IN THE SUPREME COURT OF FLORIDA

FREDERICK NOWITZKE,

Appellant,

vs. Case No. 71,729

STATE OF FLORIDA,

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

The state's answer brief is referred to herein by use of the symbol "S". Other references are as denoted in appellant's initial brief.

This reply brief is directed to the competency to stand trial and Neil issues. Appellant will rely on his initial brief with regard to the guilt phase and penalty phase issues.

STATEMENT OF THE CASE AND FACTS

Undersigned counsel concurs with the state's assessment that his decision not to raise the four potential issues listed on page 1 of the state's brief was a strategic judgment. See Jones v. Barnes, **463** U.S. **745, 752-53 (1983).** Cave v. State, **476 So.** 180, 183 n.1 (Fla. **1985).** However, the issues concerning Frances Carroll's estate and her life insurance policies, and the penalty phase testimony of Clay Carroll, stand on a different footing. Undersigned counsel raised those issues in the originally submitted initial brief because he believed they were meritorious. He still believes they are meritorious. Those issues were deleted from the revised initial brief solely in order to comply with the Court's order that the brief be reduced to 100 pages (a nearly one-third reduction, even after typographical changes were made). Undersigned counsel acknowledges that, given the necessity of complying with the Court's order, his decision as to which issues to omit was strategic. However, the state has now suggested in its answer brief that:

> Appellate counsel was correct in his deletion. Why? Because the omitted claims either established motive or reflected heinous, atrocious, cruel pain caused by someone else.

(S3)

The undersigned will resist the temptation to move to re-submit the original version of the brief on the ground that the state is now arguing the merits of the issues appellant was forced to eliminate. Instead, he will briefly assert that the testimony concerning Frances Carroll's estate and life insurance was of no probative value under the circumstances of this case. Appellant and his siblings were Frances' natural heirs, and there was no showing that the possibility of an inheritance played any role in appellant's actions. Contrast Michael v. State, 437 So.2d 138 (Fla. 1983). As for the life insurance policies, there was no evidence that appellant was even aware of their existence. See People v. Mitchell, 473 NE.2d 1270, 1271-72 (Ill. 1984). They merely provided the State Attorney with the opportunity to speculate to the jury, and to portray the shooting incident as something it was not. Regarding the second omitted issue, Clay Carroll's testimony about his own pain and emotional distress (not to mention his having to okay the removal of organs from his son Bret for transplantation) was not relevant to the issue of whether the shooting deaths of Frances and Bret were "especially heinous, atrocious, or cruel", see Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985), and served only to invoke the jury's sympathy and inflame their emotions.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO ORDER A COMPETENCY HEARING PRIOR TO SELECTION OF THE JURY ON OCTOBER 26, 1987.

The state says:

> Assuming that Frederick Nowitzke had delusions about the terms of incarceration contained in the plea agreement, then the People's only option was to withdraw the offer. However, this does not mean that Frederick Nowitzke was not to stand trial and answer the indictment. Appellant had been returned to stand trial; and, there was no need for additional hearings on competency. Immediately prior to trial; during trial; and, at sentencing, Appellant remained competent. As defense counsel stated: "We're not here trying the competency of the Defendant to stand trial. He's here. He's been adjudged competent." (R2365) The trial curt agreed; and, defense counsel asserted that this contention was no longer an issue. (R2366)

(S12)

First of all, appellant's delusions were not about the terms of incarceration contained in the plea agreement;[1] that he understood. However, the verdict and penalty made no difference to him, because he was going to be spiritually released - and subsequently physically released - on July 4, 1989 regardless of the Court proceedings. He had arrived at this date because it was Independence Day, and based on the number of letters in his three

[1] The plea agreement provided for concurrent life sentences, with a combined mandatory minimum of 28 years before parole eligibility.

names. He told counsel that the information had come from what a judge had told him in his dreams.

The state's solution? Since he's too crazy to consider the plea offer without delusions, we'll simply withdraw it. That way, the state seems to think, the case is back in the same posture as if the plea offer (made on the Friday before jury selection) had never been made, and there is no need to worry about whether the prior findings of competency - made months earlier - were still valid.

However, the fact is that the plea offer **was** made; and the problem is not that appellant refused it. The problem is that his reasons for refusing it were irrational and delusional. Therefore, when defense counsel explained what had occurred to the trial judge and requested a competency evaluation, there was clearly a reasonable doubt whether appellant had a sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding. Lane v. State, 388 So.2d 1022 (Fla. 1988); Scott v. State, **420** So.2d 595 (Fla. 1982); Pridgen v. State, 531 So.2d 951 (Fla. 1988).

The state's further comment is grossly misleading. It says:

> Immediately prior to trial; during trial; and, at sentencing, Appellant remained competent. **As** defense counsel stated: "We're not here trying the competency of the Defendant to stand trial. He's here. He's been adjudged competent." (R2365) The trial court agreed; and defense counsel asserted that this contention was no longer at issue. (R2366)

(S12)

The state seems to be trying to suggest that defense counsel was waiving his pre-trial request for a competency evaluation, or at least conceding that it was groundless. Nothing could be further from the truth. The remarks which the state takes wildly out of context occurred during the cross-examination of Dr. Tanay by State Attorney Schaub. Throughout the trial, Schaub introduced (over repeated defense objections and motions for mistrial) a great deal of evidence directed not to appellant's mental condition at the time of the offenses (November **16, 1985**), but rather to his mental state and behavior during the summer and fall of **1986**, when he was hospitalized as incompetent to stand trial **(R2354-88** [Tanay]; **2636-50** [Vaughn]; **2756-2829** [Bonar]; **2735-42, 2754** [NFETC Treatment Summary]). See appellant's initial brief, Issue VII. What defense counsel was saying was that appellant's competency to stand trial was not an issue before the jury. **(R2363-66)**

The trial court's responsibility to ensure that the defendant is not tried while incompetent is a continuing one; extending through the pre-trial stages to the beginning of trial, and throughout the trial and sentencing proceedings. Drope v. Missouri, **420** U.S. **162 (1975)**; Lane; Pridgen. A prior determination of competency is by no means conclusive of the defendant's present mental condition, in light of new or additional evidence indicating that he may now be incompetent. Lane; Pridaen; see also State v. Bauer, **245** N.W.2d **848, 852-57** (Minn. **1976**). **"...** [A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards

of competence to stand trial." Drope, 420 U.S. at 181; Lane, 388 So.2d at 1025. In the instant case, the trial court committed reversible error by failing to observe the mandatory requirements of Rules 3.210 and 3.211, to protect appellant's right not to be tried while incompetent. Drope; Lane; Scott; Pridgen.

ISSUE II

THE TRIAL JUDGE ERRED IN ALLOWING THE PROSECUTOR TO USE PEREMPTORY CHALLENGES TO EXCUSE JURORS McDUFFIE AND JOHNSON, WHERE (1) THE PROSECUTOR FAILED TO ARTICULATE A LEGITIMATE, RACIALLY NEUTRAL EXPLANATION FOR THE STRIKES UNDER THE STANDARDS ESTABLISHED IN THE NEIL AND SLAPPY DECISIONS, AND (2) THE JUDGE ACCEPTED THE REASONS PROFFERED BY THE PROSECUTOR AT FACE VALUE, AND FAILED TO EVALUATE THE CREDIBILITY OF THE EXPLANATION.

The state's reliance on Reed v. State, ___ So.2d ___ (Fla. 1990) (15 FLW S115) is misplaced. In Reed, there were at least ten black people on the prospective panel, two of whom were seated as jurors. Of the eight blacks who were excused, the defense did not question the prosecutor's motivation for five of the strikes, and the reasons given for the other three "had at least some facial legitimacy." 15 FLW at S116. This Court concluded in Reed that the defense had not made a prima facie showing of a "likelihood" of discrimination, and commented:

> Reed was not prejudiced by the prosecutor having given explanations for his challenges. In fact, if it appeared from the prosecutor's explanation that his challenges were racially motivated, the trial judge would have been warranted in granting a mistrial despite not yet having ruled that the defense had made a prima facie showing.

In the present case, unlike Reed, the state's use of its peremptory challenges resulted in not a single black member remaining on the panel, thus raising an inference of a racial motivation for the strikes. See Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988) (where at the time defense counsel's

objection was made, not a single black member remained on the prospective panel, burden of proof to justify strikes shifted to the state); Floyd v. State, **511** So.2d 762, **763** (Fla. **3d** DCA **1987)** (where state used peremptory challenges to remove all black persons from venire "presumption of discriminatory use of peremptory challenges did arise"); Parrish v. State, **540 So.2d 870, 871** (Fla. 3d DCA **1989)** (striking of the only black member "demonstrated a strong likelihood that the juror was rejected on racial grounds", and burden shifted to the state to provide legitimate explanation). See also Kibler v. State, **546** So.2d **710, 713** (Fla. **1989)** (defense counsel requested Neil inquiry after state had challenged all the black people on the jury); Bryant v. State, ___ So.2d ___ (Fla. 1990) (15 FLW S178) (white defendants satisfied burden of prima facie showing where state exercised five of its first seven peremptory strikes against black persons, and where only twelve blacks were on the venire; likelihood of bias must be resolved in complaining party's favor).

Here, of the three black jurors who remained on the panel after the challenges for cause were concluded, the state peremptorily excused all three. As to two of the three, Ms. McDuffie and Mrs. Johnson, the prosecutor's explanation actually enhanced, rather than dispelled, the likelihood of a racial motivation. Contrast Reed. He misstated answers given by **both** jurors on voir dire, indicating that he was listening for reasons to excuse them, rather than listening to what they said. The laundry list of reasons given by the prosecutor include reasons totally unsupported

by the record, reasons unrelated to the facts of the case or to the jurors' ability to serve impartially, and reasons equally applicable (or more applicable) to white jurors who were accepted by the state. State v. Slappy, 522 So.2d 18 (Fla. 1988). See appellant's initial brief, p. 41-56.

The state, inartfully, asserts that "there was no objection to Miss McDuffie being black." (S13)[2] If the state is trying to argue that there was an insufficient objection to apprise the trial court of the need for a Neil inquiry, the state is clearly wrong. After the first two black jurors were challenged, defense counsel noted for the record that they were black. (R1293, 1446) The prosecutor said "If we could do that outside of the presence of the jury." (R1446) When the third and last black juror was excused by the state, defense counsel said:

> ...[T]hat is the third black juror that the State has excused and the last black juror in this venire. I believe the State needs to place on the record the reasons why they have excused every single black juror on this panel. How do you want to do that?
>
> MR. SEYMOUR [prosecutor]: I think we can do that after the jury retires for the afternoon. I'll be more than happy.

(R1611-12)

Defense counsel's objection was made when the last black prospective juror was struck by the state, and he requested an

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[2] Along similar lines, the state re-frames the issue as "whether the trial court erred as a matter of law in declining to strike jurors McDuffie and Johnson?" (S13) (emphasis supplied), when it presumably means to say whether he erred in allowing the prosecutor to strike them.

inquiry as to "the reasons why they have excused every single black juror on this panel." This objection was precisely what is required to apprise the judge of the need for a Neil inquiry into the reasons for each and every peremptory challenge exercised by the state against blacks. Tillman v. State, 522 So.2d 14, 16-17 (Fla. 1988); Thompson v. State, 548 So.2d 198, 202 (Fla. 1989) (emphasis in opinion). Obviously, the reason why defense counsel made his full objection when the last black juror was excused was because his ability to satisfy the prima facie standard of a "likelihood" of racial discrimination was strongest at that time. See Blackshear; Kibler; Floyd.

The excusal of even one minority juror for impermissible reasons - reasons which are unsupported by the record or which appear to be a pretext for racial discrimination - is reversible error. Slappy; Tillman; Thompson. Here, two black jurors were excused by the state for reasons impermissible under Slappy, and the result was an all white jury. Appellant is entitled to a new trial, with a jury selected free of racial discrimination.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court grant the following relief:

As to Issues **1** through **7:** Reverse the convictions and sentences and remand for a new trial.

As to Issues **8** through **13:** Reverse the death sentence, and remand for imposition of **a** sentence of life imprisonment without possibility of parole for twenty-five years.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room **804, 1313** Tampa St., Tampa, FL **33602, (813) 272-2670,** on this 14 day of June, **1990.**

Respectfully submitted,

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