Banks's trial, not five or ten years earlier. While time may heal all wounds, the more violent the assault on a person the longer the healing process takes. Indeed, for murders, as judged by Victim Impact Statements, the wounds may never heal. So, with the robbery with a gun we should expect some strong residual emotions in this

prospective juror still lingered when his daughter had been assaulted only six weeks earlier.

Third, consider the situation where the daughter had been murdered and not simply robbed six weeks earlier. Would his professions of impartiality have been similarly accepted as clinching the matter? Hardly. Or, consider that someone had simply stolen his daughter's lunch. Would this Court accept the argument Banks's made that Mr. Constantino could not be impartial? Of course not because that crime would amount to nothing more than a minor irritant we assume most adults can properly put in perspective.

Robbery with a firearm is obviously more serious than the theft of a chicken sandwich, but it is less serious, but not by much, than a first degree murder. So we should accept his claim it would have no effect on him with a great deal of skepticism.

It is also much more serious than selling cocaine within 1000 feet of a school. In White v. State, 579 So.2d 784, 785 (Fla. 3rd DCA 1991), the relatively less seriousness of that crime required the Third DCA to look at the prospective juror's situation as a parent, teacher, and lover of children when it considered her profession of impartiality. In that case, had the prospective juror never said anything about her attitude towards children, her answer that she could probably be fair would likely have withstood appellate scrutiny. The totality of the

circumstances, however, required the Third DCA to find the trial court had abused its discretion in this noncapital case when it refused to excuse her for cause.

In this case, this Court must, as the Third DCA did, look beyond the prospective juror's claim of impartiality. Not only must it evaluate it in light of the totality of Mr. Constantino's responses, it must evaluate them in light of this being a capital case in which the juror would determine not only Banks's guilt but recommend whether he should live or die. Under that much more controlled discretion, the trial court clearly erred in refusing to excuse him for cause.

ISSUE II

THE COURT ERRED IN ALLOWING THE STATE TO PEREMPTORILY EXCUSE TWO BLACK MALES FOR REASONS THAT WERE NOT RACIALLY NEUTRAL, A VIOLATION OF BANKS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

On page 26 of its brief, the State argues that "a prosecutor may exercise an available peremptory challenge against a prospective juror for any non-discriminatory reason whatsoever, whether the reason be reasonable or wholly illogical." That is incorrect. State v. Holiday, 682 So.2d 1092, 1094 (Fla. 1996) ("gut feeling" is not a legitimate reason to exercise a peremptory challenge); Nowell v. State, 998 So.2d 597, 604 (Fla. 2008)(Prosecutor did not "particularly like a prospective juror); Foster v. State, 557 So.2d 634, 635 (Fla. 3rd DCA 1990) (A "feeling" about a juror)

On page 27 of its brief, the State says that Banks is mistaken that "the prosecutor must always show a nexus between the stricken venireman and the case at hand." (Emphasis in brief, footnote omitted.). In Slappy v. State, 522 So.2d 18, 22 (Fla. 1988), this Court said that if the state's reason for using a peremptory challenge is unrelated to facts of the case it tends shows an impermissible pretext. In Nowell, this court said "the judge must consider all the relevant circumstances to determine whether the justification is genuine, including the reasonableness of the explanation...." How else can the prosecutor show the genuineness of his or

her use of peremptory challenge without showing some logical reason for exercising it on a particularly member of the venire. While courts want to give parties wide latitude in the use of those challenges, it is not unbounded. And, the limits are reached and exceeded when a prosecutor uses such arbitrary reasons as feelings and rental and marital status to justify removing citizens from serving on a jury. When he fails to provide some justification, some logical nexus, for his use of the challenge, he has not provided a genuine reason for trying to remove a particular person from serving.

Such was the case in this case. The prospective juror's marital status and being a renter had no logical connection to the first-degree murder the State had charged Banks with committing. As such it amounted to a pretextual reason for peremptorily excusing them.

The State also argues that because the State did not peremptorily challenge some blacks, the fact that it did so on Ford and Laws does not mean it did so improperly. (Answer Brief at p. 28) But a black defendant does not have to show the State so challenged every black member of the venire. Bowden v. State, 588 So.2d 225 (Fla. 1991); State v. Whitby, 975 So.2d 1124, 1129 (Fla. 2008) (Pariente, concurring)(A pattern of discrimination is not required before a party can demand a race neutral reason for exercising a peremptory challenge.)

The State further contends that because it excused other, presumably white members of the venire, who also were single and rented, that reason was race neutral. (Answer Brief at pp. 28-29) Yet, as the State admitted, it had plenty of peremptory challenges, so many in fact that it did not use all of them (8 R 196). Thus, it could have very well have exercised them on white single renters to camouflage its real intention to excuse black members of the venire.

In support of this argument, Banks has found only two cases in which the issue of the State's use of peremptory challenges on single renters arose. Both came from Duval County, the same county this case took place. In Knight v. State, 559 So.2d 327 (Fla. 1st DCA 1990), the prosecutor supported its peremptory challenge of a black woman in part because she did not own her home. The First District very reluctantly found the prosecutor's reasons acceptable. "While a tenuous argument might be made that a home owner would be more likely to convict in a residential burglary case than would a renter, we note that two unchallenged jurors were also renters. In short, the prosecutor's showing as to Miss Bellamy was extremely marginal, at best."

In Givens v. State, 619 So.2d 500, 502 (Fla. 1st DCA 1993), the Duval County prosecutor again used the single renter excuse to challenge a black member of the venire. When Givens told the court that the challenged juror owned a home, the State persisted in its challenge because he was single. "Unless [his being

single] has 'some connection to the facts of the case,' where Appellants were charged with entering a dwelling with intent to commit theft, marital status is not a valid reason for a peremptory strike. We find no such connection here."

Similarly, here, the State presented no link between the facts of this case and Mr. Ford's and Mr. Law's status of being single renters. Hence, this Court should find no connection between their status and the facts of this case.

The State, on page 29 of its brief, argues that because it said the Court had to make a determination that the reason it peremptorily challenged the black prospective jurors was genuine that it was "well aware of Melbourne's third step. But being aware does not mean it in fact followed it. This Court in Mebourne v. State, 679 So.2d 759 (Fla. 1996) clearly required the trial court, not the prosecutor, to find the reason it propounded as genuine. Id. at 764. Saying nothing other than "I will allow the challenge," (8 R 198) does not satisfy that requirement.

Finally, if, as the United States Supreme Court said in J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination" then clearly the State violated the constitutional rights of those members of the venire it peremptorily struck simply because they were single and rented. Use of peremptory challenges on this class

of citizens sends a clear message that members of the community who are single and rent have no business sitting on juries. That is not the message this Court should send.

ISSUE III

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE THAT VARIOUS PIECES OF EVIDENCE MATCHED BANKS' DNA WITHOUT ALSO REQUIRING IT TO PRESENT EVIDENCE AS TO THE SIGNIFICANCE OF THAT MATCH, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The State, on pages 31-35 of its brief, argues that Banks did not preserve the issue he raised on appeal. "The defendant did not make the same argument below that he makes here." (Appellee's brief at page 31) That is a remarkable claim because before trial Banks put the court on notice that he had good reason to believe that the State would not present any population statistic evidence that would have given significance to Dr. Pollock's anticipated testimony that DNA found at the crime scene matched Banks (7 R 1272). Moreover, then and at trial, the defendant cited Brim v. State, 695 So.2d 268 (Fla. 1997)[1] for the proposition that besides showing the match, the State also had to present evidence establishing the statistical significance of that comparison. Banks repeatedly told the court that the prosecutor had to show "that there's the comparison to the population statistics and the databases." (10 R 474)

When Banks raised the issue at trial, the State amazingly dismissed the objection by saying "Frankly I wasn't even going to ask him the questions about

[1] At the pretrial hearing on the motion it also cited Butler v. State, 842 So.2d 817, 827 (Fla. 2003), which reiterated what this Court had held in Brim.

statistics." (10 R 474). The court seemed to agree, and it held that as long as the evidence showed a match "at all 13 loci" with Banks' DNA it was admissible "I can't imagine how it's objectionable." (10 R 474)

On appeal, Banks is arguing nothing more than what he argued below: Brim and Butler require the State, as part of the two-step process to have DNA evidence admitted, to show the statistical significance of the match.

The State, on page 35 of its brief, says, "Contrary to Banks' argument, this Court's decisions in Brim and Butler do not create a new *per se* rule for the admissibility of DNA evidence." Whether those cases created a new rule or not is irrelevant. What they did is "clarify and emphasize that the DNA testing process consists of two distinct steps." Brim at 269. "DNA testing requires a two-step process, one biochemical and the other statistical." Butler, at 827. Whether this is a new rule or one that should apply in every case is besides the point. Brim and Butler clearly require the statistical evidence, and the State did not, and in fact, refused to present it here. Allowing the State to avoid presenting what those two cases clearly require was error

The State, on page 36 of its brief, argues "This Court has never extended Brim and Butler to exclude DNA test results if the State doe not offer 'qualitative

or quantitative estimates demonstrating the significance of the match.' This Court should not do so now."[2]

First, it has never done so before now because no prosecutor, until now, has so blatantly refused to ignore the requirements of Brim and Butler. Second, when a party fails to comply with the second step, the obvious conclusion from the strong language used in those cases is to exclude the DNA evidence. Third, even a casual reading of Brim and Butler clearly imply that the two step process is mandatory. "DNA testing requires a two step process." Butler at 287. If a party fails to present evidence of "statistics to estimate the frequency of the profile in the population" the court should exclude the DNA evidence.

If this Court accepts the State's suggestions and excuses the lack of proof of statistical significance the result will tend to confuse or more likely mislead the jury into giving more the DNA match evidence more significance than it deserves. The second step is absolutely required to prevent that and give meaning to the first step. Without any statistical evidence, the evidence of the match means nothing, and worse it leads to jury speculation about its significance.

[2] By way of footnote it also argues "Such a matter may be relevant to weight but not admissibility."

ISSUE IV

THE COURT ERRED IN DENYING BANKS' MOTION FOR MISTRIAL WHEN, ON CROSS EXAMINATION, SUDIE JOHNSON IMPLICATED THE DEFENDANT IN AN UNCHARGED STABBING, A VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State, on pages 42-44 argues that this Court's opinion in Thompson v. State, 648 So.2d 692 (Fla. 1994) presented a similar situation as the one in this case. Not at all. In the Initial Brief, Banks noted that cases finding invited error arose when the party asked open ended questions. They usually did not when they asked leading questions. (Initial Brief at p. 42). Defense counsel in Thompson asked an open ended question. "When did your crew see him?" Such a non-leading question invited the damning response.

In this case, Banks' questions required only a yes or no answer, and they never invited a broader response than those short responses.

Finally, the State essentially argues that the error was harmless. Allegations of other criminal conduct, however, are rarely harmless and demonstrate a remarkable immunity to curative instructions. This is particularly true in this case when Sudie Johnson said she changed her mind after seeing her boyfriend stab William Johnson. A bland request "please disregard the last remark made by this witness," hardly does so (9 R 376-81). Even individual assurances of impartiality cannot entirely remove the taint of the attempted murder and robbery. Some

stains, no matter how hard we scrub, and no matter how much bleach we use, remain. Sudie Johnson's comment is of that type. Good intentions and an earnest desire to minimize the damage of what she had blurted out could not remove the unfair taint it left. Short of granting a mistrial, nothing the court did, or probably could have done, would have sufficed to remove the stain of what she said.

ISSUE V

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT, DURING THE PENALTY PHASE OF BANKS' TRIAL, A VIDEO SHOWING HIM COMMITTING AN ARMED ROBBERY ON A MR. WILLIAM JOHNSON, OSTENSIBLY TO SUPPORT THE AGGRAVATING FACTOR THAT THE DEFENDANT HAD A PRIOR CONVICTION FOR A VIOLENT FELONY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In his Initial Brief, by way of footnote 19, Banks cited Singleton v. State, 783 So.2d 970 (Fla. 2001), and claimed it had no relevance to this case because that case involved the relevancy of the jury seeing a video of the defendant in jail garb, which was not at issue in this case. As it turns out, the State, on page 48 of its Answer Brief, pointed out that in Singleton this Court also had the issue of the whether the victim could show the jury that the defendant had cut off her arms. This court said that demonstration had relevance because it assisted the jury in evaluating the character of Singleton. Id. at 978.

Singleton, however, continues to have little relevance to resolving this issue because Banks admitted that the video of his assault on Mr. Williams was relevant. (Initial Brief at page 46). The issue was its unfair prejudicial value. Did it outweigh its probative significance? That is the issue Banks presents, and Singleton provides no help in resolving that question. Indeed, in that case, this Court, after finding the display of the victim's prosthetic arm relevant, noted that

the defendant "does not otherwise challenge the presentation or content of her[the victim's] testimony." Id. at 978.

In this case, Banks challenges what Singleton did not. The admitted probative value of the videotape was significantly outweighed by its prejudicial value. As such, this Court should reverse the defendant's sentence of death and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here and in his Initial Brief, Donald Banks respectfully requests this Honorable Court reverse the trial court's judgment and sentence and remand for a new trial, or reverse the court's sentence and remand for a new sentencing hearing with or without a jury.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to **MEREDITH CHARBULA**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and **DONALD LENNETH BANKS**, #A-J29603, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of August, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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