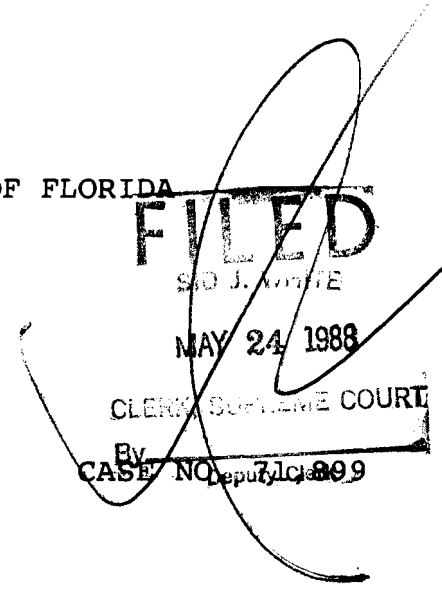
IN THE SUPREME COURT OF FLORIDA



GERALD DOBLY McCLOUD, :

Petitioner, :

vs. : CASE NO. 71,899

STATE OF FLORIDA, :

Respondent. :

_____ :

BRIEF OF PETITIONER ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Gerald Dobly McCloud was the defendant in the trial court in Circuit Court Case Nos. 85-4591-CF and 85-4592-CF and the Appellant in the District Court of Appeal, First District. He will be referred to in this brief as "petitioner," "defendant," or by his proper name.

The record on appeal contains the pleadings and transcripts in both Case Nos. 85-4591-CF and 85-4592-CF. The one volume record of pleadings will be referred to as "R" followed by the appropriate page number in parenthesis. The transcripts of the two lower court proceedings are contained in 16 chronological and consecutively numbered volumes. References to the transcript will be designated as "T".

II STATEMENT OF THE CASE AND FACTS

By information filed May 1, 1985, petitioner was charged in Circuit Court Case No. 85-4592-CF with Burglary of a dwelling, the property of [redacted], and in the course of committing the burglary made an assault upon Ms. [redacted] (Count I), and sexual battery upon Ms. [redacted] using or threatening to use a deadly weapon, to wit: a gun (Count II), which offenses allegedly occurred on March 21, 1985 (R 8).

In Circuit Court Case No. 85-4591-CF, petitioner was charged in a two-count information filed May 1, 1985, with burglary of a dwelling, the property of [redacted] with the intent to commit an assault and in the course of committing the burglary made an assault upon [redacted] (Count I), and sexual battery upon [redacted] using or threatening to use a deadly weapon, to wit: a knife (Count II), which offenses allegedly occurred on January 1, 1985 (R 6).

Petitioner was tried separately on the two informations.

A. Case No. 85-4592-CF

Jury selection in Case No. 85-4592 commenced on September 9, 1985. During the voir dire, the prosecutor used peremptory challenges to excuse eight black prospective jurors: [redacted] (T 139); [redacted] (T 140); [redacted] (T 141); [redacted] (T 141-142); [redacted] (T 142); [redacted] (T 146); [redacted] (T 147), and [redacted]

(T 149-150). The prosecutor did not strike a single white person. One black female, Ms. [redacted] did sit on the jury.

After the state's fifth peremptory challenge, petitioner noted the pattern and objected on the ground that the challenges were exercised in a racially discriminatory fashion. Petitioner's motion to strike the venire was denied (T 142-144). Petitioner renewed his motion after the seventh black juror was excused by the state, which motion was again denied (T 147-148). When the state challenged Ms. O[redacted], a black female, as an alternate, petitioner again objected and asked the court to conduct a hearing into the reasons for the state's excusal of the eight blacks (T 150-151). While the state volunteered some reasons for its challenges, the prosecutor attempted to justify its actions on the ground that one black female was not struck (T 142, 151). The court denied petitioner's request for a hearing, stating:

> I think they [the state] have stated sufficient reasons, that we have a record if those reasons are sufficient to create a systematic pattern of exclusion. I don't believe they are, but if the appellate courts feel like it, we've got the record. So, I'll deny the motion for any kind of a separate hearing on that issue.

(T 151).

Petitioner renewed his objections the next day before the trial commenced, specifically noting that of the 21 jurors originally seated, ten were black and only one was not excused by the state. Defense counsel pointed out:

> Since the most recent decision dealing with the courts conducting hearings of

> instances such as this, requiring the State -- or providing the State with an opportunity to justify the usage of their challenges, I'm beginning to see another pattern developing. That is, when there are a substantial number of black jurors on the panel, as there was in this case, I think there were approximately ten jurors originally seated who were black out of 21, that the State seems to be purposely leaving one black individual on the jury not exercising a challenge against that person, and using that factor as a means of justifying their other challenges.

(T 172-173). The trial court again refused to inquire into the state's motives, stating:

> I think the definition of peremptory challenges are challenges the Court can't request any reason for, as long they are within the peremptory challenges. However, I realize the appellate courts have indicated that they want the State to be able to defend against -- they want the State to defend against charges of systematic exclusion of those jurors. I think in spite of Mr. Cofer's indication he wants to hear what the reasons are, whether it's an accusation of systematic exclusion, notwithstanding that, I don't think I can ask them for reasons on why they exercise peremptory challenges.

(T 174).

At the conclusion of the trial, the jury found petitioner guilty of the lesser included offenses of trespass in Count I of the information and sexual battery with slight force in Count II (R 70; T 584).

B. Case No. 85-4591-CF

Jury selection in Case No. 85-4591 commenced on October 14, 1985. During voir dire, the prosecutor again exercised

peremptory challenges to excuse eight prospective black jurors: [redacted] (T 671); [redacted] (T 670-671); [redacted] (T 671); [redacted] (T 673); [redacted] (T 672); [redacted] (T 679); [redacted] (T 680); [redacted] (T 690). The prosecutor exercised only one peremptory challenge to strike a white juror, R[redacted] P[redacted] whose father was a court reporter assigned to that criminal division (T 615-616, 657,699).

Of the first six jurors initially seated, three were black and subject to the state's backstrikes (T 670-671). When the state struck two additional black jurors, petitioner moved for a mistrial on the ground that the state was exercising its peremptory challenges is a racially discriminatory manner. Defense counsel noted that he had not exercised a single challenge since the state began bumping all the blacks off the jury panel (T 673, 678). The court sustained the purported objection to backstriking, but overruled the motion for mistrial, finding that the state excused some of the jurors for reasons other than race alone (T673-674, 679). The prosecutor justified its position by pointing out that petitioner exercised each of its challenges against white females, but asserted that "the State is not itself basing any of its peremptory challenges on racial grounds" (T 674-675). The prosecutor then stated its "reasons" for excluding each of the blacks from the jury (T 675). McCloud renewed his motion for mistrial when the state challenged the two remaining blacks on the panel (T 679, 680), and also noted that the state

exercised its final peremptory challenge to excuse a black as an alternate juror (T 691).

Following a three day trial, petitioner was found guilty as charged on both counts of the information (R 81-81; T 1044).

Petitioner was sentenced on October 25, 1985, in both Case Nos. 85-4591 and 85-4592. He was adjudicated guilty on all charges. In Case No. 85-4592, the trial court sentenced petitioner to 60 days in the county jail in Count I and to 15 years imprisonment in Count II (R 97-101; T 1091-1092). In Case No. 85-4591, the trial court departed form the recommended guidelines sentence of 17 to 22 years, imposing concurrent terms of life imprisonment on both counts (R 89-93; T 1091-1092). The trial court's reasons for departure (R 94) were subsequently disapproved on appeal to the First District Court of Appeal. McCloud v. State, 517 So.2d 56,58 (Fla. 1st DCA 1988).

Although tried separately in each case, petitioner filed one notice of appeal for both cases (R 107), and the cases were consolidated for purposes of appeal.[1] Petitioner argued on appeal that the issue of racial discrimination in the jury selection was properly presented to the trial court in both trials, and petitioner met his initial burden of showing a

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[1]With leave of the Court, petitioner filed two briefs in the District Court in order to avoid confusion of the factual and evidentiary issues in each trial.

strong likelihood that the prospective jurors were challenged solely on the basis of race. Petitioner further argued that the state failed, in both trials, to show that the questioned challenges were not exercised on the basis of race.

The District Court rejected these arguments, finding that although petitioner timely objected and demonstrated on the record that the challenged jurors were members of a district racial group, petitioner did not present any further evidence of a likelihood that the prospective jurors had been challenged because of their race. The Court relied on a footnote in State v. Neil, 457 So.2d 481, 487 n.10 (Fla. 1984), and its holding in Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987),[2] to conclude that the mere demonstration of the exclusion of a member of blacks is not sufficient to entitle a party to inquire into the other party's use of peremptories. The court further held that the state's action of volunteering nonracial reasons for striking some of the jurors and the trial court's blanket acceptance of those reasons required affirmance of the trial judge's denial of the motions for mistrial in each case. McCloud v. State, supra.

Petitioner timely sought discretionary review in this Court, and by order dated April 27, 1988, this Court accepted jurisdiction. This appeal follows.

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[2]The District Court's opinion in Blackshear was quashed by this Court after the decision in the instant case. Blackshear v. State, 13 FLW 192 (Fla. March 10, 1988).

SUMMARY OF THE ARGUMENT

Petitioner contends, contrary to the holdings of the lower court, that his timely objection to the prosecutor's use of peremptory challenges on prospective black jurors shifted the burden to the state to give racially neutral reasons for its strikes. Furthermore, the state failed to show that the questioned challenges were race neutral, reasonable or supported by the record. Petitioner is thus entitled to new trials.

ARGUMENT

ISSUE PRESENTED

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. 85-4591-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.

This Court, in State v. Neil, 457 So.2d 481 (Fla. 1984), established the procedure a trial court must follow when faced with a challenge to the use of peremptory strikes based solely on race. The trial court in Neil ruled that the state did not have to explain why it had struck all these black jurors. This Court reversed that ruling, holding that when a party timely objects to the other party's use of its peremptory challenges, the objecting party must show that the challenges were used against members of a distinct racial group, and that there is a strong likelihood that they have been challenged solely because of their race. The burden then shifts to the striking party to show that the questioned challenges were not exercised solely because of the prospective juror's race.

In State v. Slappy, 13 FLW 184 (Fla. March 10, 1988), and Blackshear v. State, 13 FLW 192 (Fla. March 10, 1988), this Court further defined the procedure to be followed when a challenge of racial discrimination in the use of peremptory

strikes is made. Slappy instructs that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.

> [W]e affirm that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a 'likelihood' of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial questions.... [W]e hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

State v. Slappy, 13 FLW at 185.

In the instant case, the record in both Case Nos. 85-4591 and 85-4592 leaves little doubt that petitioner met his initial burden regarding the likelihood that the state exercised its peremptory challenges solely on the basis of race. In the latter case, the prosecutor used all of its peremptories to exclude blacks; in the former case, the same prosecutor exercised nine peremptories, eight against blacks and one against a white juror who was the son of a court reporter in that criminal division. In both cases, black males were struck; black females were struck; employed and unemployed blacks were challenged; married blacks and single blacks were challenged, and blacks with children and without children were removed by the state. The only common thread in the state's use of its peremptory challenges was the race of the jurors. In each case, the victim was white and the defendant was black.

If these facts fail to show a strong likelihood of racial discrimination, as the court below held, petitioner maintains such a showing could never be made.

In Blackshear v. State, supra, this Court held, under almost identical facts, that the burden of proof clearly had shifted to the state. In Blackshear, as here, there was no indication that any of the excluded blacks would be unfair or partial. Indeed, here, the state initially accepted some black jurors (in Case No. 85-4591), only to backstrike them later. Petitioner timely objected to the state's exclusion of blacks and clearly demonstrated a strong likelihood that the petitioner jurors were being challenged solely because of their race. Petitioner met his initial burden under State v. Neil.

In Case No. 85-4592, the trial court refused to conduct a hearing as required by Neil because "I don't think I can ask them [the state attorney] for reasons on why they exercise peremptory challenges" (T174). This was plainly error. In both cases, however, the state volunteered reasons for some of its challenges. Petitioner submits these reasons failed to overcome the state's burden of proof.

Although the reasons for peremptory challenges need not rise to the level justifying a challenge for cause, the reasons must be neutral, reasonable and supported by the record. Batson v. Kentucky, 476 U.S. 79 (1986); State v. Slappy, supra. Moreover, the trial court must evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. "A judge cannot merely accept the

reasons proffered at face value." State v. Slappy, supra at 185. The court below admittedly did just that.

A comparison of the voir dire examination of the excluded and seated jurors and the state's reasons for its challenges demonstrate that the explanations were not neutral, reasonable or supported by the record.

A. Case No. 85-4592-CF

The following eight jurors were challenged by the state below.

R[redacted] G[redacted]

Ms. G[redacted] had been a resident of Jacksonville for 44 years. She was employed in the Holiday Inn Restaurant, was divorced and had five children, two of whom were living at home (T 69-70, 106). The state gave no reasons for striking her.

H[redacted] L[redacted]

He had lived in the area for 22 years. He was employed as a landscaper, was divorced and had two children, ages 8 and 12 (T 74,109). The state challenged Mr. L[redacted] because "besides being a male, [he] had been convicted of loitering, so he does have a prior record" (T 142).

G[redacted] B[redacted]

Ms. B[redacted] was a job recruiter and supervisor for Royal Janitorial Service. She had recently retired after 24 years with Royal. She was married and had five children, three boys and two girls, between the ages of 23 and 30. One son and a

niece lived in her home (T 77-78, 113). The prospective juror volunteered that she was a minister (T 128). When asked whether her religious beliefs would cause a problem in passing judgement on another person, Ms. B[redacted] responded:

> Well, no, you know, it's really something to think about, but my job is to keep it from getting this far. *** When they get this far, you know, my job -- you know, I can't come in here and do that, so my job is to just be honest and tell the truth, you know.

(T 132). Ms. B[redacted] iterated that she would have to tell the truth in returning a verdict (T 133-134). The state moved to strike Ms. B[redacted] for cause because "I think she's still got religious beliefs that would hinder her in reaching a verdict. I don't think she may want to follow the law" (T 141). The challenge for cause was denied, and the state exercised a peremptory challenge to excuse her (T 141). The state's reason:

> As to Ms. B[redacted] the state struck her because she's a minister, and thinks that would hinder her in being able to render a correct verdict.

(T 143).

A[redacted] B[redacted]

She is life time resident of Jacksonville and a second grade school teacher at Oak Hill elementary School. Her husband is a pharmacist at the VA Hospital. They have no children (T 78-79, 114). The state initially accepted Ms. B[redacted] as a juror (T 141), but then challenged her because

> [S]he didn't have any children; the state

> struck her. And one of the victims in this case had children. The state figures that might be a reason to come back not quilty.

(T 143).

R[redacted] H[redacted]

He is a yardsman for U-Haul of North Florida, single, and has two children (T 79, 114). The state peremptorily challenged Mr. H[redacted] (T 142) because he is "20 years old, single, and young" (T 143).

L[redacted] W[redacted]

L[redacted] W[redacted] was retired, separated and had no children. Her home had been burglarized twice and she was convinced her husband did it (T 80, 96). Ms. W[redacted] did not want to sit on the jury: "I just don't want no more part of this;" "I just don't believe I would make the right decision" (T 97). When questioned by the court, she stated she would be able to render a verdict (T 98-99). In response to questions by defense counsel, Ms. W[redacted] stated that she could reach a verdict "best I know how," even though "I don't want to judge nobody" (T 134). The state moved to strike Ms. W[redacted] for cause because she did not want to suit in judgment. The court noted that the prospective juror did not want to be on the jury, but denied the challenge for cause because Ms. W[redacted] said she could render a verdict on the evidence (T 144-146). The state excused her because "I don't think she's qualified" (T 146).

G[redacted] R[redacted]

Ms. R[redacted] worked for Revlon. Her husband was a mechanic. She had five grown children. One daughter and two grand children were living at home (T 80-81). She was nervous about sitting on the case (T 86-87); she had been the victim of a purse snatching four years before and was still afraid as a result, but said she could base her verdict on the evidence (T 100, 123-124). Her daughter was mugged the first of the year and that case was still pending (T 125-126). The state challenged her (T 147) based on the same objections as to Ms. W[redacted] (T 149).

R[redacted] O[redacted]

The final juror excused by the state, Ms. O[redacted], worked at a candy shop, was single and had one daughter (T 82-83, 117). The state struck her as an alternate juror without stating a reason (T 150). This was the state's last peremptory challenge.

The following individuals served on petitioner's jury.

B[redacted] K[redacted]

She was a life long resident of Jacksonville and had recently been employed as a secretary at Associated Staffing. Her husband was a grocery buyer for Winn Dixie and they had three children, ages 8,12,15 (T 72, 107).

F[redacted] C[redacted]

Ms. C[redacted] was a maid in a dentist's office. She was divorced and had four adult children. One daughter and three grandchildren lived at home with her (T 73, 108). Ms. C[redacted] was the only black to serve on the jury (T 149).

M[redacted] R[redacted]

Mr. R[redacted] was a certified mechanic, divorced, and had no children (T 74, 108-109).

N[redacted] C[redacted]

Ms. C[redacted] was a professional nanny and also employed by the Jacksonville Jaycees. She was a widow and had five children between the ages of 21 to 30 (T 75, 109-110).

G[redacted] S[redacted]

Ms. S[redacted] was an invoice clerk. Her husband was in the Navy. She had two children and two step children, ages 10, 13,21 and 26. Two of the children were living at home (T 77, 112).

P[redacted] C[redacted]

He was a hearing clerk in disability cases. His wife was a nurse. They had three children, ages 8, 11 and 13 (T 82,116).

The prosecutor's reasons for removing the black jurors had nothing to do with the case on trial or the parties and witnesses. The only exception was with regard to Ms. W[redacted],

who clearly exhibited a reluctance to sit in the case.[3] The remaining reasons articulated by the state were clearly insufficient under the dictates of Slappy and Neil.

First, it should be noted that the state provided no reasons for its removal of two jurors. See Blackshear v. State, supra at 193 ("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."). The remaining challenges were either unrelated to the facts of the case or based on reasons equally applicable to jurors who were not challenged. State v. Slappy, supra. For example, Mr. H[redacted] was excused because he was young and single, yet the same attributes did not disqualify Mr. R[redacted] from jury service in the prosecutor's view. H[redacted] L[redacted] was excused because of a prior misdemeanor conviction and his gender, although the state apparently had no objection to the gender of Mr. R[redacted] and Mr. O[redacted] who did serve on the jury.

The state ostensibly wanted a jury of mothers as it excused A[redacted] B[redacted] because she did not have any children; since the victim had children, the state figured that would be a reason for Ms. B[redacted] to acquit Mr. M[redacted]. This explanation was clearly spurious since Mr. R[redacted] also had no

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[3]The legitimate excusal of some black jurors does not defeat petitioner's contention of racial discrimination since, "If one juror has been improperly excused because of race, it does not matter that one juror was not so excluded." Tillman v. State, 13 FLW 194, 195 (Fla. March 10, 1988).

children. Interestingly, of the eight blacks excused, six were parents, four of whom were mothers.

Of course, a prosecutor would not be inclined to say that he challenged a particular juror because of race, but the state's purported reasons here bore no relationship to the particular case, the parties or witnesses, or the characteristics of the potential jurors other than race. Thus the state failed to carry its burden of explaining why it peremptorily challenged a disproportionate number of blacks. Further, because the state could not or would not explain why it excused Ruthie Goshen and Renee Olover, the presumption exists that the two women were excused solely because they are black.

B. Case No. 85-4591-CF

In the second trial held one month later, the state challenged the following eight prospective jurors.

Beverly Hales Watson

Ms. Watson was a married female with no children. She had lived in the area for four years, was unemployed and had no prior jury service. Her husband was a manager of W.C. Enterprises (T 615). The prosecutor initially accepted Ms. Watson (T 669), but then excused her in a series of backstrikes against black prospective jurors (T 671). The reason for the state's challenge: "Ms. Watson is unemployed"

(T 675). The state did not conduct any voir dire of this prospective juror.

J[redacted] F[redacted]

Mr. F[redacted] was a car salesman at Coggin Pontiac. He was married and had two teen-age children. His wife was a data specialist manager for AT&T (T 617-618). Mr. F[redacted] was also the victim of a backstrike, the state having initially found the juror acceptable (T 670, 671). The prosecutor's reason for the challenge:

> Your Honor, Mr. F[redacted] -- I'm not particularly fond of that agency -- he's a car dealer. I don't like individuals on this type of jury that sells cars. It's just the tone of his personality has come through, has offended Mr. de la Rionda and I as it relates to this type of offense.

(T 675). The state did not question this prospective juror.

E[redacted] D[redacted]

Mr. D[redacted] was a computer operator for Florida Steel. He was married and had four adult children. Prior to living to Jacksonville six years before, Mr D[redacted] lived in Germany for ten years (T 618-619). While in the army, he worked for three years in the criminal investigations division (T 638). Mr. D[redacted] was also subject to a backstrike by the state (T 672, 673), "his employment" being the sole reason for the state's challenge (T 675).

D[redacted] M[redacted]

D[redacted] M[redacted] was a medical assistant who provided in-home care for the Visiting Nurses Association. Her husband was a retired merchant seaman. She had a 21 year old daughter and had been the victim of a robbery and residential burglary (T 617, 634). The state challenged Ms. M[redacted] because she was "a convicted felon" (T 675), although the state apparently forgot that fact when it accepted her initially (T 670), only to backstrike her along with the precious jurors (T 671).

Z[redacted] A[redacted]

Z[redacted] A[redacted] had lived in the area for 37 years. He was employed by Alton Packaging, making paper, was married and had two children living at home (T 619-620). The state struck Mr. A[redacted] because of his unspecified criminal record (T 672, 675).

R[redacted] S[redacted]

R[redacted] S[redacted] lived in Jacksonville for 10 years and in Fort Walton Beach for 28 years before that. He was a salesman for Life Insurance Company of Georgia. His wife was a school teacher and they had two children living at home and one child in college (T 620-621). Mr. S[redacted] had been a victim of a residential burglary and theft (T 635). Mr. S[redacted] was challenged by the state because "he's a prior convicted person" (T 679).

E[redacted] C[redacted]

The state's final challenge was to excuse a black female as an alternate juror. E[redacted] C[redacted] was from Miami but was attending Florida Junior College. She was studying printing. Before entering school she worked at Sears in Miami. She was presently in the job corps. Ms. C[redacted] was single (T 685, 687-688). The state exercised its last peremptory challenge against Ms. C[redacted] stating as it reason, "she's on welfare, Job Corps" (T 690, 691).

A[redacted] D[redacted]

A resident of Jacksonville for 21 years, Mr. D[redacted] was single and employed as a cement finisher. He had been so employed for six months (T 622, 648). The state challenged him because of an unstated prior criminal record (T 680).

The following jurors were not challenged by either party and did serve on the jury.

J[redacted] A[redacted]

Mr. A[redacted] was a computer operator for Prudential Insurance Company. His wife was a school teacher. They had two children, ages 10 and 12. He had been the victim of both a residential and automobile burglary. A close friend of his wife's had been sexually assaulted in her home less than a year before (T 612, 630, 659-660).

E[redacted] B[redacted]

He was a service technician for Southern Bell. His wife was the staff coordinator at a hospital and was expecting a

child. He had one child by a previous marriage. Mr. B[redacted] had also been the victim of a car burglary (T 613, 631).

N[redacted] P[redacted]

Ms. P[redacted] was a medical assistant, divorced and mother of three children, ages 17, 20 and 23 (T 616).

D[redacted] F[redacted]

Mr. F[redacted] was the only single male on the jury. He was an undertaker and had no children (T 168).

M[redacted] N[redacted]

He was a manager at K-Mart. His wife was a homemaker and they had one five year old child (T 620).

J[redacted] M[redacted]

Ms. M[redacted] was a widow and school teacher. She had two grown children and had preciously served on a criminal jury panel (T 622-623, 649).

The state's examination of the prospective jurors was exceptionally brief and, in fact, the state did not question two jurors at all.[4] Typically, the state asked how long each juror had been employed in his or her present occupation. The prosecutor then addressed a few general questions to the panel as a whole (T 642-651). The tenor of the state's voir dire,

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[4]The failure to question the challenged jurors on the grounds alleged for bias renders the state's reasons immediately suspect. State v. Slappy, supra at 186.

the manner in which the state's peremptory challenges were exercised, and the traits revealed in the foregoing profiles indicate that jurors were not selected or rejected on the basis of their individual characteristics, but solely on the basis of their race.

For example, Ms. W[redacted] was excused because she was unemployed. On the other hand, Ms. C[redacted] was excused because she was employed by Jobs Corps while attending school. Mr. D[redacted] was excused solely because of "his employment" (T 675). It is unclear from the record whether "his employment" referred to his past employment as a criminal investigator with the military or his present employment as a computer operator. Interestingly, the state did not inquire into any other juror's military experience and the state did not object to the occupation of another computer operator, J[redacted] A[redacted]. Mr. A[redacted], who is white and sat on the jury, was a computer operator for Prudential Insurance Company and had been so employed for almost 14 years. Like Mr. D[redacted], he was married and had children.

In addition, Mr. F[redacted] was excused because the prosecutor did not like the agency he worked for and because "the tone of his personality" offended the state attorneys. Curiously, the prosecutor never asked Mr. F[redacted] a single question on voir dire to explore "the tone of his personality". While the prosecutor may not have liked car dealers as jurors, the reasons for challenging Mr. F[redacted] are highly suspect.

Four prospective jurors were ostensibly challenged because they had criminal records. None of the veniremen had criminal charges pending against them (T 629), nor did the state inquire about criminal charges or convictions. Presumably, none of the jurors had been convicted of a felony or of bribery, forgery, perjury or larceny; otherwise, the state could and should have challenged the jurors for cause. Sections 40.013 (1), 913.03 (1), Florida Statutes. It would have been ironic indeed if four prospective jurors on a venire had been so convicted, had their civil rights restored and were summoned for jury service on the some day in the same criminal division. Not only did the prosecutor fail to mention the nature of each juror's criminal conviction, but also failed to mention how old or extensive the criminal records were. Also noteworthy is that one of the jurors, Ms. M[redacted] who was struck because of her alleged criminal record, had previously served on a jury (T 617). When the state excused her because of that record and the defense counsel inquired what she had been convicted of, the prosecutor responded: "She's a convicted felon, that's all I need to say" (T 675). If this were true, it is curious that the state did not try to remove her for cause. Furthermore, if it were true and Ms. M[redacted]'s civil rights had been restored, the prosecutor failed to show that its reason was based on the particular case, the parties or witnesses. In short, the prosecutor's glib excuse that four jurors had criminal records, with no record support for such explanations, is suspicious.

Even if the purported prior criminal records are sufficient to overcome the state's burden with regard to those four jurors, the state's other reasons weigh against the legitimacy of race-neutral jury selection. The state objected to jurors because they were unemployed and because they were employed; because they were single and because they were childless. Yet, the same attributes applied to jurors who were not challenged.

For these reasons, petitioner requests this Court to find the reasons insufficient and order that petitioner receive a new trial in both causes in which racial factors do not permeate the jury selection process.

CONCLUSION

Based upon the preceding analysis and authorities, reversible error has been demonstrated. Consequently, petitioner requests this Court reverse his convictions in Case Nos. 85-4591-CF and 85-4592-CF and remand the causes to the trial court for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant 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 24th day of May, 1988.

Paula S Sanders
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