IN THE SUPREME COURT OF FLORIDA

JERRY STOKES,

Appellant,

v. CASE NO. **71,485**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE THIRD JUDICIAL CIRCUIT OF
AND FOR MADISON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. MCLAIN #201170
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX **671**
TALLAHASSEE, FLORIDA **32302**
(904) 488-2458

ATTORNEY FOR APPELLANT

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I PRELIMINARY STATEMENT

Jerry Stokes relies on his initial brief to respond to the State's answer brief except for the following additions concerning Issues I, 11, III and VIII.

II ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN RULING THAT STOKES HAD FAILED TO MAKE A PRIMA FACIE SHOWING OF A LIKELIHOOD OF RACIAL DISCRIMINATION IN THE STATE'S USE OF PEREMPTORY CHALLENGES AND IN NOT REQUIRING THE STATE TO GIVE REASONS FOR ITS EXCUSING OF BLACK PROSPECTIVE JURORS.

Appellee labors under the inaccurate premise that the sole reason for the procedures outlined in State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, No. 70,331 (Fla. March 10, 1988) "is to ensure that the reasons for the peremptory challenges are in the record." (State's Brief at page 11) Upon this premise, the State has combed the record and listed possible reasons the prosecutor might have used had he been required to articulate his reasons at a timely Neil hearing. Such after-the-fact justification for exercising peremptory challenges does not satisfy Neil and Slappy. As this Court said in Blackshear v. State, No. 70,513 (Fla. March 10, 1988),

> [W]e conclude that the hearing, conducted well after the trial had concluded, was untimely. When a ~~Neil~~ objection is properly raised, as it was in this instance, the time for the hearing has come. The requirements established by Slappy cannot possibly be met unless the hearing is conducted during the voir dire process. Only at this time does the court have the ability to observe and place on the record relevant matters about juror responses or behavior that may be pertinent to a Neil inquiry.

Blackshear, slip opinion at 3.

The State's appellate counsel is now improperly asking this Court to conduct a belated Neil hearing based on reasons he, not the prosecutor at trial, has gleaned from the appellate record. During voir dire, the prosecutor articulated reasons for only two of his peremptory challenges. Stokes met the threshold requirement of showing a likelihood of racial discrimination, and the trial judge should have placed the burden on the State at jury selection to justify its peremptory challenges of black prospective jurors. This Court cannot now act as fact finder regarding the validity of the reasons now offered for the first time on appeal. Blackshear. Stokes was entitled the reasoned judgment of the trial judge at jury selection to determine the validity of any offered reasons for the peremptory challenges.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING STATE WITNESS WILLIAM BROWN TO TESTIFY TO HIS IDENTIFICATION OF THE GRAND PRIX AUTOMOBILE SINCE THE IDENTIFICATION WAS MADE AFTER BROWN HAD BEEN HYPNOTIZED TO ENHANCE HIS MEMORY ABOUT THE CHARACTERISTICS OF THE CAR.

The State's contention that Bundy v. State, 455 So.2d 330 (Fla. 1984) (Bundy I) controls this issue is without merit. First, Bundy I was decided before this Court announced the per se rule of exclusion in Bundy 11. Bundy v. State, 471 So.2d 9 (Fla. 1985). Second, in Bundy I, this Court had not yet adopted the position that hypnosis is an inherently unreliable process which taints posthypnotic testimony. Third, contrary to the State's argument, the danger of a witness remembering untrue details is not the only problem with posthypnotic testimony. A more insidious, yet equally dangerous, problem is the effect the hypnosis has on the witness which makes them impervious to cross-examination. Consequently, the fact that a witness claims to make a posthypnotic identification solely on the basis of details recalled prior to hypnosis does not remove the taint. The witness may be unjustifiably more certain of a posthypnotic identification. The witness may fill in minor details which falsely strengthens the witness's perception of his ability to recall events. The witness may be unable to separate true memories from false memories. This Court acknowledged all of these problems when adopting the rule announced in Bundy 11. 471 So.2d at 17-18. Fourth, Bundy I is

factually distinguishable from this case. Unlike the witness in Bundy I, William Brown did not repudiate any effect of the hypnotic session. He testified that the hypnosis helped him remember and refreshed his recollection of the car he said he saw for two seconds as he passed it at over 60 miles an hour. **(R 392-394)**

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN LIMITING STOKES' CROSS-EXAMINATION OF WILLIAM BROWN BY PRECLUDING THE USE OF EVIDENCE FROM THE HYPNOTIC SESSION WHICH INCLUDED INCONSISTENT DESCRIPTIONS OF THE CAR HE ALLEGEDLY SAW AT THE STORE.

On page 18 of the State's brief, the untenable assertion is made that Stokes invited the limitation of cross-examination because he refused to withdraw his objection to the introduction of the posthypnotic identification of the car. The court's offer to allow full cross-examination using the fact that the witness was hypnotized only if the defense completely gave up the objection to the inadmissible identification evidence was a Hobson's choice. Stokes never asked that the evidence of the hypnotic session, alone, be excluded. His objection was to the hypnotic session and Brown's subsequent identification which had been tainted by the hypnosis. (R 415-416, 470-473) The trial judge granted Stokes' motion in a piecemeal fashion which had the effect of giving the State a double benefit -- the identification testimony and the exclusion of the best impeachment evidence against it.

ISSUE VIII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO USE REFERENCES TO CRIMES STOKES ALLEGEDLY COMMITTED, WHICH HAD NOT RESULTED IN CONVICTION, TO IMPEACH A CHARACTER WITNESS WHO TESTIFIED DURING PENALTY PHASE.

The State's attempt to distinguish this case from Robinson v. State, 487 So.2d 1040 (Fla. 1986), is based on a misreading of Robinson. The harm in Robinson was not that the State had tried to bolster its position concerning the aggravating circumstance that the defendant had been previously convicted for a violent felony. Instead, the harm was that the criminal allegations, which had not resulted in conviction, was improper evidence of nonstatutory aggravating circumstances. Consequently, it does not matter that the prosecutor here was not claiming that Stokes qualified for the aggravating circumstance of having a previous conviction for a violent felony. Nonstatutory aggravating circumstance evidence is inadmissible regardless of the statutory aggravating circumstances the State asserts. The impeachment technique used here is identical to the one used in Robinson. The prejudicial impact of that technique is also the same. Robinson controls and compels a reversal.

III CONCLUSION

For the reasons presented in the initial brief and this reply brief, Jerry Stokes asks this Court to reverse his judgments and sentences.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. MCLAIN #201170
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

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 12 day of August, 1988.

W. C. MCLAIN