O/a 11-7-87

IN THE SUPREME COURT OF FLORIDA

WALTER BLACKSHEAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,613

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

WALTER BLACKSHEAR,	:	
Petitioner,	:	
v.	:	CASE NO. 70,513
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Walter Blackshear was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," "defendant," or by his proper name.

Reference to Volume I of the record on appeal, containing the pleadings and orders filed in the cause and the transcripts of the hearing held on petitioner's motion for a new trial, will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to Volumes II and III of the record on appeal, containing transcripts, will be by use of the symbol "T" followed by the appropriate page number in parentheses.

Filed simultaneously with this brief is an appendix containing a copy of the opinion issued in this case by the District Court of Appeal, First District. Reference to the

appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

As the Statement of the Case and Facts, petitioner incorporates by reference as if fully set out herein the case and facts as set forth in the opinion issued in this case by the District Court of Appeal, First District (A-1-5).

In addition, the record reflects that the alleged victim, one [redacted], testified on direct examination that on August 28, 1985, petitioner placed his penis in her mouth (T-204-205), while on cross examination she specifically stated petitioner did not place his penis in her mouth (T-214-215).

The state also presented testimony from Deputy Leonard Harris of the Madison County Sheriff's Department that, after petitioner was arrested, he told petitioner that he was facing the electric chair. Later that day, petitioner was interviewed by Harris and Sheriff Peavy of Madison County. Peavy told petitioner that it would be better for him to just go ahead and admit his participation in the offense. Petitioner stated he had placed his penis in [redacted] mouth. The trial court admitted this statement over an objection to the effect that it was involuntarily given by petitioner (T-260-280).

III SUMMARY OF ARGUMENT

In Issue I, infra, petitioner contends, contrary to the holding of the lower court, that his timely objection made in response to the prosecutor's utilization of eight of its nine peremptory challenges on prospective black jurors shifted the burden to the state to give racially neutral reasons for its challenges. Petitioner further asserts that the reasons given by the prosecutor for the exercise of its peremptory challenges were insufficient.

In Issue II, infra, petitioner argues the trial court erred in admitting his confession into evidence, since it was obtained only after petitioner was incorrectly informed that he was facing the electric chair, and told that he would be better off if he made a statement.

In Issue III, infra, petitioner argues that his conviction was improperly based, in part, upon the testimony of an incompetent witness. No objection to competency need be made since the duty to assess competency falls upon the trial court. Moreover, the error is fundamental and, in addition, this Court may grant petitioner relief in the interests of justice.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO GRANT PETITIONER'S MOTION TO STRIKE OR DISMISS THE JURY PANEL, WHERE THE STATE EXERCISED EIGHT OF NINE PEREMPTORY CHALLENGES UPON BLACK MEMBERS OF THE PANEL, THUS RAISING A PRIMA FACIE SHOWING OF DISCRIMINATION BASED UPON RACE, AND THE STATE'S REASONS GIVEN FOR THE EXCLUSION OF BLACKS FROM THE JURY WERE INSUFFICIENT, CONTRARY TO ARTICLE I, SECTION 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES.

The record in this case shows that during jury selection, petitioner moved to strike the jury panel, contending the state had exercised nine challenges, with eight of them being directed toward black jurors. The prosecutor claimed the motion was untimely and requested an opportunity to examine his notes and inform the court of the reasons each black potential juror was excluded. The motion to strike was denied (T-171-172). At the hearing held on petitioner's motion for a new trial, the prosecutor gave his reasons for excluding the eight black jurors. The motion for a new trial was denied (R-62-87).

Petitioner contends the trial court erred in denying his motion to strike and his motion for a new trial, since petitioner made a prima facie showing of racial discrimination that was not sufficiently rebutted by the state's reasons for striking the eight black potential jurors. In order to properly understand this issue, the statements of the excluded jurors on voir dire and the prosecutor's reasons for excluding them must

be compared and contrasted with those of the jurors who actually served on the jury at petitioner's trial.

[redacted] is a single person employed at the power plant, who lives with his mother. He had two children, ages 3 and 4 (T-16-17). The prosecutor excluded B[redacted] for the following reasons:

> MR. FINA: But Mr. B[redacted], while I was questioning him, he said that he had two children although he was single and never married. That was one of the reasons that I decided to strike him. Also, while I was asking him some questions, he had a pair of dark glasses on, he was not looking at me when he was responding. I could not get a good feel for his truthfulness of his answers by the way he was responding to my questions. And for those reasons, I did strike him.
>
> I also seem to remember him from something and I didn't know what it was. I didn't know if I prosecuted him or if he had been here as a witness, but there was something that I could not determine what it was. For those reasons, I struck Mr. B[redacted]

(R-72).

R[redacted] E[redacted]

R[redacted] E[redacted] is a married, self employed carpenter, who has lived in Madison County for 30 years. E[redacted] has an 11 year old son and his wife is employed at Gold-Kist Poultry (T-15-16, 28). The prosecutor excluded E[redacted] for the following reasons:

MR. FINA: Mr. E[redacted] worked at a -- I think he was a Carpenter or a Carpenter's apprentice and had worked at a pulpwood or something, or worked in some kind of pulpwood. Ms. Rosier also was here and Ms. Rosier had prosecuted someone that worked for that same company for a similar type offense that -- a child sexual battery. I asked him if he knew who he was but he didn't recall if he did or not. For that reason -- also, while I was talking to him, he smiled at each question. Every time that I asked him for a response, he seemed to be smiling and I don't know what reason he had for that, maybe he was just happy. But he did not seem to be taking the questions I was asking him or Mr. Stone for that point very seriously and did not seem to be taking this case in a serious matter like it should have been.

(R-72-73).

E[redacted] W[redacted]

E[redacted] W[redacted] is a single person employed at Winn-Dixie. Originally from Fort Pierce, W[redacted] has lived in Madison County approximately eight years (T-11-12). The prosecutor excused W[redacted] for the following reasons:

MR. FINA: Ms. W[redacted] was a black juror that I struck. Ms. W[redacted] was sitting with the defendant's family in the audience prior to the time she was called into the jury box. Afterwards, after I did strike her, she went back and talked to them again but I did notice that she was back there talking to the family prior to the time that I called her into the jury box.

THE COURT: How did you know that it was his family?

MR. FINA: I saw the defendant talking to them prior to that time and I asked one of the witnesses in the courtroom at that point who they were and she -- I was under the impression anyway that that was his family. So, for that reason, I struck Ms. W[redacted]

(R-73).

J[redacted] D[redacted]

D[redacted] a life-long resident of Madison County, has three adult children and a grandchild. She is not married and works at Red James. She has never been a victim of a crime (T 38-46). The prosecutor excluded D[redacted] for the following reasons:

> I believe I struck a Ms. D[redacted] Ms. D[redacted] was a black juror. She works at the Chicken Shack, I believe it was, or Ria Janes' as a cook. There is quite a lot of disturbances and for my two years of prosecuting cases over here, there is quite a bit of criminal activity that goes on around Ria Janes' at night.
>
> Many, many times she has to call law enforcement or someone has to and they have to go to her business. Many times she is called as a witness to testify and just about every time that I can recall, she always has been hesitant in wanting to get involved in anything like that. Understandably, she may have cause for doing that but she did not seem to be to me a fair and impartial juror or could be based on the fact that she has experience in calling the law constantly and being exposed to all the criminal activity.

(R 74).

R[redacted] B[redacted]

R[redacted] B[redacted] is married with four children, one by his first wife and three by his current wife. He has lived in Madison County 24 years, at the same address for 14 years, and is a driver for Henry Dickinson Timber Company. His wife has

worked at Thompson International Telephone and Telegraph Industry for 15 years (T-98-99). The prosecutor recited the following reasons for excusing Mr. B[redacted]

> MR. FINA: Mr. B[redacted] or B[redacted] I hit it off with him in a bad way right from the beginning. I kept mispronouncing his name. Finally, I asked him how to pronounce his name and he told me and at that point he seemed discouraged and disgusted with me. And every time I did ask him something, he didn't seem to want to respond. I would have to ask him the same questions over and over again.
>
> I asked him also at some point whether or not they knew each other on the panel. And I noticed who was looking around to see who they knew on the panel and he didn't seem to respond to that, and I didn't want to be picking on him by asking whether or not he knew anyone. But he didn't seem to be concerned about the questions that I was asking him, and for that reason, I struck Mr. B[redacted] or B[redacted]

(R-76).

W[redacted] A[redacted]

W[redacted] A[redacted] is a junior college student interested in criminal justice. He is single and lives with his mother. He has a brother named A[redacted] (T-60-63). He was excluded because:

> MR. FINA: Mr. A[redacted] Mr. A[redacted] told me that he was going to school at North Florida Junior College and that he was taking some criminal law courses or criminal justice courses and working toward a degree that would enable him to work with delinquent juveniles, I believe. For that reason, I didn't feel as though he would make a fair juror.
>
> Also, A[redacted] he said was his brother and I have prosecuted A[redacted] several times in the past, just recently as a matter of fact. He looked just like Mr. A[redacted] - just

like his brother and I talked to him and he said he didn't know anything about me but I'm sure his brother had an opportunity to discuss the case that I prosecuted him for.

(R-73-74).

E[redacted] M[redacted]

E[redacted] M[redacted] once had defense counsel do some work for her. She served on a jury in the past, an experience M[redacted] had problems with, but which would not influence her in the instant case (T-89-94). She was excluded because:

> MR. FINA: I struck Ms. M[redacted] Ms. M[redacted] stated that she was a juror on a Sonny Williams' case. Sonny Williams was a deputy here in Madison County prosecuted by our office. Ms. M[redacted] said she had a very -- that that case left a very bad taste in her mouth regarding our judicial system.
>
> She was uncertain at first whether or not she would be fair and impartial because of the way she was treated in that prior deliberation in that prior case. She seemed to have some hostility toward the system the way it was based on that experience she had with Mr. Williams or in Mr. Williams' case -- criminal case.
>
> And several times she was on the verge of saying that she was sure she couldn't be fair and impartial, but she came across as giving a lot of statements or responses to my questions that she could not be. And for that reason, I struck Ms. K[redacted] --Ms. M[redacted]

(R-74-75).

H[redacted] J[redacted]

Mr. J[redacted] served in the Air Force, is a resident of Greenville, and is employed at North Florida Plywood. He knows

the lawyers and knows several of the state's witnesses, and is remotely related to the alleged victim, [redacted]. None of these factors would influence J[redacted] (T-134-142). The prosecutor excused J[redacted] for the following reasons:

> MR. FINA: Okay. To my memory at this point, I do remember striking a black H[redacted] J[redacted] Mr. J[redacted] in response to some of the questions that I asked him -- first of all, he did look familiar to me and I did remember that he testified in a jury trial last spring in the case of State v. Randalls, a robbery case. He testified for the defendant as to an alibi and I did ask him whether or not he knew me and he said he wasn't sure. But I do remember thoroughly cross-examining him in that case as to inconsistencies in his statement.
>
> Also, he said that he knew many of the witnesses. He knew the arresting officer. He knew Deputy Ross who was also a potential witness; knew the family. And for those reasons, I struck Mr. J[redacted]

(R-71).

The above is a summarization of the eight excluded black jurors and the state's expressed reasons for excluding them. The following persons actually served on the jury:

L[redacted] F[redacted]

L[redacted] F[redacted] a single person, is supervisor of the hospital laboratory, and has lived in Madison County for 10 years (T-151-154).

N[redacted] H[redacted]

Ms. H[redacted] married to a self-employed cabinet maker, has lived in Madison County for 15 years and has no children. She is a teller at a local bank (T-114, 120).

D[redacted] B[redacted]

Mr. B[redacted] a self-employed insurance man for 23 years, is married and has two married daughters and one grandchild (T-163-164).

B[redacted] S[redacted]

Ms. S[redacted] is married and has two sons and one grandchild. She is an operator for the State Department of Labor, and her husband works for Tri-County Electric (T-165).

B[redacted] M[redacted]

B[redacted] M[redacted] is divorced, and has a three year old son. She works at an insurance agency in Valdosta, Georgia, and lives with her parents (T-38-39).

G[redacted] P[redacted]

Mr. P[redacted] is married and has two young daughters. He is self-employed, involved in the wholesale nursery and landscaping business (T-14).

In State v. Neil, this Court held that Article I, Section 16, Constitution of the State of Florida, securing the right to an impartial jury, is violated if a party exercises a peremptory challenge to exclude from a jury, because of race, a person

otherwise qualified to serve. In order to effectuate this policy the Court in Neil set forth the following procedure:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other sides's use of peremptory challenges must make a timely objection and demonstrate 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. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective juror's race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

457 So.2d at 486-487.

Some seven months after Neil, the Supreme Court of the United States decided the case of Batson v. Kentucky, 476 U.S.--, 90 L.Ed.2d 69, 106 S.Ct. -- (1986), in which it was held that a prosecutor's use of peremptory challenges to exclude blacks from a jury trying a black defendant violated

the Equal Protection Clause. The following procedure was set forth in Batson:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must first show that he is a member of a cognizable racial group, Casteneda v. Partida, supra, at 494, 51 L Ed 2d 498, 97 S Ct 1272, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, for which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Avery v. Georgia, supra, at 562, 97 L Ed 1244, 73 S Ct 891. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.
>
> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.
>
> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases

> on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.

90 L.Ed.2d at 87-88.

Although both Neil and Batson are clearly aimed at the same evil, several differences seem to exist between the two cases. First, some language in Neil seems to suggest that race can be a factor in the exercise of peremptory challenges as long as it is not the sole factor. Batson makes it clear that race cannot constitutionally be a factor in jury selection at all. Second, Neil creates a "...presumption...that peremptories will be exercised in a nondiscriminatory manner." 457 So.2d at 486. Batson, by contrast, tells us that "...the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Petitioner thus contends that the "presumption" recognized in Neil cannot be squared with Batson and, as a consequence, cannot constitutionally exist.

A third significant difference exists between Neil and Batson concerning the showing that the defendant must make to trigger the trial court's inquiry into the state's use of its peremptory challenges. In Neil, note 10, the Court stated that "...the exclusion of a number of blacks by itself is insufficient to trigger an inquiry...." 487 So.2d at 487. But Batson explicitly recognizes that "...a 'pattern' of strikes against black jurors in the particular venire might give rise to an

inference of discrimination." 90 L.Ed.2d at 88. Given the fact that a party in fact discriminating on the basis of race would hardly be expected to admit it in open court, numbers alone are often the only objective factor available to discern the existence of discrimination.

To the extent Neil conflicts with Batson in the three areas discussed above, Batson takes precedence because the Batson approach confers greater protection to the citizen than does Neil. See Sibron v. New York, 392 U.S. 40 (1968) and State v. Small, 483 So.2d 783 (Fla. 3d DCA 1986). There is a fourth distinction between Batson and Neil, in which Neil appears to offer greater protection, and is thus not affected by Batson. Specifically, Neil prohibits either party from discriminating in jury selection on the basis of race, whereas Batson seems to restrict only the government. This difference has an impact on the instant case.

Here, the opinion notes that the defense used its ten peremptory challenges to excuse nine whites and one black (A-2). Although as noted Neil applies to both parties, the state failed to lodge a timely objection to this at trial, a requirement imposed by Neil. Nor did the state attempt to take a cross-appeal on this point in the District Court of Appeal, First District. The state has clearly waived this issue and thus the only question before this Court is whether the state violated Neil and Batson in the case at bar. For the following reasons, petitioner contends it did.

Both Neil and Batson require a "timely" objection. In this case, the lower tribunal hinted that petitioner's objection was not timely, although the court expressly did not rule on the timeliness question (A-3-4). In State v. Castillo, 486 So.2d 565 (Fla. 1986), the Court held that a Neil objection is timely if it is made prior to the jury being sworn. Sub judice, defense counsel's objection (T-170-172) was made prior to the swearing of the jury (T-179). It follows that petitioner's objection was timely.

The next step in the Neil analysis involves determining whether petitioner, in making the timely objection, established "...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." 457 So.2d at 486. Batson requires that the objection "...must show that he is a member of a cognizable racial group...and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." 90 L.Ed.2d at 87. The accused must "...raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." 90 L.Ed.2d at 88.

It is this burden which the lower tribunal held petitioner failed to carry for the opinion states, "he [petitioner] did not carry his burden of demonstrating that there was a strong likelihood that they were challenged solely because of race" (A-4). In reaching this determination, the lower court

erroneously relied upon note 10 in Neil to the effect that the exclusion of a number of blacks does not per se satisfy the burden, and the "presumption" that peremptories are not used in a discriminatory manner. As noted, neither ground has survived Batson.

In the vast majority of criminal cases in this state each party would have six peremptory challenges, but because the offense here is a capital felony, each party had ten. Florida Rule of Criminal Procedure 3.350. The state exercised nine challenges, and every one of them (100%) were used against black jurors. Of the ten available to the state, nine of them (89%) were directed toward blacks. This is a clear "pattern" which, according to Batson, may give rise to the requisite inference of discrimination. Given these compelling statistics, the inference was established. It should be stressed that Batson requires only an "inference" of discrimination, whereas Neil requires that a "substantial likelihood" of discrimination be shown. Again, petitioner asserts that Batson controls.

Petitioner is not relying merely upon the "numbers" in the instant case but in addition is relying upon those statistics in conjunction with the questions asked the excluded jurors on voir dire, which will be developed, infra, in the discussion regarding the reasons given by the prosecutor for exclusion of the jurors.

Petitioner relies upon State v. Jones, 485 So.2d 1283 (Fla. 1986) and Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987). In Jones, the defense based a Neil objection on the fact

that the state used five of its peremptory challenges to remove the five black prospective jurors questioned on voir dire. According to the lower tribunal's opinion in Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), the trial court then refused to require the state to justify its challenges. This Court held that the "...defendant adequately fulfilled his part of the required procedure in Neil." 485 So.2d at 1284.

In Slappy, the state used all six of its challenges, four of them against potential black jurors. The appellate court would have been required to affirm Mr. Slappy's convictions under the "right for any reason" rationale if the trial court had erred in requiring the state to justify its challenges. Instead, the court remarked the trial judge "...was obviously satisfied that a prima facie showing was made that the State was excluding jurors based on race...." 503 So.2d at 352.

In the instant case a higher per centage of the state's challenges (89%) were used on blacks than was the case in either Jones (83%) or Slappy (67%). Based upon those cases, as well as the arguments made here, petitioner asserts that his objection was sufficient to trigger the duty of the trial court to inquire into the state's exercise of its peremptory challenges. Since petitioner's objection was timely and sufficient to require the trial court to follow the Neil procedure of inquiring into the state's use of its peremptory challenges, and since that procedure was not followed because Neil requires that the inquiry be made and the state's reasons be assessed prior to the swearing of the jury, petitioner is entitled to a

new trial. Neil, Jones, and Andrews v. State, 459 So.2d 1018 (Fla. 1985). However, even if this Court were of the mind to review the validity of the prosecutor's reasons in this case, for the following reasons petitioner argues such a review would lead the the conclusion that the reasons were not sufficient.

In the instant case the prosecutor, at the hearing held on the motion for a new trial, did give his reasons for excluding the eight black potential jurors, which reasons were set out in full earlier in this argument. The lower tribunal, in clear dicta, stated that the reasons given by the prosecutor "...were racially neutral such that, even had the defendant met his initial burden, it would have been incumbent upon the trial court to deny the defense motion to dismiss the panel" (A-5). Petitioner disagrees with this statement.

As noted in Slappy, cases discussing the analytical approach that courts should take in assessing the validity of the prosecutor's reasons for excluding black potential jurors are sparse. Neil tells us that such challenges, to be valid, must not be based upon race but instead should be "...based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons...." 457 So.2d at 487. Batson merely requires that the prosecutor "...articulate a neutral explanation related to the particular case to be tried." 90 L.Ed.2d at 88. In Slappy, the appellate court, after discussing several California cases (because California was the first jurisdiction to adopt a Neil-type approach and thus had the most experience in the this area), stated:

> In summary the California cases give meaning to the requirements of Neil v. State and Batson v. Kentucky. After a presumption arises that a party has used its peremptory challenges to exclude prospective jurors on the basis of race, the offending party must articulate "legitimate reasons" which are "clear and specific" and which are "related to the particular case to be tried." The following will weigh heavily against the legitimacy of any race-neutral explanation: 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror; 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason for the challenge is unrelated to the facts of the case; and (5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.

503 So.2d at 355.

Petitioner strongly urges this Court to adopt the approach taken by the District Court of Appeal, Third District, in Slappy. Unless the trial court is deemed not to be bound by the state's reasons on their face, cases like Neil will be window dressing only and the evil it was designed to erase will flourish.

Before analyzing the prosecutor's reasons in this case under the factors set forth in Slappy, petitioner notes that if it is shown that even one of the eight black potential jurors was erroneously excluded by the state in this case, petitioner is entitled to a new trial. Davis v. Georgia, 429 U.S. 122 (1976).

Potential juror M[redacted] B[redacted] was excluded because he had supposedly fathered two children out of wedlock and had on dark glasses, and thus the prosecutor did get a "feel" for his truthfulness (R-72). These reasons are not supported by the record. B[redacted] stated that he was "single," and could very well have been divorced. Divorced persons view themselves as "single." In point of fact, a white "single" (divorced) juror, B[redacted] M[redacted] actually served on the jury in this case. B[redacted] as well as all of the other blacks, received only a perfunctory examination by the prosecutor on voir dire. Two of the five Slappy criteria apply to B[redacted].

Potential juror R[redacted] E[redacted] was excused because he was a carpenter who worked at a pulpwood company, and someone from that same company had been prosecuted for sexual battery on a child. Also, E[redacted] smiled at the prosecutor, which made the prosecutor believe E[redacted] was not taking the proceedings seriously.

These reasons are clearly bogus. E[redacted] a self-employed carpenter, never testified that he worked at a pulpwood plant; he stated that he had done some work at the power plant (T-15-16, 28). And the jury system is in real trouble if smiling is deemed a valid reason to excuse someone peremptorily!

E[redacted] W[redacted] was excluded because she was seen talking with members of the defendant's family (R-73). There is no evidence that she knew it was the defendant's family she was conversing with. Significantly, she stated on voir dire that

not only did she not know any of the witnesses or lawyers (T-7-9), but she did not know the defendant (T-11). This reason is not support by the record and has nothing to do with the case.

J[redacted] D[redacted] was excused because he worked at the "Chicken Shack" or Ria Janes' as a cook. The prosecutor in effect stated that D[redacted] had called on the police many times because of disturbances at her place of employment but later did not want to get involved (R-74). Again, these reasons are not supported by the record. D[redacted] testified that she worked at Red James, not the Chicken Shack or "Ria Janes" (T-38-46). Even assuming Red James and Ria Janes are one and the same, she was not asked if she had ever witnessed criminal activity or phoned the police. Petitioner asserts that the prosecutor's reasons for excluding Ms. D[redacted] are not supported by the record.

The state's reasons for excluding W[redacted] A[redacted] are curious indeed. He was excluded because he had taken some courses pertaining to criminal justice at a community college and was interested in helping juvenile offenders. Petitioner argues this would seem to enhance, not hinder, A[redacted]' ability to be a juror. The prosecutor's other reason, that the juror's brother had been prosecuted by him and this brother told the juror about the prosecutor, must be deemed insufficient in light of the juror's response on voir dire that he did not know the prosecutor (T-59).

The prosecutor excluded Eunice McKinney because she had served on a jury in the past and it was a bad experience (R-74-75). This reason is invalid because Ms. McKinney affirmatively stated that her past experience as a juror would not influence her in the instant case (T-89-94). As was true with respect to several of the excluded jurors, the prosecutor in effect branded McKinney a liar. In any event, the reason is not a good one because refuted by the juror's responses on voir dire.

Petitioner concedes that the eighth excluded potential juror, Herman Jinks, was properly excluded for a reason not pertaining to his race. Nevertheless, the foregoing discussion has established that seven of the blacks were improperly excluded, and it should be remembered that the erroneous exclusion of only one person entitles petitioner to a new trial.

Petitioner relies upon the following cases from other jurisdictions which assess the validity of reasons given for peremptorily excluding jurors. In Roman v. Abrams, 608 F.Supp. 629 (S.D.N.Y. 1985) the defendant was white, but the chief state witness was black. The prosecutor used 10 out of 11 peremptory challenges against whites. The court found the following reasons to be "childish, pretextual, and unbelievable": One juror could not be fair to the state; one knew the defense attorney, but no challenge for cause had been made on that basis; one was employed in the electronics field and had too technical a background; and one was a bookkeeper who had a

nephew who was a police officer. The court reversed for a new trial, even though three whites did serve on the jury.

In Commonwealth v. Brown, 416 N.E.2d 218 (Mass. App. 1981), the court reversed where the prosecutor used three out of six peremptory challenges to exclude blacks, stating only that the defendant had used his peremptory challenges to exclude some white jurors.

In State v. Gilmore, 489 A.2d 1175 (N.J. Super. App. Div. 1985), the defendant was the son of a black Baptist minister. The prosecutor generally excluded black women because their maternal instincts would favor the defendant, and wanted jurors who would be able to ignore theatrics, who had high intelligence, and who did not have maternal family instincts. The court found the prosecutor's reasons for excluding seven blacks were a sham: One man was a lab technician who might be influenced by Baptists; one man was related to someone who had been convicted of a crimes, and also maybe had known the defendant's girlfriend; one man was a truck driver; one man looked at the prosecutor with a mean face; two females had maternal instincts; one man was a window washer; and, one man was a therapist who would sympathize with the defendant.

In the instant case, the prosecutor's reasons were as childish, pretextual, and unbelievable as those offered in Roman. They were as much of a sham as those offered in Gilmore. Assuming this Court reviews the reasons given here, based upon the above petitioner requests this Court to hold them

insufficient and order that petitioner receive a new trial in which racial factors do not permeate the jury selection process.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING PETITIONER'S CONFESSION INTO EVIDENCE BECAUSE IT WAS NOT VOLUNTARILY MADE, DEPRIVING PETITIONER OF DUE PROCESS OF LAW GUARANTEED BY ARTICLE I, SECTION 9, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES.

The record reflects that petitioner objected to the state's introducing a confession be made to Deputy Leonard Harris and Sheriff Joe Peavy, arguing unsuccessfully that it was not voluntarily obtained (T-260-282). The trial court found the confession voluntary (T-280), which ruling petitioner contends was in error.

On proffer it was developed that petitioner was taken into custody and questioned twice. During the first interview, Deputy Harris told the defendant that capital sexual battery was punishable by the death penalty when, in fact, it was not, Buford v. State, 403 So.2d 943 (Fla. 1981). This erroneous advice was not corrected by the time of the second interview, which occurred later that same day. On this occasion Sheriff Peavy told petitioner that it would be better if he would just go ahead and admit his part in the offense (T-266). Petitioner admitted placing his penis in the mouth of the victim (T-262-264).

In order for a confession to be admissible, the state must show it was freely and voluntarily made. Brewer v. State, 386 So.2d 232 (Fla. 1980). It cannot have been obtained by any sort of threat or promise, direct or implied, however slight. Bram

v. United States, 168 U.S. 532 (1897). At the time the confession is made the mind of the accused must be free to act uninfluenced by either hope or fear. Frazier v. State, 107 So.2d 16 (Fla. 1958).

In this case petitioner argues that Harris' patently erroneous and never corrected "advice" that petitioner was facing the electric chair, when considered in connection with Peavy's "advice" to the effect that petitioner would be "better off" if he confessed, rendered the confession involuntary. These factors certainly constituted, at a minimum, a "slight threat." Bram v. United States, supra. It can hardly be maintained that the presence of these factors did not influence the mind of the defendant through hope of a sentence less than death if he did confess, or fear of a death sentence if he did not confess, directly contrary to Frazier.

Petitioner recognizes the existence of a line of cases, exemplified by Paramore v. State, 229 So.2d 855 (Fla. 1969), which hold that a confession is not rendered involuntary solely because the police tell the accused it would be easier on him if he confessed. See also Bush v. State, 461 So.2d 936 (Fla. 1984). These cases do not apply here because, not only was petitioner told he would be better off if he confessed, he was also threatened erroneously with the death penalty.

Petitioner of also aware of cases such as Milton v. Cochran, 147 So.2d 137 (Fla. 1962), that hold that telling an accused that a confession was the only way to avoid the death penalty does not render a confession involuntary. Since Cochran

was a first degree murder case, the defendant was in fact subject to the death penalty. Here, the defendant was not so subjected. It is one thing to obtain a confession by making the accused aware of the true maximum penalty; it is quite another to give what amounts to erroneous and coercive legal advice.

Since the confession admitted into evidence at petitioner's trial was involuntarily made, petitioner requests this Court to reverse the convictions appealed from and remand the cause to the trial court with directions to conduct a new trial.

ISSUE III

PETITIONER IS ENTITLED TO A NEW TRIAL BECAUSE HIS CONVICTION WAS BASED UPON THE TESTIMONY GIVEN BY AN UNSWORN, INCOMPETENT WITNESS.

The indictment alleged that petitioner committed sexual battery upon [redacted] by either placing his penis in her mouth, or by placing his penis in her anus (R-1).

At trial, the trial court apparently perceived a potential problem with respect to [redacted] competency to be a witness, for it sua sponte conducted a brief competency hearing. That hearing revealed that [redacted] was 11 years old, but only in the fourth grade. She claimed to know the difference between a truth and a lie. The trial court stated [redacted] "understands what a lie it" but refused to swear [redacted] as a witness (T-186-188). See Section 90.605(2), Florida Statutes (1985).

What followed cast strong doubt as to [redacted] ability to differentiate between what happened and what did not. While [redacted] detailed acts perpetrated upon her by co-defendant Abraham Brooks (T-196-201), she testified affirmatively that petitioner did not attempt to penetrate her anally (T-204). Thus, the only remaining issue was whether petitioner had placed his penis in [redacted] mouth. Only through the use of leading questions was the prosecutor ever able to elicit evidence from [redacted] on direct examination that petitioner did so (T-204-205).

Moments later, on cross-examination, [redacted] repeated that petitioner did not attempt to penetrate her anally but, at this time, she testified in complete contradiction to her testimony

moments earlier on direct examination and stated petitioner did not place is penis in her mouth (T-213-215).

At this point the jury was excused and the state requested permission to ask leading questions on re-direct examination. During this period the prosecutor asked [redacted] questions on proffer. At this time [redacted] was quite willing to testify that petitioner not only placed his penis in her mouth, but also that petitioner attempted to penetrate her anally, an astonishing piece of testimony in light of the fact that it is an act which [redacted] had twice previously denied had ever occurred (T-218-219). This testimony, however, was not ever elicited in the presence of the jury (T-222-223).

The next witness, [redacted] s mother, while relating that her daughter did not tell lies |since the witnesses were sequestered (T-184), this witness was not privy to the numerous inherently inconsistent statements just testified to by [redacted] the witness testified that [redacted] is in a special education class and had to have therapy because she was a slow learner (T-223-224).

Petitioner asserts he is entitled to a new trial because his conviction is predicated largely upon the testimony given by an incompetent witness. Petitioner argues that this Court should reverse because the determination of competency is a duty of a trial court, and the accused need not object. Alternatively, petitioner asserts that no objection was required because the error is fundamental. This Court may also reverse on the basis of the interests of justice.

A person is not competent to be a witness if the witness is not capable of understanding the duty to tell the truth. Section 90.603(2), Florida Statutes (1985). In order to be competent, the witness must be intelligent and understand the nature of the oath and possess a sense of obligation to tell the truth. Bell v. State, 93 So.2d 575 (Fla. 1956) and Crockett v. Cassels, 95 Fla. 851 (1928).

Applying this criteria, in the instant case it is apparent that the witness was not shown to be intelligent. The record is silent as to her ability to understand the nature of the oath for, as noted, the trial court denied petitioner's request that the witness be sworn (T-186-188). The record is anything but silent, however, on the issue of [redacted] sense of the obligation to tell the truth, for the sheer number of inconsistent statements on material issues demonstrate that the witness had little, if any, sense of the obligation to tell the truth. Thus, [redacted] was not competent to be a witness.

In McKinnies v. State, 315 So.2d 211 (Fla. 1st DCA 1975), the defendant appealed his conviction for grand theft, and the appellate court held the trial court had abused its discretion in allowing a witness to testify. Several of the factors leading to the holding in McKinnies are present here. There, as here, the witness, through leading questions, gave contradictory testimony which the opinion characterized "...as to be without probative value in a judicial proceeding which leads to the incarceration of the citizen." 315 So.2d At 212. The same characterization is applicable to [redacted] testimony in the

instant case. See also Bell v. State, supra, and Davis v. State, 348 So.2d 1228 (Fla. 3d DCA 1977).

The McKinnies opinion does not reflect that there was a trial objection directed toward the witness' competency. In the area of competency, the duty to ascertain competency falls directly upon the trial court, Rowe v. State, 87 Fla. 17 (1924), not defense counsel. Petitioner accordingly asserts that no objection is required in the instant case to preserve the point for review. The trial court made a ruling of competency, and thus there is a judicial action capable of being reviewed. See State v. Barber, 301 So.2d 7 (Fla. 1974).

Alternatively, petitioner requests that the competency issue be reached in the "interests of justice." Florida Rule of Appellate Procedure empowers this Court to grant relief in the interests of justice. Only evidentiary weight is excluded from the types of matters cognizable by this rule. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

In Davis v. State, supra, the trial court conducted a competency hearing of a child and concluded that the child had the requisite intelligence and ability to testify, but was concerned that the child had been influenced by his mother. The mother was then extensively questioned about her influence, and then the trial court permitted the child to testify. On appeal, although recognizing that the competency of a witness is within the discretion of the trial judge, a new trial was ordered in the "interests of justice." 348 So.2d at 1230. Thus, a

competency issue is a viable subject for a reversal in the interests of justice.

Petitioner submits the multitude of inherently inconsistent responses to leading questions on material facts involved here, in conjunction with the witness' young age and low intelligence, afford this Court more than ample grounds to reverse in the interests of justice.

As an alternative basis for reversal, petitioner asserts that the allowance of [redacted] testimony, under the unique facts of the instant case, is fundamental error. "Fundamental error," which can be considered on appeal without objection in the trial court, is error which goes to the foundation of the case or goes to the merits of the cause of action. Clark v. State, 363 So.2d 331 (Fla. 1978) and Sanford v. Rubin, 237 So.2d 134 (Fla. 1970).

Here, the alleged victim of a capital felony gave inherently inconsistent evidence on material issues. The entire case is predicated upon acts supposedly committed upon the witness in question. It follows that the error in allowing [redacted] testimony went to the very core of the case and merits of the cause of action, rendering it fundamental.

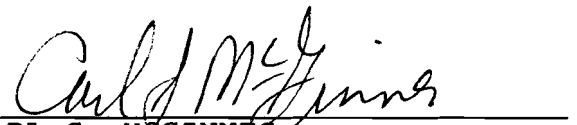
Based upon the preceding petitioner requests this Court to reverse the conviction appealed from and remand the cause to the trial court with directions to conduct a new trial.

V CONCLUSION

Based upon the preceding analysis and authorities, petitioner contends reversible error has been demonstrated. As a result of any or all of the three errors asserted herein, petitioner requests this Court to reverse the judgment and sentence appealed from, quash the opinion issued by the District Court of Appeal, First District, and remand the cause to the trial court with directions to conduct a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Ms. Beverly Berry, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Walter Blackshear, #042450, Post Office Box 221, Raiford, Florida, 32083, this 7th day of August, 1987.

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