IN THE SUPREME COURT OF FLORIDA

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GERALD DOBLY MCCLOUD, :

Petitioner, :

VS. : CASE NO. 71,899

STATE OF FLORIDA, :

Respondent. :

______________________________________:

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This brief is submitted in reply to respondent's brief on the merits. Respondent's brief will be referred to herein as "RB" followed by the appropriate page number in parenthesis. All other references will be as set forth in the Brief of Petitioner on the Merits.

II ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR MISTRIAL, WHERE THE STATE EXERCISED ALL EIGHT OF ITS PEREMPTORY CHALLENGES IN CASE NO. 85-4591-CF UPON BLACK PROSPECTIVE JURORS AND EIGHT OF NINE PEREMPTORY CHALLENGES IN CASE NO. 85-4592-CF TO EXCLUDE BLACKS, THUS RAISING A PRIMA FACIE SHOWING OF DISCRIMINATION BASED ON RACE, AND THE STATE'S REASONS FOR THE EXCLUSION OF BLACKS FROM THE JURY WERE INSUFFICIENT, CONTRARY TO ARTICLE I, SECTION 16, FLORIDA CONSTITUTION, AND AMENDMENTS V AND XIV, UNITED STATES CONSTITUTION.

Respondent initially claims in its brief that petitioner failed to demonstrate a strong likelihood that the prospective jurors in petitioner's two trials were challenged solely on the basis on race. Conspicuously lacking from respondent's discussion of this issue is any mention of this Court's opinion in Blackshear v. State, 521 So.2d 1083 (Fla. 1988), which clearly refutes the state's contention.

In Blackshear, the state used eight of ten peremptory challenges to exclude blacks from the jury. The resulting jury consisted of all white jurors, with one black alternate. In affirming the trial court's denial of Blackshear's motion to strike the panel, the district court held that the exclusion of a number of blacks by itself was insufficient to trigger an inquiry into a party's use of peremptories. Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987). The court's holding was based simply on a footnote in State v. Neil, 457 So.2d 481 (Fla. 1984). This Court reversed the First District Court of

Appeal, finding that the burden of proof had clearly shifted to the state:

> The state conceded that it had used its peremptory challenges to exclude eight members of a cognizable group from the panel. 504 So.2d at 1330-31. At the time the defense's objection was made, not a single black member remained on the prospective panel. There was no indication that any of the excluded blacks would be unfair or partial, nor did the prosecutor so contend. See State v. Jones, 485 So.2d 1283 (Fla. 1986). Indeed, when pressed by the trial court, the state at first was unable to recall any neutral record-based reason for excluding eight blacks from the panel. 504 So.2d at 1331.

521 So.2d at 1084 [Footnote omitted].

The instant case in indistinguishable from Blackshear. Petitioner clearly met his initial burden under State v. Neil.

Moreover, petitioner did not rely solely on the number of challenges exercised, as respondent contends. While the numbers alone are compelling in this case, and should require reversal of the district court's holding, other factors were present giving rise to a prima facie showing of racial discrimination. It is important to note that the state did not strike a single white juror in Case No. 85-4592 and only one black sat on the jury; in Case No. 85-4591, the state struck one white male, the son of the court reporter, and no blacks served on the jury; three of the black prospective jurors in Case No. 85-4591 were the subjects of backstrikes. The manner in which the state's peremptory challenges were exercised, the final composition of the jury and the inordinate number of blacks peremptory removed clearly demonstrate a likelihood of of an

impermissible motive of the state's use of its peremptory challenges.

Respondent next contends that the state's reasons for bumping blacks from the jury were racially neutral, reasonable and not a pretext, although conceding that the prosecutor proffered no reasons for removing two black females from the jury. Petitioner submits that the failure to offer any reason for excusing a jury is in itself suspect. See Blackshear v. State, supra, 521 So.2d at 1084. Respondent further notes that the reasons for excluding one black male (Mr. H[redacted], based on his gender and age, are "tenuous" (RB 8), but claims such reasons are not improper. While age and sex are indeed race neutral, the reasons were unrelated to the facts of the case, the reasons were equally applicable to a juror who was not challenged, and the state's examination of the juror was perfunctory. State v. Slappy, 522 So.2d 18 (Fla. 1988). This reason must, therefore, be deemed improper.

The prosecutors were apparently preoccupied with the jurors' employment, as evidenced by their objections to the occupations of four prospective jurors: Ms. W[redacted] (a housewife), Mr. F[redacted] (a car salesman), Mr. Dudley (a computer operator and former criminal investigator in the army), and Ms. C[redacted](a student who was employed by the Job Corps). Respondent contends that "employment is a valid reason for striking a juror" (RB 11), but as the Slappy Court pointed out, employment status alone is not sufficient to establish grounds alleged for bias. Here, the employment rationale is particularly suspect

since one black female (Ms. W[redacted]) was excused because she was not employed, while another black female (Ms. C[redacted]) was excused because she was employed; one black male (Mr. D[redacted]) was excused for his employment, while a white male (Mr. A[redacted]) with the very same occupation served on the jury. Employment may be race neutral, as respondent states (RB 15), but it is not a reason. It is only a meaningless statement which bears no relationship to the cause or the parties.

Respondent conjectures that Mr. D[redacted] may have been challenged because of his past employment, and "the prosecution may have felt that he would have directed his attention more to the method of the criminal investigation rather than to the evidence presented in the case" (RB 11), although the state made no inquiry of the prospective juror to explore this potential bias. State v. Slappy, 522 So.2d at 23 (The utter failure to question the challenged jurors on the grounds alleged for bias renders the state's explanation immediately suspect). One could just as easily speculate that an experienced criminal investigator in the military would tend to identify more with the prosecution.

The mere fact that a person is unemployed cannot be a bona fide reason to challenge when unemployment can result from such divergent factors as disability, voluntary or mandatory retirement, or a conscious choice to work in the home raising a family. That Ms. W[redacted] is a homemaker and housewife wholly fails to explain how the challenge against her was "based on the particular case on trial, the parties or witnesses, or

characteristics of the challenged persons other than race." State v. Neil, 457 So.2d at 487. Respondent's lame attempt to justify the challenge of Ms. W[redacted] on the basis that women who remain in the home develop "a limited understanding of the world around them because of the lack of intellectual stimulation in their environment" (RB 10) is invidious. Not all women outside the labor force spend their time watching soap operas and knitting; nor did the prosecutor ask Ms. W[redacted] a single question to explore her "understanding of the world."

Perhaps in an attempt to salvage a hopeless case, respondent suggests that the state's discriminatory exercise of peremptory challenges was "invited error" (RB 12). The excusal of white prospective jurors by the defense does not justify the systemic exclusion of blacks by the prosecution, nor can it be deemed invited error. The prosecutor in Case No. 85-4592 noted to the court that "the State is entitled to due process, the victim is a white female in this case, and in all instances the defense's challenges have been white female jurors" (R 148). The prosecutor indicated that the state would cross-appeal (R 148), but the state never interposed a timely objection to petitioner's use of his peremptory challenges as required by Neil. In the subsequent trial, the prosecutor again noted that "I'm concerned that the defense is basing its challenges on racial grounds" (R 676) and asked the court to inquire of defense counsel, but specifically waived a motion for mistrial when defense counsel admitted that he was exercising peremptory challenges in order to secure a representative sampling of

blacks on the jury (R 677-678). Having failed to move for a mistrial or to file the cross-appeal in the case, the state cannot now be heard to complain.

The goal of State v. Neil and its progeny is to uphold a defendant's constitutional right to an impartial jury drawn from a cross section of the community. Neil explains that there is an initial presumption that peremptory challenges are exercised in a non-discriminatory manner. That presumption is rebutted when the complaining party demonstrates on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. That showing was made in the court below. As Slappy instructs, once the burden shifts to the party exercising the challenges, the inquiry should not end simply because a reason is stated; the reasons must be evaluated both in terms of the credibility of the person offering the explanation as well as the credibility of the reasons themselves and in light of the circumstances of the case and the total course of the voir dire in question. 522 So.2d at 22. It should be obvious that the trial court below accepted the reasons proffered at face value without any such critical evaluation. Such a critical evaluation would have weighed against the legitimacy of the state's reasons. In short, the reasons given by the state below failed to satisfy its burden of proof under Slappy.

This Court must find error and reverse petitioner's convictions and sentences.

III CONCLUSION

Based upon the foregoing reasoning, argument and citations of law, as well as that in petitioner's brief on the merits, petitioner requests this Court reverse his convictions and sentences and remand the causes to the trial court for new trials in Case Nos. 85-4591-CF and 85-4592-CF.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by hand delivery to Kurt L. Barch, Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. Gerald Dobly McCloud, Inmate No. 099828, Cross City Correctional Institution, Post Office Box 1500, Cross City, Florida 32628, on this 30th day of June, 1988.

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