IN THE SUPREME COURT OF FLORIDA

ALMERTIS STEPHENS,

Petitioner,

v. CASE NO. **76,030**

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CERTIFIED QUESTION

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the First District Court of Appeal, and will be referred to as petitioner in this brief. A three volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. The appendix will be referred to as "A" followed by the appropriate page number.

II STATEMENT OF THE CASE

By information filed October 7, 1988, the petitioner was charged with two counts of armed robbery with a firearm, two counts of aggravated assault with a firearm, two counts of armed kidnapping with a firearm, and use of a firearm in the commission of a felony. All the offenses were alleged to have occurred on April 20, 1988, involving two victims (R 3).

The cause proceeded to jury trial on February 6 and 7, 1989. At the conclusion of the state's case the trial court granted the petitioner's motion for judgement of acquittal on the charge of use of a firearm in the commission of a felony and denied the motion as to the remaining charges (R 172, 181).

The jury returned a verdict of not guilty on the two armed kidnapping charges and a verdict of guilty of the lesser included offense of assault on one of the counts of aggravated assault. As to the other charge of aggravated assault with a firearm and the two charges of armed robbery with a firearm, the jury returned verdicts of guilty (R 8-14).

Petitioner's timely motion for new trial (R 15) was denied on February 17, 1989 (R 17). At that time, over petitioner's objection (R 286) the trial court adjudicated him guilty and sentenced him to seventeen years prison on the armed robbery counts and five years prison on the aggravated assault count. All felony counts carried a minimum mandatory sentence of three years. On the misdemeanor count of assault, the court sentenced the petitioner to sixty days jail. The sentences on all counts were to be served concurrent to each other and

consecutive to sentences the petitioner was then serving. The trial court denied the petitioner credit for time served in the county jail awaiting trial (R 18-25).

On February 21, 1989, a timely notice of appeal was filed (R 28). On direct appeal, the petitioner raised five issues. The First District Court of Appeal affirmed in part and reversed in part. The appellate court reversed the convictions and sentences for aggravated assault and assault, as they were lesser included offenses of the robbery convictions (A 9). The court also held that certain prior offenses were incorrectly scored on the guidelines scoresheet and remanded for recalculation of the scoresheet (A 8). As to the remaining issues, the court agreed that the admission of a comment on the petitioner's right to remain silent was error, but found such to be harmless (A 7); rejected the petitioner's argument regarding improper use by the state of peremptory challenges to exclude blacks from the jury (A 2-6); and rejected the petitioner's argument regarding the trial court's failure to delay sentencing until other pending cases were resolved in order to score all cases on one scoresheet (A 8). As to this last issue, the First District Court of Appeal certified the following question:

> WHETHER IT IS THE TRIAL COURT'S DUTY TO ASSURE THAT ALL OF A DEFENDANT'S CASES PENDING IN A PARTICULAR COUNTY AT THE TIME OF THAT DEFENDANT'S FIRST SENTENCING HEARING ARE DISPOSED OF USING ONE SCORESHEET, INCLUDING DEFERRAL OF SENTENCING UNTIL ALL OF THE PENDING CASES HAVE BEEN ADJUDICATED UNLESS THIS WOULD CAUSE UNREASONABLE DELAY OR WOULD UNDULY

BURDEN THE COURT OR PREJUDICE THE DEFENDANT?

The petitioner filed a motion for rehearing in the First District Court of Appeal, on the issue of the state's use of peremptory challenges. This motion was denied on May 15, 1990. On May 16, 1990, the petitioner filed a notice to invoke the discretionary jurisdiction of this Court. This appeal follows.

III STATEMENT OF FACTS

The petitioner was convicted of two counts of robbery with a firearm for taking currency from Richard Westbrook and a gun from Michael Tanner. These convictions resulted from an incident occurring on April **20, 1988,** at the Hospitality Inn.

Tanner was the security guard at the Hospitality Inn. At approximately 4:00 a.m. the petitioner entered the lobby of the Inn holding a revolver (R **79, 94).** He walked up to Tanner and and removed Tanner's gun. The appellant's gun was pointed at Tanner during this time (R **81).**

While this was happening, Westbrook, the night auditor, had gone around the back of the front desk (R **94-96).** The petitioner led Tanner around to the back of the desk to a small office area (R **82).** Westbrook had already walked to this area (R 106). Tanner was told to lay down on the floor of the office, which he did (R **82,** 108). The petitioner threw a trash can to Westbrook and told him to put the money in the can (R **109).** Westbrook went to the cash drawer and put the money, **$295.61,** in the bag inside the trash can (R 110, **185, 219).** The petitioner then placed Tanner's gun in the bag with the money and threatened Tanner and Westbrook not to go anywhere (R **85).** The petitioner then went toward the back door, shutting the door to the office, but returned **15** to 30 seconds later and looked inside the office (R **86, 112).**

The petitioner then left. After a few minutes, Tanner got up and checked the area. Westbrook called the police (R **86, 112-113).**

Tanner and Westbrook provided the police with a description of the robber (R 87, 114). Three to four weeks after the incident Tanner was shown a photospread by the Jacksonville Police Department from which he identified the petitioner (R 91, 99).

Stephen Foster, an evidence technician with the Sheriff's Office, testified that on the day following the incident, he was called to a traffic stop (R 133). He recovered a gun from the floorboard of the front passenger seat of a car (R 135). The gun was identified as the one taken from Tanner (R ***88***, 137).

IV SUMMARY OF ARGUMENT

1. This Court should answer the certified question in the affirmative. The trial court improperly proceeded to sentencing over the petitioner's objection. The petitioner had other pending charges which should have been scored on one scoresheet, along with the instant offenses. The language of Rule 3.701(d)(1) regarding the use of a single scoresheet "covering all offenses pending before the court for sentencing" should be interpreted to include the instant facts. This would ensure equity between a defendant who proceeds to trials on multiple cases and a defendant who enters guilty pleas on multiple cases, and preclude the manipulation of sentencing dates to achieve departure sentences without valid written reasons.

2. The District Court erred in determining that the trial court did not abuse its discretion in accepting the state's reason for excluding a black juror, although there was no record support for the stated reason. The District Court misapplied the language in Reed v. State, 15 F.L.W. S115 (Fla. March 1, 1990) to the second phase of the inquiry required by Neil v. State, 457 So.2d 481 (Fla. 1984), and, in effect, negated the requirement of record support for purported race-neutral reasons.

V ARGUMENT

ISSUE I

WHETHER IT IS THE TRIAL COURT'S DUTY TO ASSURE THAT ALL OF A DEFENDANTS CASES PENDING IN A PARTICULAR COUNTY AT THE TIME OF THAT DEFENDANT'S FIRST SENTENCING HEARING ARE DISPOSED OF USING ONE SCORE-SHEET, INCLUDING DEFERRAL OF SENTENCING UNTIL ALL OF THE PENDING CASES HAVE BEEN ADJUDICATED UNLESS THIS WOULD CAUSE UNREASONABLE DELAY OR WOULD UNDULY BURDEN THE COURT OR PREJUDICE THE DEFENDANT.

At the sentencing hearing, the petitioner objected to sentence being imposed at that time because he had other cases pending. The petitioner argued that sentencing him under separate scoresheets on all pending offenses would result in a harsher sentence (R 286). The court proceeded to sentencing over his objection.

Rule 3.701(d)(1), Fla. R. Crim. P., mandates the use of one scoresheet for each defendant "covering all offenses pending before the court for sentencing". The meaning of this seemingly straight forward rule had been the subject of disagreement among the District Courts. The definition of "pending" was discussed in Gallagher v. State, 476 So.2d 754, 755 (Fla. 5th DCA 1985), in which the District Court defined "pending" offenses as those for which either a guilty or nolo contendere plea or a conviction had been obtained. The Fifth District Court looked to the Committee Note of this rule and held that a sentencing court has the burden of assuring that all of a defendant's cases pending for sentencing in a particular county at the time of that defendant's first

sentencing hearing are disposed of using one scoresheet. Id., at **756.**

To date, this Court has not addressed the correctness of this definition. Other District Court's, however, have adopted the Gallagher definition, while the Second District Court of Appeal has expanded this definition.

In Render v. State, **516** So.2d **1085** (Fla. 2d DCA 1987) the defendant was charged with violating probation by committing new offenses. A trial was held on the new offenses. While the jury was deliberating, the trial court held a hearing on the violation of probation allegations. After finding the defendant in violation of her probation, the trial court revoked the probation and imposed sentence. The jury then returned a guilty verdict on the new charges. The trial court then imposed sentence on these new charges, consecutive to the violation of probation sentence, using a second scoresheet.

The Second District Court, citing to its earlier decision of Boston v. State, **481** So.2d **550** (Fla. 2d DCA 1986), which in turns cites Gallagher, agreed that the burden is on the trial court to assure that all of the defendant's cases pending for sentencing at the time of the first sentencing hearing are disposed of using one scoresheet. Render, at **1086.** Noting that the trial judge "decided to hear the matter of the probation violation during the trial", it held:

> **...** we believe the spirit of the rule [3.701(d)(1)] would be defeated by allowing separate sentencing based on separate scoresheets where, as here, the sentences are imposed on the same day in combined

> proceedings. In this case, sentencing on the offenses underlying the appellant's probation should have been deferred until the conclusion of her trial, and then all sentences on all offenses should have been imposed on the basis of a single score-sheet.

Id., at 1087.

Thus, although no conviction or guilty plea had been entered on the new charges at the time of sentencing on the violation of probation, the Second District Court found that the new charges were "pending before the court for sentencing" for purposes of requiring a single scoresheet.

Two months later, the Second District Court decided Bembow v. State, 520 So.2d 312 (Fla. 2d. DCA 1988). Citing to Render, the Second District Court held that a trial court's decision to allow separate sentencings based on separate scoresheets defeats the spirit of rule 3.701(d)(1), especially where the sentences are imposed on the same day in combined proceedings. Id., at 313.

Between the the time of the Render and Bembow decisions, the First District Court of Appeal decided Clark v. State, 519 So.2d 1095 (Fla. 1st DCA 1988). Clark was charged with crimes in two separate cases. The defendant proceeded to trial in the first case and was convicted. He then proceeded to trial in the second case. While the jury was deliberating on this second case, the trial court sentenced the defendant on the first case. The jury then returned a guilty verdict on the second case and the defendant was sentenced, using a separate scoresheet on the second case. The First District Court,

noting conflict with Render, affirmed the sentences, adopting a strict Gallagher definition of "pending". Id., at 1097. The Court, however, discussed at length its concern with the state's or trial court's ability to manipulate sentencing procedures and scoresheets:

> We are concerned, however, that our affirmance of these sentences might seem to imply that this court would approve manipulating the trial and sentencing calendars in such cases in order to impose what amounts to a departure sentence without the necessity of articulating reasons for departure and undergoing appellate review of the validity of those reasons. We are convinced that the legislature did not intend such a technical manipulation of the guidelines procedure.
>
> The better procedure in such cases, where it would not involve unreasonable delay, would be for the trial judge(s) to defer sentencing until the guilt or innocence of the defendant has been adjudicated in all cases pending before the court at the same time. One scoresheet would then be prepared which would include (as either "primary offense" or "additional offenses") all cases pending for sentencing. Each judge would then use this scoresheet, with the restriction that the total of all sentences imposed may not exceed the guidelines recommended range without the articulation of facts or circumstances which reasonably justify the aggravation of the sentence.

Id., 519 So.2d at 1097.

The First District Court certified to the Florida Supreme Court as a matter of great importance, the same question as involved in the instant case. This question is currently pending. Clark v. State, Case No. 72,075.

Four months after its decision in Bembow, the Second District Court attempted to limit that decision in Parrish v.

State, 527 So.2d 926 (Fla. 2d DCA 1988). Parrish was convicted at trial in case number one. In a single proceeding, the trial court imposed sentence for case number one and scheduled cases two and three for trial. The defendant was later convicted and sentenced in case numbers two and three. The defendant claimed that sentencing in case number one should have been delayed until convictions were had in case numbers two and three, and sentence could be imposed in all cases using a single score-sheet. The District Court rejected this argument, stating:

> In the case before us, the trials in #2 and #3 were only set on the same day that sentence was pronounced in #l. Thus, the later two cases were not in anv wise "pending for sentencing." Gallagher v. State, 476 So.2d 754 (Fla. 5th DCA 1985)..., or even arguably close to "pending for sentencing" as they were in Render. To give Render the expansive reading that appellant argues would be to force the trial court, here, to further delay disposition of a case that was complete and ready for sentencing for reasons, speculative at best, that the other cases might be ready for disposition soon (emphasis original).

Id., at 927-928.

Thus, the Second District Court now appears to expanded the definition of "pending for sentencing" to include cases which are "arguably close" to the Gallagher definition, but not beyond. An attempt to create a bright line definition with such a vague standard as "arguably close" leads only to confusion and inequitable results.

This Court should reject the strict definition of "pending" as stated in Gallagher, and rather, adopt the rulings

of the Second District Court of Appeal in Render, and the "better procedure" discussed in Clark, which look to the spirit of the single scoresheet rule. Such an interpretation of rule 3.701(d)(1) would be consistent with the intended purpose of the sentencing guidelines - uniformity in sentencing - and with the rules governing departures from the guidelines. F.S., section 921.001(1); Fla. R. Crim. P., 3.701(b), 3.701(11).

Although the Clark and Render decisions involve multiple offenses in which sentences were imposed on the same day, the reasoning still applies to the instant case, The petitioner was charged with multiple cases, convicted at trial on certain offenses and then sentenced, over his objection, despite the fact that the remaining cases were still awaiting trial before the same court. If a defendant chooses to proceed to trial on each of a number of pending cases, (which necessitates different trials on different days and, thus, convictions on different days) he should not receive harsher treatment than a defendant who chooses to enter guilty pleas to multiple cases on the same date, simply because of a quirk in the guidelines sentencing procedure. To apply the "one scoresheet rule" otherwise would, in effect, punish a defendant for proceeding to trials rather than entering simultaneous guilty pleas when charged with more than one case.

Parrish does not point to any specific harm that may result from delaying sentencing until all cases can be disposed of in a single proceeding. (On the other hand, Parrish does recognize the potential for manipulation by the state to

achieve sentences outside the guidelines range without the required valid departure reasons.) The defendant is actually the only one who is potentially harmed by a delay in sentencing. When a defendant is convicted of an offense, the trial court has the authority to revoke the pretrial bond pending sentencing. Thus, a defendant will be sitting in the county jail while the remaining cases are being resolved by a plea or trial; not building gain time on a prison sentence or released on probation or community control.

As defense counsel argued to the trial court, either applying the definition of "pending" in Gallagher, or restricting the ruling in Render to offenses sentenced on the same day, requires the petitioner to choose between proceeding to trial with sentencing under separate scoresheets resulting in a harsher sentence or entering a guilty plea to each of the pending cases with a combined scoresheet and a lesser guidelines sentence. The petitioner should not be required to give up his right to trial in exchange for a fair guidelines sentence. This Court should answer the certified question in the affirmative and reverse and remand this case for resentencing.

ISSUE II

THE APPELLATE COURT ERRED IN FINDING THAT THE REASON GIVEN BY THE STATE FOR ITS USE OF A PEREMPTORY CHALLENGES TO EXCLUDE A BLACK JUROR WAS A VALID, RACE-NEUTRAL REASON, DESPITE THE LACK OF RECORD SUPPORT FOR THE STATED REASON.

The petitioner is black. During jury selection the state used three peremptory challenges, each of which excluded a black person from the jury (R 50-53). The petitioner raised a timely objection to the state striking only blacks (R 53). State v. Castillo, **486** So.2d 565 (Fla. **1986).** The trial court properly granted an inquiry under State v. Neil, **457** So.2d **481** (Fla. **1984)** and required the state to place on the record its reasons for use of the peremptory challenges (R 53). The state provided the following reasons:

> The Court: I'll grant the Neak (sic) inquiry and require the state to state the reasons on the record for why they've excused the three black males, beginning with Mr. Warren, **169** in the third seat.
>
> Ms.Worrall:[prosecutor] The state excused him because, one, he has a record. We don't know what it is.
>
> The Court: He's got a record and you don't know what it is?
>
> Ms. Worrall: No, sir. It was not mentioned but he does have a record. I was not able to find it (R 53-54).

The trial court then ruled:

> I will find that those are valid reasons in each of those instances and that the state has not used the peremptory challenges, although each of their three challenges have been directed at black males, that they have not systemically excluded blacks from the jury and those are

> valid reasons.
>
> In addition, of course, the District Court tells me not to count numbers, but, at any rate, there are three black females on the jury currently the same race, and I've never known any court decision to go on the basis of gender, only race, and there are three black females on the jury (R 55).

On direct appeal the petitioner argued that the state had not presented valid, race-neutral reasons for the exclusion of blacks from the jury. Specifically, the petitioner argued that the state's reason for the exclusion of Juror **169** was not supported by the record, nor shown to be race-neutral. The First District Court of Appeal affirmed the trial court on this issue **(A 6).**

Once a defendant demonstrates a strong likelihood that the jurors were challenged solely because of their race, and the trial court determines that there is a substantial likelihood that the jurors were challenged solely because of their race, the state has the burden to present "specific reasons based on the jurors' responses at voir dire or other facts evident from the record" for the striking of the black jurors. State v. Slappy, 522 So.2d 18, 23 (Fla. 1988); Johnson v. State, 14 F.L.W. 84 (Fla. 1st DCA 1988). The reasons must be reasonable, have record support, and not be pretextual. Slappy, 522 So.2d at 23; Batson v. Kentucky, **476** U.S. **79, 99, 106** S.Ct. **1712, 90** L.Ed.2d **69 (1986)** (Prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.)

In the instant case, citing to this Court's recent opinion on rehearing in Reed v. State, 15 F.L.W. S115 (Fla. March 1, 1990) [hereafter Reed II], the District Court stated that a trial judge is "vested with broad discretion" in determining whether peremptory challenges are racially intended and:

> Recognizing that we are reviewing a trial court's exercise of its discretion, we are mindful of the Supreme Court's recent observation that "[i]n trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of cur trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process." Reed v. State, supra at S116. In sum we have not been shown that the record indicates the jury selection process failed to meet the requirements of Neil (A 6).

The First District Court misapplied the language of Reed II regarding a trial court's broad discretion. The focus of the decision in Reed II was on the trial court's conclusion that the defense had failed to make a prima facie showing that there was a strong likelihood the state's challenges were racially motivated:

> 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. State v. Slappy. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved. Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused his discretion in concluding that the defense had failed to make a prima facie showing that there

> was a strong likelihood that the jurors were challenged because of their race (emphasis added).

Reed II, at S116.

In fact, in Neil, supra, the only reference to the trial court's discretion was the statement that the court's decision as to whether or not an initial inquiry is needed is "largely a matter of discretion". Id., at **487**, fn. 10.

In the instant case the trial court determined, at least "implicitly", that the defense had made a prima facie showing of racially motivated peremptory challenges (A **4**). Thus, the correct focus of the instant case was on the next phase; whether the state had met its burden of presenting "specific reasons based on the jurors' responses at voir dire or other facts evident from the record" for the striking of the black jurors. Slappy, supra, at 23 (Fla. **1988**). In this second-phase inquiry, the state has the burden of showing that its reasons for challenging a juror are reasonable, have record support and are not pretextual. Id.; Batson, at **476** U.S. 99.

The District Court applied the "broad discretion" of the trial court as discussed in Reed II to the question of whether the state's reason for challenging Juror 169 was a valid, race-neutral reason:

> Therefore, the question before us is whether the record reflects that the trial court abused its discretion in finding the prosecution's reasons for a peremptory challenge to be sufficient.
>
> We are not persuaded that the trial court erred when it allowed Juror 169 to be excluded despite the lack of record support for the prosecution's assertion that this

prospective juror had a record (A 5) (emphasis added).

Thus, the District Court reviewed the necessity for record support of the challenges based on the trial court's "broad discretion" and determined that record support was no longer necessary. Although Tillman v. State, 522 So.2d 14, 16-17 (Fla. 1988) states in a footnote that a trial court may accept a prosecutor's assertion that a juror has a prior record without requiring the production of "a certified copy of the judgement of conviction for the record", this Court held unequivocally in the body of the opinion that it is ''incumbent upon the trial judge to determine whether the proffered reasons, if they are neutral and reasonable, are indeed supported by the record."

In this case the prosecutor did not make a statement of fact, but instead stated her belief that the juror had a record, although she was unable to verify it. The prosecutor did not "know what it [was]", nor was she "able to find it" (R 54). When the prosecutor is unable to verify the juror's prior record, if any, it would be a very simple matter to inquire of the juror. Slappy, supra, (A single question to the juror could have established the existence or non existence of her ill health, which was the stated reason for striking the juror). The prosecutor did not question the juror on this alleged basis for striking him. Additionally, since the prosecutor did not question any of the prospective jurors regarding their prior records, it is unclear whether the state

used their peremptory challenges to strike all the prospective jurors with prior records, or only the black prospective jurors with prior records.

As noted in the concurring opinion in the instant case, the reference to the juror's prior criminal record was with "considerable uncertainty." (A 11). While, until Tillman, the prosecutor was not required to present a certified copy of the judgement of conviction, certainly some record support should have been required. Here, the prosecutor stated she was not able to provide any record support for her beliefs. This is compounded by the fact that there was no inquiry of the juror on this issue.

Thus, the application of the "broad discretion" standard of review and the expansive reading of the footnote in Tillman completely negated the requirement of record support for the prosecutor's alleged reasons for exercising its peremptory challenges solely on black jurors. The District Court's opinion thereby conflicts with Slappy, in which this Court recognized that the decision of the trial court is entitled to "deference" on appeal, yet still upheld the district court's determination that a new trial was necessary where the state's explanation was not supported by the record.

In conclusion, the reason given by the state for use of its peremptory challenges to strike Juror 169 from the jury was not a valid, race-neutral reason for which there was record support.

The petitioner asserts that the District Court misapplied Reed II. Reed II is distinguishable in that (1) it involved the appellate court's review of the trial court's initial determination of whether the defendant has made a prima facie showing of a strong likelihood of racial discrimination and (2) it involved a white defendant and a white victim. The instant case involved a black defendant and focused on the second phrase of the inquiry – whether the state had met its burden to present clear and specific explanation of its legitimate reasons for challenging the black jurors.

The racially motivated exclusion of a black juror violated the petitioner's rights under the Equal Protection Clause, Amendment 14, Section 1, of the United States Constitution and Article I, Section 2 of the Florida Constitution and his right to a fair trial under Article I, Section 16 of the Florida Constitution. This case should be remanded for a new trial.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse and remand for a new trial (Issue 11) or, in the alternative, for resentencing (Issue I).

Respectfully submitted,

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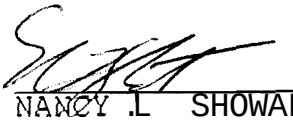
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand delivery to Laura Rush, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner this 11th day of June, 1990.

NANCY L. SHOWALTER