IN THE SUPREME COURT OF FLORIDA

GROVER REED,

Appellant,

v. CASE NO. 70,069

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Grover Reed relies on his Initial Brief to reply to the arguments advanced in the State's answer brief except for the following additions to Issues I, III and V.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY DENIED REED HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State first contends that there was no basis for finding even a prima facie showing of racial discrimination in jury selection. Correctly noting that the trial judge never made such a finding because the prosecutor volunteered his reasons for exercising his challenges (Tr 308-309), the State contends that the judge should not have made one anyway. (State's brief, pages 9-10) This position is without merit.

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court held that when a showing is made of a likelihood of discriminatory use of peremptory challenges, the trial court must conduct a hearing at which the prosecutor must justify that he excused prospective jurors for nonracial reasons. Ibid. at 486-487. Recently, in State v. Slappy, No. 70,331 (Fla. March 10, 1988), this Court acknowledged and reaffirmed the "likelihood" standard for making a prima facie showing. Writing for the Court, Justice Barkett explained the rationale behind the standard:

> Instead, we affirm that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of racial discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question.

Ibid., slip opinion at pages **5-6.** The opinion further stated,

> **...**we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.

Ibid., at page **6.** Reed easily met this threshold, and the prosecutor should have been ordered to provide his reasons for the challenges. Although numbers do not necessarily constitute prima facie proof of racial discrimination, Ibid, at page 5., here the prosecutor used eight peremptory challenges on blacks.(Tr **305-307)** This Court recently ruled a prima facie showing existed where the prosecutor used eight of his ten peremptories on blacks. Blackshear v. State, No. **70,513** (Fla. March **10, 1988).** Moreover, the threshold has been met where only four challenges were made on black jurors. See, Slappy, at page 1; Tillman v. State, No. **68,506** (Fla. March **10,** 1988), slip opinion at page **3.** The number of peremptory challenges used here certainly gives rise to an inference of racial discrimination warranting an inquiry under Neil.

The fact that the trial court did not make a finding regarding the threshold, supports Reed's claim that he is entitled to a new trial. If the trial judge incorrectly thought the threshold had not been met and did not shift the burden to the State, he may not have adequately evaluated the prosecutor's stated reasons for the challenges. The judge may have labored under an invalid impression that the State had no burden to carry when volunteering reasons. Reed was entitled to have the judge consider all the circumstances at voir dire under the proper procedural burdens when deciding the validity

of the prosecutor's reasons. See, Blackshear v. State, No. 70,513 (Fla. March 10, 1988). Without a finding on the threshold question, the record does not support an inference that the trial court shifted the burden to the State. The fact that the prosecutor volunteered reasons does not establish that the trial judge properly evaluated them with the burden of proof on the prosecutor. Although the cold record shows that the prosecutor's reasons were not race-neutral, this Court cannot conduct a review of the prosecutor's reasons under the correct burden now. Reed is entitled to the reasoned judgment of the trial judge using the correct legal standards and considering the demeanor of the jurors and the prosecutor. Blackshear, at slip opinion page 3. The lower court did not comply with the mandate of Neil, and this Court must reverse for a new trial.

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN MISLEADING THE JURY AS TO THE IMPORTANCE OF ITS SENTENCING RECOMMENDATION BY MAKING IMPROPER COMMENTS AND GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH, ALONG WITH THE JUDGE'S AND PROSECUTOR'S MISLEADING REMARKS, DIMINISHED THE ROLE OF THE JURY'S SENTENCING RECOMMENDATION.

On March 7, 1988, the Supreme Court of the United States granted certiorari in Dugger v. Adams, Case No. 87-121, to review the decision of the Eleventh Circuit Court of Appeals in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), amended on rehearing, 816 F.2d 1493 (11th Cir. 1987). One of the issues raised is similar to the one presented here. The State is asking the Supreme Court to resolve the conflict which now exists between this Court and the Eleventh Circuit on this question. A ruling in Adams could affect this Court's decision in this case.

ISSUE V

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCE CONCERNING REED'S IMPAIRED CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT.

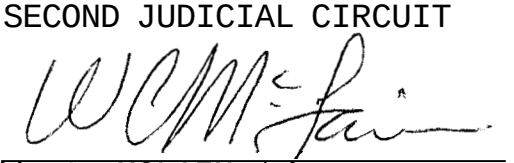
The State has incorrectly applied the legal standard for giving an instruction on the intoxication defense to this issue. (State's brief at pages 37-38) In the penalty phase of a capital trial, the defendant is entitled to an instruction on any mitigating circumstance supported by any evidence. Floyd v. State, 497 So.2d 1211, 1215-1216 (Fla. 1986); Robinson v. State, 487 So.2d 1040 (Fla. 1986). Moreover, this Court has admonished trial judges to "err on the side of caution and to permit the jury to receive [instructions on mitigating circumstances], rather than being too restrictive." Robinson, at 1043. Although the evidence here would have supported an instruction on the defense of intoxication, it need not meet that level before an instruction on the mitigating circumstance of impaired capacity is required. Evidence does not have be a defense to the crime before it is mitigating. See, Ferguson v. State, 417 So.2d 631 (Fla. 1982)(evidence of mental disturbance does not have to meet insanity standard to be considered mitigating) While the trial judge was not compelled to find the evidence mitigating, the evidence was, at least, sufficient to mandate a jury instruction.

CONCLUSION

For the reasons expressed in his initial brief and in this reply brief, Grover Reed asks this Court to reverse his conviction and sentences.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



W. C. MCLAIN
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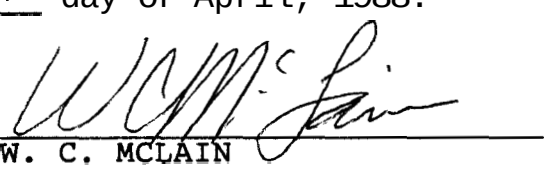
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 27th day of April, 1988.



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