97-2540

No. 97-2540

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREGORY SOLOMON, et al.

Plaintiffs-Appellants,

vs.

LIBERTY COUNTY, FLORIDA, et al.

Defendants-Appellees

On Appeal From The United States District Court
For The Northern District Of Florida

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

DAVID M. LIPMAN
Suite 304
5901 SW 74th Street
Miami, Florida 33143-5186
(305) 662-2600

Counsel for Plaintiffs-Appellants

No. 97-2540

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREGORY SOLOMON, et al.,

Plaintiffs-Appellants,

vs.

LIBERTY COUNTY, FLORIDA, et al.

Defendants-Appellees

On Appeal From The United States District Court
For The Northern District Of Florida

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

DAVID M. LIPMAN
Suite 304
5901 SW 74th Street
Miami, Florida 33143-5186
(305) 662-2600

Counsel for Plaintiffs-Appellants

CERTIFICATE OF TYPE SIZE AND STYLE

This brief uses 12 point courier type with 10 characters per inch. It is not proportionally spaced.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY BRIEF FOR APPELLANTS

Standard of Review

The appellees vigorously contend that all of the errors we have alleged go to pure findings of fact, governed by the clearly erroneous rule, and not to rulings of law or mixed findings of law and fact. School Board brief (S.B.) at 17-18; County brief (Cty.) at 7-8. But they are wrong in this regard. For example, appellate claims regarding the weight assigned by district courts to election victories by a single black individual, or a small number of black candidates, have generally been treated as issues of law by courts of appeal. See, e.g., Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1554, 1560 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988); Clark v. Calhoun County (Clark I), 21 F.3d 92, 96-97 (5th Cir. 1994). The proper analysis of a candidate slating process -- determining whether it is open to "black candidates who seek to represent black interests," instead of simply determining if a single black candidate has been slated by whites -- has been treated as a legal question. Solomon v. Liberty County, 865 F.2d 1566, 1582 (11th Cir. 1988) (panel opinion). The same appears true for unsupported assumptions about the cause of black political defeats, see, e.g., Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 145 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977), as well as issues about the proper treatment of various "totality of circumstances" factors. See, e.g., Westwego Citizens for Better Government v. Westwego (Westwego I), 872 F.2d 1201, 1204, 1211-1212 (5th Cir. 1989) (listing under the heading "errors of law" various errors related to the treatment of history

of discrimination, socioeconomic inequalities, and enhancing factors); United States v. Marengo County Commission, 731 F.2d 1546, 1571-1572 (11th Cir.), cert. denied, 469 U.S. 976 (1984) (absence of racial appeals "should not weigh heavily against a plaintiff" and "unresponsiveness is of limited importance" under Section 2). The relevance of racially polarized voting to the question of racial bias and racial animus has been perceived as a legal question. Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc) (opinion of Tjoflat, C.J.). The constitutional issues in this case -- whether the plaintiffs must prove that the challenged plan was both adopted and maintained for racist reasons, and whether they must prove both discriminatory intent and discriminatory results -- are legal matters and not factual issues. As all of this illustrates, a number of the issues in this appeal relate to questions of law that are governed not by the clear error rule, but instead are subject to de novo review.

Moreover, to the extent the clear error rule does govern, we contended in our opening brief (see p. 8) that the District Court did commit clear error in a number of respects. Appellees suggest that clear error could not exist, particularly in light of the election victories of the single black candidate, Earl Jennings. S.B. at 21. But clear error has been found in similar situations despite black candidate victories, causing appellate courts to reverse on the basis of that error and render judgment for the plaintiffs. See, e.g., Clark v. Calhoun County (Clark II), 88 F.3d 1393, 1396-1397, 1408 (5th Cir. 1996).

In this connection, we reiterate the point made in our opening brief and made by a number of courts of appeals: "It will only be the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances." Clark I, 21 F.3d at 97, quoting, Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1135 (3rd Cir. 1993), cert. denied, 114 S.Ct. 2779 (1994). See also, NAACP v. City of Niagara Falls, 65 F.3d 1002, 1019-1020 n.21 (2nd Cir. 1995) (quoting the same language). The Supreme Court suggested the same thing in Johnson v. DeGrandy, 512 U.S. 997, 1012 (1994), noting that the "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential Gingles factors." (Emphasis added).

The Gingles Factors

Despite the unanimous conclusion of this Court sitting en banc that the three Thornburg v. Gingles, 478 U.S. 30 (1986), factors have been established, and despite the District Court's later agreement with that conclusion, the appellees contend that the three Gingles factors have not been proven. The School Board argues that "the 1990 Census data indicates that blacks no longer comprise a majority in any of the five districts of Liberty County, R5-154-77 n. 75, calling into question whether the first Gingles factor is still satisfied." S.B. at 24. The "five districts" of which the Board speaks are residence districts. Although all five school board members and all five county commission members are

elected at-large, one on each board must reside in one of the five residence districts in the County. Whether one of these is majority black under the 1990 census data is beside the point, since the appellees stipulated and the District Court found that a black majority district can be created under the 1990 data sufficient to meet the first Gingles factor. R5-154-77 n.75.

The School Board also argues that this Court's unanimous finding on the third Gingles factor should be rejected because Earl Jennings is now in public office. S.B. at 23. But as the District Court noted, the successes of one person do not override this Court's finding of polarization, particularly where the appellees presented no regression analysis of the Jennings elections. R5-154-77 n.75 and id. at 89 and n. 89. And while the County contends that it was the plaintiff-appellants' burden to produce a regression analysis of the Jennings elections, C. at 21, actually the opposite is true. This Court's en banc remand order said that the Gingles factors were established as a matter of law. If the defendant-appellees wanted to attempt to override that, they at least had the burden of coming forward with a regression analysis of new elections sufficient to set aside that holding.

The Jennings Elections and the Slating by White Families

In Section I of the argument portion of our opening brief, we pointed out that the success of Earl Jennings does not detract from the plaintiffs' Section 2 showing inasmuch as he is the only black person to be elected in Liberty County, his victory was the result of slating by the white families, and he has not been proven to be

the candidate of choice of black voters. The appellees claim we have not proven our contentions regarding the Jennings success. S.B. at 35, Cty. at 10. But in fact we have. The points regarding the role of the slating by white families in his success come straight from the District Court's own findings. See our opening brief at 13-14, 17. And despite the statistical quarrels we have with the appellees and the District Court -- see our opening brief at 15-16 -- it is undisputed that in the most heavily black residence district, when another black candidate ran against Jennings (in 1996), that other candidate received many more votes than Jennings. R5-154-97-97 n.97. See our opening brief at 15-16. All of this demonstrates what Chief Judge Tjoflat suggested in the panel opinion in this case -- that Jennings may be the candidate of choice of the white slating powers, but he is not necessarily that of the black voters.

> Earl Jennings, although black, may not have been perceived to be a black candidate. . . . On remand, the district court should consider the possibility that the slating of Jennings on a white ticket in 1980 does not permit the inference that the candidate slating process in Liberty County is open to blacks. Particularly, the district court should consider whether the white slating process is open to black candidates who seek to represent black interests.

865 F.2d at 1581-1582.

Indeed, the results of that 1996 election, where another black candidate ran against and defeated Jennings in the most heavily black areas but lost to him in the most heavily white areas, demonstrates that if a single-member district plan existed with a majority black district, a black candidate would be elected but it would not be Jennings. Under a single-member plan, black voters

could elect the candidate of their choice. Under the existing system, the only black candidate who can win is the one who is the choice of the white slating organizations.

The appellees contend that since Jennings has been elected and re-elected "several" times, his success should not be discounted. Cty. at 9, 33. But the election of a "safe" black candidate, 478 U.S. at 75, particularly after litigation is well underway (in this case, after the remand from this Court), is dubious even if that candidate is re-elected (particularly while litigation continues). Indeed, Gingles points out that "incumbency" is one of the special circumstances indicating that minority success in a particular election is insufficient to override the showing of polarization and dilution otherwise made by plaintiffs in a given case. Id. at 57. While Jennings was initially elected in 1990, his two later victories came while he was an incumbent -- and the one in 1996 came over another black candidate who was the favored choice of black voters. So while Jennings can be elected and re-elected as the slated candidate of white families, that privilege has not been extended to any other black candidates or citizens in Liberty County.

The School Board insists that another black candidate, Gregory Solomon, received support from the white slating organizations. S.B. at 5, 8. Actually, once the School Board explains this point more fully in its brief, it concedes that the evidence shows only that Solomon was "promised support through the slating process," later to be "double-crossed" by the white powers. S.B. at 28-29.

Nevertheless, says the School Board, "[t]he relevant inquiry should be the willingness of the families to promise their support rather than the elections results." S.B. at 29. That is ridiculous. Section 2 guarantees black voters an equal opportunity with white voters to elect candidates of choice, not simply to be promised support by white slating organizations.

The School Board also claims that black voters have "two and a half families worth" of votes that can be used to offset the power of the white slating groups. S.B. at 30. The problem is that in an at-large system, the white majority can control 100% of the seats. The fact that black citizens constitute some 25% of the voting age population is of little help where they are almost always outvoted by the white majority, where the only way a black person can be elected is if he or she is endorsed by the white families, and where black support for any other black candidate is doomed at the hands of the white families and the white majority.

The County argues that the District Court "simply" found that some of the large, white families "tend to vote as blocs -- much as the black voters do." Cty. at 24. The County also contends that black candidates other than Jennings have not been knowledgeable or savvy enough to suck up to these white families, and now that Jennings has shown the way, other black candidates can follow his footsteps. Cty. at 24. Of course, the District Court found not just that the white families vote as blocs, but also found that they are slating organizations whose support is essential to victory. See our opening brief at 13-14. Moreover, there was no

evidence and no findings of black slating organizations at all -- much less black organizations with power anywhere close to that of the white families. Contrary to the County's assertion, other black candidates, such as Gregory Solomon, have attempted without success to be slated. R5-154-95 n.95. Most importantly, it is not enough under Section 2 to say that black candidates can be elected if they are the candidates of choice of white slating organizations. The touchstone under Section 2 is whether black voters can elect candidates of their own choice irrespective of whether those candidates have the blessing of powerful white family groups.

The District Court's Assumption Regarding the Cause of Black Defeats

In Section II of the argument portion of our opening brief, we challenged the District Court's conclusion that since black citizens are free to cast ballots, run for office, and campaign for office, the black defeats must be caused by "a lack of knowledge of the dynamics of running effective campaigns." Opening brief at 19, quoting, R5-154-102. According to the School Board, this "assumption" by the District Court about the cause of black defeats is actually "well supported by evidence in the record." S.B. at 32. However, we have already analyzed in our opening brief how that conclusion is not supported by, and indeed is contrary to, the evidence in the record. We add here only the following point: The District Court based its assumption largely on the fact that "Dr. Billings [the defense expert] testified that Earl Jennings' electoral success in 1990 resulted in large part from becoming more

knowledgeable about the political process in Liberty County, and running 'a very personal kind of campaign.' *Billings Test., 1991 Tr.* at 50." R5-154-102 n.101. A review of the 1991 transcript actually shows that Dr. Billings' conclusions in this regard came from nothing more than three telephone interviews -- one with the white county clerk, one with the white superintendent of schools, and one with a black employee of the school district who lives outside the county. R7-152-50-52, 54-56. (R7-152 is the transcript of the 1991 hearing). Apparently, Dr. Billings did not interview Mr. Jennings himself or any black voters in the county. This is quite a slim reed to support the District Court's conclusion that black defeats are the result not of polarized voting, but of "a lack of knowledge of the dynamics of running effective campaigns."

Enhancing Factors

According to the School Board, "Appellant contends that the District Court erred by holding that the detrimental effect that the physical size of the county had on black political participation was less than vote buying." S.B. at 27-28. Actually, we made no contention or comparison regarding vote buying as opposed to size of the county. Instead, we simply stated that the District Court erred by discounting the detrimental effect of the county's geographic size. Opening brief at 25-27.

The County insists that numbered seats are not the equivalent of an anti-single shot provision. Cty. at 23. But as the Supreme Court explained in Gingles, a numbered-seat scheme generally

prevents and frustrates single-shot (or "bullet") voting. 478 U.S. at 38-39 and nn. 5-6. Thus, numbered seats are the equivalent of anti-single shot provisions.

Racial Appeals

According to the County, the District Court did not count the absence of racial appeals in the defendants' favor. Cty. at 25. But that is wrong. The District Court specifically listed the absence of racial appeals as one of the circumstances supporting its ruling in the defendants' favor. R5-154-119. This is improper inasmuch as the absence of racial appeals "should not weigh heavily against a plaintiff." United States v. Marengo County Commission, 731 F.2d at 1571-1572 (11th Cir.), cert. denied, 469 U.S. 976 (1984).

Tenuousness

This issue is discussed more fully in the section on the constitutional claims at the end of this reply brief. We address here the claim made by the School Board that a single-member plan will harm black voters because it will increase the influence of the white families. S.B. at 16, 39. We note first that the School Board apparently agrees with us that the concentration of power in the hands of the white slating organizations is contrary to the interests of black voters. However, there is no finding of the District Court -- and no credible proof in the record -- that the white families will gain more power if the County goes to single-member districts. And under a single-member plan, black voters will be able to elect candidates of their choice to both the School

Board and the County Commission without having to secure the blessings of the white families.

Also, we point out here, as did Judge Tjoflat in his Nipper opinion, that the tenuousness issue is of "marginal importance" in the Section 2 analysis. 39 F.3d at 1542 n.89.

Finally, we note that the School Board and the County make much of the referendum in which 60% of the black voters chose to retain at-large elections. S.B. at 15, 39; Cty. at 13, 29, 41. The School Board also claims that some of the named plaintiffs are opposed to single-member districts and the maintenance of the lawsuit. S.B. at 8, 15-16, 24. Of course, the referendum is not dispositive of or relevant to the Section 2 issue. Certainly, a referendum in which 60% of the black voters supported a change would not mean that the present system violated Section 2, and this referendum does not mean the system complies with Section 2. As Judge Tjoflat pointed out in the panel opinion, "class opposition to the remedy that may result from the successful litigation of a section 2 claim is irrelevant in weighing the totality of circumstances." Solomon, 865 F.2d at 1564. Furthermore, those named plaintiffs who were purportedly opposed to single-member districts said simply that they would be opposed if no majority-black district could be created. R1-80-11 and 19. Obviously, one can be created, thus obviating that concern.

Racial Animus

According to the School Board, the only evidence of racial animus comes from the testimony of Gregory Solomon. S.B. at 39-40.

But in fact, the strongest evidence comes from the racial polarization that this en banc Court found unanimously and that the District Court confirmed as part of the Gingles factors. The failure of the District Court to consider this evidence as indicative of racial bias is one of the many legal errors it made in this case. As Judge Tjoflat explained in his Nipper opinion, "[p]roof of the second and third Gingles factors . . . is circumstantial evidence of racial bias operating through the electoral system. . . ." 39 F.3d at 1524. See also, United States v. Marengo County Commission, 731 F.2d at 1567 ("the surest indication of race-conscious politics is a pattern of racially polarized voting").

Moreover, the District Court erred by counting the purported absence of racial animus against the plaintiffs. R5-154-116. As this Court said in Marengo County:

> Evidence of racism can be very significant if it is present. But its absence should not weigh heavily against a plaintiff proceeding under the results test of Section 2.

731 F.2d at 1571 (citations omitted).

Proportional Representation

The School Board points out that no violation was found in Johnson v. DeGrandy despite the Supreme Court's assumption that the Gingles factors had been established. S.B. at 43. Of course, in DeGrandy, the proportion of majority-minority election districts equalled the minority proportion of the overall population. 512 U.S. at 1023. The County claims here that black citizens in Liberty County "constitute a majority in one of five election

districts (20 percent)." Cty. at 31. But that is flat wrong. Perhaps black citizens constitute a majority in one of five residence districts, but those are not election districts. The election is held at-large. White citizens constitute the overwhelming majority in that at-large election district, which chooses 100% of the members of the school board and the county commission. Thus, black citizens are not a majority in any election district in Liberty County.

The County references the discussion of proportional representation in Gingles, 478 U.S. at 77. Cty. at 31. There, the Supreme Court held there was no dilution in North Carolina House District 23, where the last six elections had resulted in proportional representation for black voters. The Court noted that the plaintiffs had not demonstrated that "such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." 478 U.S. at 77. By contrast, in Liberty County, there have been black election successes over the last three elections -- not the last six -- and they involved only a single black candidate endorsed by the white slating groups. This victory by Earl Jennings has resulted only in "proportional representation" on the county commission, not the school board. When the two at-large bodies at issue here are combined, only one in ten of the at-large officeholders is black, which is much less than proportional for the 25% black voting age population in the county. And the plaintiffs here -- as spelled out in this brief and our opening brief -- have demonstrated that the Jennings

success, attributable to the white slating groups, "does not accurately reflect the minority group's ability to elect its preferred representatives." 478 U.S. at 77.

The Constitutional Claim

The School Board contends that "a court will decline to decide a case on a Constitutional basis if the matter may be resolved under a statute." S.B. at 48. The Board adds that since the present case has been resolved against the plaintiffs on statutory grounds, this Court should not review the constitutional issue. Id. But the initial premise of the Board's argument applies only when full relief can be and is granted on statutory grounds. In such a situation, a court should not adjudicate the constitutional question. But where the statutory claim is held to provide no basis for relief for the plaintiffs, and the plaintiffs are alleging the constitutional claim as an alternate ground for granting the relief, courts must review the constitutional claim.

The School Board acknowledges that the 1947 statewide legislation regarding school board elections was motivated by racial discrimination, but repeats the District Court's mantra that at-large elections for the board in Liberty County were actually not adopted until 1953. S.B. at 7, 12, 38. Indeed, the School Board claims that its evidence regarding the 1953 adoption is "unrefuted." S.B. at 12. To the contrary, we have explained at length that the Liberty County at-large school board elections were dictated by the 1947 legislation and were not the subject of an unrelated and delayed adoption in 1953. See our opening brief at

34-38. Nowhere do the appellees refute our analysis. The School Board cites only the District Court's findings and citations, all of which we addressed in our opening brief. As we noted in our opening brief, the expert testimony cited by the District Court regarding a 1953 change to at-large school board elections actually related to the county commission and not the school board. Opening brief at 35-36. Moreover, even that expert testimony about a 1953 change was based only on the expert's interview of one person -- a former county clerk. R1-79-5-6.

(According to the School Board, we have "conceded" there is no tenuous state policy underlying the at-large elections for county commissioners. Actually, we have made no such concession, but we have not raised constitutional claims in this Court regarding the county commission).

The School Board emphasizes the 1990 referendum in which 60% of the black voters chose to retain at-large elections. S.B. at 15, 39; Cty. at 13, 29, 41. But on the constitutional claim, the fact that the at-large school-board system may have been maintained for non-discriminatory reasons does not cleanse the constitutional violation arising from the discriminatory adoption. This is clear from the Supreme Court's decision in Gingles, see our opening brief at 47-48, and from the Supreme Court's decision in Hunter v. Underwood, 471 U.S. 222 (1985). In Hunter, the Court struck down under the Fourteenth Amendment an Alabama disfranchisement statute because its adoption had been motivated by racial discrimination. In doing so, the Court rejected the argument that "events occurring

in the succeeding 80 years had legitimated the provision" by showing non-racial grounds that supported its maintenance. Id. at 232-233. Regardless of whether the offending provision "would be valid if enacted today without any impermissible motivation," said the Court, it must be struck down in light of the fact "that its original enactment was motivated by a desire to discriminate against blacks on account of race." Id. at 233.

The School Board insists that both a discriminatory intent and a discriminatory result must be proven to support a constitutional claim, S.B. at 48, but nowhere does the Board respond to, much less refute, our contrary position based on the Supreme Court's holdings in Shaw v. Reno, 509 U.S. 630 (1993), and its progeny. See our opening brief at 48.

Conclusion

For the foregoing reasons and on the basis of the authorities cited, the District Court's judgment should be reversed.

Respectfully submitted,

ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

DAVID M. LIPMAN
Suite 304
5901 S.W. 74th Street
Miami, Florida 33243-5186
(305) 662-2600

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by first-class mail, postage prepaid, on the following:

David LaCroix
420 W. Olympia Avenue
Punta Gorda, Florida 33950

J.C. O'Steen
177 Salem Court
Tallahassee, Florida 32301

This 18 day of December, 1997. All parties required to be served have been served.

ROBERT B. McDUFF