IN THE SUPREME COURT OF FLORIDA

GARY LEONARD TILLMAN, :

Appellant, :

vs. : Case No. 74,756

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

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TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant, Gary Leonard Tillman, will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

The new grounds advanced for withdrawal of Tillman's guilty pleas required the trial judge to exercise his discretion and make a ruling on the merits.

In conjunction with this Reply Brief, Appellant has filed a Motion for Relief from the State's Breach of Plea Agreement. The State's breach of the plea agreement by including material from outside the record in Appellee's brief to argue that Tillman's sentence of death is proportionate has tainted this Court's proportionality review of Tillman's death sentence.

Appellee's comparison of the excusals of white prospective juror Barnes and African-American prospective juror Williams does not bear up to scrutiny. Barnes said that missing her vacation would upset her so much that she couldn't be a fair and impartial juror. Williams was not upset by the prospect that he would have to reschedule his vacation; in fact he was very willing to serve

on the jury. It was this desire to participate in a civic duty that the prosecutor cited when striking Williams from the jury.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS.

Contrary to Appellee's assertion, the trial court was not required to deviate from the mandate of this Court in order to entertain Appellant's "Motion to Withdraw Previously Entered Pleas of Guilty". The trial court would only have disregarded the mandate of this Court if it ruled on the specific grounds previously advanced by Appellant to this Court in Tillman v. State, 522 So.2d 14 (Fla. 1988). Since Appellant offered new grounds for withdrawing his plea (grounds which had never been ruled upon by this Court), the trial judge should have ruled on the merits of his motion.

Appellee also asserts that the "changed circumstances" cited by Appellant in his motion would not have warranted relief. Brief of Appellee, p.10. That decision is not one for this Court to make. Fla.R.Crim.P. 3.170(f) places discretion in the trial judge to determine whether a plea of guilty may be withdrawn. At bar, the trial court should have exercised that discretion. See, Fazio v. Russell Building Movers, Inc., 469 So.2d 844 (Fla. 3d DCA 1985) (trial judge must exercise discretion afforded him or reversible error results).

ISSUE II

A SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL PENALTY DECISIONS OF THIS COURT.

Because the content of Appellee's brief on this issue violated the plea agreement between Tillman and the State, this Court should not consider this issue except in terms of Appellant's "Motion for Relief from the State's Breach of Plea Agreement".

If this Court does reach the merits of this issue, Appellee's assertion that Tillman's case is comparable to Hudson v. State, 538 So.2d 829 (Fla. 1989) ignores one great difference. Hudson had previously been convicted of a violent felony, sexual battery, whereas Tillman has no prior history of violence.

ISSUE III

THE TRIAL JUDGE ERRED BY RULING THAT THE PROSECUTOR GAVE SATISFACTORY REASONS FOR HIS EXERCISE OF PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN PROSPECTIVE JURORS.

In his brief, Appellee urges this Court to compare the State's reason for excusal of African-American prospective juror Robert Williams with the excusal of white prospective juror Beverly Barnes. Brief of Appellee, p.22-23. To begin with, prospective juror Barnes was excused on the State's challenge for cause (R543). When given a chance to rehabilitate prospective juror Barnes, defense counsel declined the opportunity (R698-9).

He cited her planned vacation with her husband as a reason not to put her on the jury. (R698-9).

The record reflects that when prospective juror Barnes was asked about how she would feel if she had to miss her vacation, she said:

> I would be so upset or whatever I will not be able to give Gary Tillman a fair trial or I will not be able to give the people of the State of Florida that I represent, a fair trial?

(R521) By contrast, prospective juror Williams said that he would be able to reschedule his vacation and the change of plans wouldn't bother him (R100-01,102--3,127-8). Thus, Barnes was not a willing juror but Williams was.

Indeed, the prosecutor characterized Williams' desire to participate in the judicial process and do his civic duty as being "too anxious to sit here and participate in a trial of this nature" (R870). This is an invalid reason to justify a peremptory strike of an African-American prospective juror. After all, Justice Kennedy made it clear in his concurring opinion to Holland v. Illinois, 110 S.Ct. 803 (1990) that the Court could not concede

> that racial exclusion of citizens from the duty, and honor, of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees.

110 S.Ct. at 812.

Accordingly, Tillman was deprived of his rights under the Equal Protection Clause of the Fourteenth Amendment, United States Constitution, and Article I, section 16 of the Florida Constitution to a jury selected without racial discrimination.

ISSUE IV

THE TRIAL JUDGE'S INSTRUCTION TO THE JURY ON THE SECTION 921.141(5)-(h) AGGRAVATING CIRCUMSTANCE WAS CONSTITUTIONALLY INADEQUATE BECAUSE IT FAILED TO INFORM THE JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE V

THE TRIAL JUDGE ERRED BY FAILING TO CONSIDER UNCONTROVERTED MITIGATING FACTORS IN THE WEIGHING PROCESS.

Appellant will rely upon his argument as presented in his initial brief.

CONCLUSION

Appellant will rely upon his conclusion as presented in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 25th day of April, 1991.

Respectfully submitted,

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