IN THE SUPREME COURT OF FLORIDA

PERRY A. TAYLOR, :

Appellant, :

vs. : Case No. 74,260

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The state's brief will be referred to by use of the symbol "S". Other references are as denoted in appellant's initial brief. This reply brief is directed to Issues I, IV and V. Appellant will rely on his initial brief with regard to Issues II, III, and VI.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE PROSECUTOR TO GIVE A REASONABLE, RACIALLY NEUTRAL EXPLANATION FOR HIS EXCUSAL OF PROSPECTIVE JUROR FARRAGUT.

The state's brief is most revealing in what it leaves out. The prosecutor and the trial judge were the same ones as in Thompson v. State, 548 So.2d 198 (Fla. 1989), and they committed the same errors as they did in that case. Since the state cannot meaningfully distinguish Thompson, it ignores it.

Even more telling is the state's bland presentation of the facts. If one reads the state's argument without comparing it to the record, it would appear that the state only peremptorily challenged one black juror out of four (S.3, 7), and that, upon the defense's objection (which the state implies was insufficient (R.1, 5, 6)), the trial judge exercised his discretion in determining that there was no substantial likelihood that the challenge was racially motivated. (S.1, 9, 10) After that, nothing else relevant to the Neil issue happened. (S.3-10)

Under the above hypothetical set of facts, the state's argument might have merit. Under the real facts the state's argument fares less well:

(1) The state suggests that defense counsel did not properly object to the prosecutor's exercise of the peremptory challenge against Mr. Farragut, and cites Smith v. State, 562 S.2d 787 (Fla. 1st DCA 1990) for the proposition that merely asking to have "the record show" that black jurors have been excused does not constitute an objection and is insufficient to trigger the trial court's obligation to conduct a Neil inquiry. (S.1, 5, 6) Fine, but that is not what happened in this case. When the prosecutor peremptorily excused Mr. Farragut

(the first of the two black jurors who had a realistic chance of serving on the jury[1]), defense counsel made the following objection:

> Judge, Mr. Farragut is ... at this point in time, the only black that is on the panel, and I would submit that he is striking -- has struck him simply because of his race, and not for any legitimate reasons for his ability to render a fair and impartial trial.[2]

(R.1000)

Soon afterward, when the prosecutor peremptorily challenged Ms. Boyd, defense counsel stated "We are going to interpose the same objection as we did before", noting that the state had previously excluded Mr. Farragut and now they were excusing the only other black person who remained. (R.1003-04) Plainly, according to the very decision relied on by the state, defense counsel's objection was in full compliance with the procedures outlined in Neil and Slappy,[3] and was more than sufficient to apprise the trial court of the need for an inquiry into the prosecutor's motivation for excusing the juror. Smith v. State, 562 So.2d at 788-89. As further recognized in Smith, at 788, "Slappy holds 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." The principle that any doubt as to whether the prima facie showing has been made must be resolved in favor of a Neil inquiry has been

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[1] The third black juror was married to a Tampa police officer, and four of the five state witnesses in this trial were also City of Tampa police officers. The fourth black juror was "Witherspoon - excludable", as he could not recommend death under any circumstances.

[2] Note also that (1) appellant is a black man (a factor which tends to support the prima facie showing of a likelihood of discrimination when the defendant is of the same race as the challenged juror or jurors), see e.g. Kibler v. State, 546 So.2d 710, 712 (Fla. 1989); (2) nothing in the voir dire of Mr. Farragut indicated any unfairness or partiality, or any disability to serve as a juror, see e.g. Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988); and (3) any doubt as to whether there is a "likelihood" of discrimination must be resolved in favor of the complaining party, see e.g. Tillman v. State, 522 So.2d 14, 16 (Fla. 1988).

[3] State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Slappy, 522 So.2d 18 (Fla. 1988).

repeatedly recognized by this Court. See Tillman v. State, 522 So.2d 14, 16 (Fla. 1988); Thompson v. State, 548 So.2d 198, 200 (Fla. 1989), and the cases cited at p. 30 of appellant's initial brief.

(2) Quoting Reed v. State, 560 So.2d 203, 206 (Fla. 1990), the state says "Within the limitations imposed by State v. Neil, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended", and suggests that the trial court's ruling should be accorded great deference. (S.9) The problem is that the trial court's refusal to conduct a Neil inquiry in the instant case was not within the limitations imposed by Neil and Slappy. The trial judge never ruled that the defense had failed to make a prima facie showing that the excusal of Mr. Farragut was racially motivated. Rather, based on the same misunderstanding of the Neil requirements that led to the reversal in Thompson v. State, he merely stated that he could not make a finding that the state was systematically excluding blacks, since another black person remained on the potential jury panel. Therefore he refused to require the prosecutor to explain his excusal of Mr. Farragut. This was not a discretionary ruling within the bounds of Neil and Slappy; it was error as a matter of law. As this Court stated in Thompson, where the same prosecutor and the same judge committed the same error:

> ...[T]he entire course of voir dire recounted here reflects a serious misunderstanding of our holdings in Neil and Slappy, as well as the related federal case law. In Slappy we found
>
> > the number [of challenged peremptories] alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.
>
> Slappy, 522 So.2d at 21 (citations omitted). Accord United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986). The present record reflects a grave possibility that the trial court below relied upon the state's erroneous statement that Neil only comes into play if there is a "systematic" exclusion of blacks. This is the only reasonable conclusion based on the record. Indeed, the trial court first began to conduct a Neil inquiry but then reversed itself after hearing the state's erroneous statement of the law. Moreover, every relevant state-

> ment by the trial court incorrectly characterized Neil as applying only to "systematic" uses of the peremptory.

548 So.2d at 202.

> The term "systematic" is derived from Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), a decision that was rejected on state-law grounds by the Court in Neil and overruled by the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79, 105 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Under Neil and Slappy, there is no requirement that the improper use of the peremptory be "systematic."

548 So.2d at 202, n.4.

(3) Attempting to justify the trial court's failure to require the prosecutor to explain his reasons for striking Farragut, the state quotes Kibler v. State, 546 So.2d 710, 714 (Fla. 1989) out of context, saying "Eliminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge." (S.7) Here's the rest of the story:

> [T]he Neil inquiry must necessarily focus on the reasons given by the prosecutor for making the challenge. The bare bones statement that there was no intent to discriminate does not suffice. Presumably the prosecutor's assertion that he preferred other jurors means that because of the jury selection procedure in that jurisdiction, he knew which jurors in the venire would be replacing those excused. Eliminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge. However, in the context of Neil, it would be incumbent on the prosecutor to give nonracial reasons for having challenged the black jurors rather than the white jurors in his effort to make room for the new persons he sought to have join the panel. Having failed to do so, the prosecutor did not carry the burden of showing that his challenges of Mr. Williams and Mr. Jones were not exercised solely because of their race. State v. Slappy, 522 So.2d 18 (Fla. 1988).

Kibler v. State, 546 So.2d at 714.

It is also worth noting that Kibler was a white defendant, while appellant in the instant case is black. The Kibler Court recognized that, while standing to make a Neil objection is not limited to minority defendants, it is a factor relevant to the determination of whether there has been a prima facie showing of a "likelihood" of racial discrimination when the defendant is of the same race as the challenged juror or jurors. See also Reed v. State, 560 So.2d 203, 205-06 (Fla. 1990).

(4) Finally, the state completely ignores the highly significant events which occurred after the trial judge erroneously failed to conduct a Neil inquiry into the excusal of Farragut. Jacqueline Boyd, a black juror, was placed in the box and was immediately peremptorily challenged by the state. Defense counsel objected, pointing out that the state had previously struck Farragut and now they were excusing the only remaining black juror. (R.1003-04) The trial judge said:

> I will require the State to give a valid reason for exercising a peremptory challenge as to Jacqueline Boyd since there is no other black left on this panel other than Charlie Robinson, who unequivocally stated that he could never vote to recommend death. I now find the State may well be systematically removing blacks from this jury panel.

(R.1004)

Once again, this Court's decision in Thompson v. State is right on point. [The state's strategy of not even mentioning this recent decision, prominently featured in appellant's initial brief, involving the same prosecutor, same judge, and same errors as the instant case, illustrates just how on point it really is]. In Thompson, as here, the judge failed to question the state as to its excusal of the first black juror [there Brooks, here Farragut], because he mistakenly believed (1) that a Neil inquiry is required only if there is a "systematic" exclusion of blacks, and (2) that no discrimination can be shown as long as another black person remains on the potential jury panel. 548 So.2d 201-02. In Thompson, as here, the state's use of its peremptories eventually convinced the court that the state very likely was engaging in systematic racial discrimination, and from that point forward, he ordered the prosecutor to give reasons. However, as this Court noted in reversing for a new trial:

> [A]t no time did the state give, or the trial court require, reasons for the excusal of Juror Brooks.
>
> The record reflects that the trial court below clearly entertained serious doubts as to whether the state was improperly exercising its peremptory challenges. Accordingly, the court should have resolved this doubt in favor of the defense and conducted an inquiry as to the state's reasons for all the challenged excusals. Slappy, 522 So.2d at 21-22. These reasons must be supplied by the prosecutor. Here, the trial court conducted an improper inquiry because it failed to question the state as to each and every peremptory challenge exercised against blacks once it became clear that

> the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse.

See also Tillman v. State, 522 So.2d 14, 16 (Fla. 1988); Hargrove v. State, 530 So.2d 441, 442 (Fla. 4th DCA 1988); Johnson v. State, 537 So.2d 117, 122 (Fla. 1st DCA 1988).

ISSUE IV

THE TRIAL JUDGE ERRED IN ALLOWING THE PROSECUTOR TO MAKE IMPROPER AND INFLAMMATORY ARGUMENT TO THE JURY IN THE PENALTY PHASE; THE MISCONDUCT WAS ESPECIALLY EGREGIOUS BECAUSE THE PROSECUTOR INTENTIONALLY MISLED THE TRIAL JUDGE TO BELIEVE THAT THE FLORIDA SUPREME COURT HAD APPROVED SUCH ARGUMENT, WHEN IN FACT THE SUPREME COURT HAS DISAPPROVED IT.

The state concedes that the prosecutor's argument was improper (S.2), yet argues:

> [I]t must be observed that appellant made no request for curative instruction, nor a request for a mistrial. (R 731) The proper procedure where improper remarks are purportedly made is to object and move for curative instructions. If the curative instructions are denied or are inadequate a mistrial is the proper remedy. Thus, the failure to move for either curative instructions or for a mistrial should preclude appellate relief. The remarks were not so inflammatory as to deny a fair trial, Jackson v. State, 522 So.2d 802, 809 (Fla. 1988), and, thus, a request for curative instructions should have been made. Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974), citing Perry v. State, 146 Fla. 187, 200 So. 525 (1941).

(S.20)

The state's contention is specious. The improper argument at issue here - which is a variation on the theme of "an eye for an eye" - is one which the Assistant State Attorneys in Hillsborough County make in virtually every penalty phase they try, and continue to make notwithstanding this Court's February 18, 1988 opinion in Jackson v. State, 522 So.2d 802, 808-09 (Fla. 1988) condemning it as inflammatory and outside the scope of the jury's deliberations. In the instant case, tried more than a year after Jackson was decided, Assistant State Attorney Benito, in order to forestall a defense objection in the presence of the jury, asked the judge for an in limine ruling allowing him to make the argument. Using a PCA footnote from Hudson v. State, 538 So.2d 829, 832 (Fla. 1989), the prosecutor misled the trial court that the Florida Supreme Court had specifically

approved the argument device, when in fact this Court has specifically disapproved it in Jackson.[4] The prosecutor continued:

> So with that guidance I do plan on using that type of argument, and I appreciate Mr. Simms lodging his objection to protect the record prior to my closing argument.
>
> THE COURT: So you object to that line of argument at this time rather than in the middle of Mr. Benito's argument?
>
> MR. SIMMS [defense counsel]: That is correct, Your Honor. Mr. Benito suggested that he would like to have his argument uninterrupted. I don't object. But for the record I do object to his statements concerning the Defendant has the ability to read, see the sun, watch TV. The victim doesn't have that opportunity.
>
> I submit he's in effect arguing an additional aggravating circumstance, and the rules are very precise you can only argue the aggravating circumstances listed by statute and nothing else.

(R.730-31)

The trial court, thoroughly misled by the Assistant State Attorney, stated that he was bound by the Florida Supreme Court, and since that Court had (supposedly) held in Hudson that the argument device was valid, Mr. Benito would be allowed to make it. The court stated to defense counsel:

> You've objected; your record is protected. You need not object at the time that he is making that type of argument.

(R.731-32)

For the state to now be arguing procedural default takes a lot of gall. The objection was handled the way it was as a professional courtesy to Mr. Benito because he didn't want to be interrupted in the middle of his argument. Largely as a result of Benito's deceptive presentation, the trial court erroneously overruled the defense's objection on the merits. Obviously, it would be inane to require the defense to request an instruction to "cure" an error which the

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[4] The prosecutor's deceptive conduct was almost certainly intentional, or, at the very least, grossly negligent, since he claimed to be basing his interpretation of the Hudson footnote on the argument which was made in Hudson's brief. If, as he represented, he had read the 3 1/2 page argument on this point in Hudson's brief, he could not possibly have been unaware of Jackson (a case out of his own office). See appellant's initial brief, p. 67-68 and Appendix A.

judge has just authorized the prosecutor to go ahead and commit. It is when an objection is sustained that a request for a mistrial or a curative instruction is necessary to preserve the issue. When the objection has been overruled, such a request would be a futile gesture, and is clearly not necessary to preserve the error. Simpson v. State, 418 So.2d 984, 986-87 (Fla. 1982); Johnson v. Canteen Corp., 528 So.2d 1364, 1365 (Fla. 3d DCA 1988). See also Ramos v. State, 413 So.2d 1302, 1303 (Fla. 3d DCA 1982); Lee v. State, 422 So.2d 928, 929 n.2 (Fla. 3d DCA 1982); Bullard v. State, 436 So.2d 962, 963 (Fla. 3d DCA 1983); Allah v. State, 471 So.2d 121, 122 n.1 (Fla. 3d DCA 1985); Simmons v. Baptist Hospital of Miami, Inc., 454 So.2d 681, 682 (Fla. 3d DCA 1984); Goff v. 392208 Ontario Ltd., 539 So.2d 1158, 1159 (Fla. 3d DCA 1989).

Regarding the state's "anticipatory rebuttal" argument, this Court said in Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986):

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

If, during defense counsel's argument, the prosecutor thinks he's arguing something improper, his remedy is the same as when the roles are reversed; he can object and get a ruling from the trial court. "Anticipatory rebuttal" is not a vehicle for the prosecutor to engage in inflammatory and prejudicial rhetoric with impunity.

ISSUE V

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

The state complains about the "apparently weekly fine-tuning of capital jurisprudence by this court" (S.25), and seems to suggest that Campbell v. State, ___ So.2d ___ (Fla. 1990) (15 FLW S343) - and presumably also Nibert v. State, ___ So.2d ___ (Fla. 1990) (15 FLW S415) - should be applied prospectively only. Campbell and Nibert, however, implement the long established constitutional principles of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), and this Court's guidelines set forth in Rogers v. State, 511

So.2d 526, 534-35 (Fla. 1987). All of these decisions were on the books well in advance of the sentencing in this case.[5]

The trial court must find as a mitigating circumstance any proposed factor that has been reasonably established by the evidence and is mitigating in nature. Rogers; Campbell. Notwithstanding the state's attempt to belittle it (compare the state's brief, p. 25, with the evidence set forth in appellant's initial brief, p. 20-21, 70), the effect of a traumatic childhood has been recognized as a valid non-statutory mitigating circumstance. Campbell, 15 FLW at S343; Nibert, 15 FLW at S416; Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). In the instant case, the testimony of Dr. Mussenden establishing this mitigating circumstance was unrebutted. Evidence of a defendant's good behavior while incarcerated is also a valid non-statutory mitigating factor, see Skipper v. South Carolina, 476 U.S. 1 (1986); Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987), since it bears on his probable future conduct if sentenced to life imprisonment.

> [A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.

Valle, 502 So.2d at 1226 (quoting Skipper).

Contrary to the state's suggestion (S.24), evidence of a defendant's good behavior while incarcerated is not negated by his bad behavior while not incarcerated. The issue is whether he is likely to be a model prisoner, not a model citizen. Obviously, if a conviction of a capital crime itself negated the mitigating circumstance, then evidence of a defendant's good behavior in prison or jail could never be accepted, despite well-settled law to the contrary. Cf. Nibert, 15 FLW at S416.

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[5] Moreover, if Campbell and Nibert were intended to apply prospectively only, then this Court would not have remanded for resentencing in those cases. Compare Grossman v. State, 525 So.2d 833, 841 (Fla. 1988) (procedural rule that written sentencing orders be prepared prior to or concurrent with oral pronouncement of sentence would become effective 30 days after opinion became final; Grossman gets no relief).

Finally, the trial court's "even if" statement (R.1180) regarding the "possible" mitigating circumstance of appellant's age (22) is insufficient to comply with the requirements of Lockett; Eddings; and Rogers. See Nibert, 15 FLW at S416 (trial court's finding of "possible" mitigating circumstance).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth at p. 73 of the initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 24th day of September, 1990.

Respectfully submitted,

Steven L Bolotin

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

STEVEN L. BOLOTIN
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

SLB/an