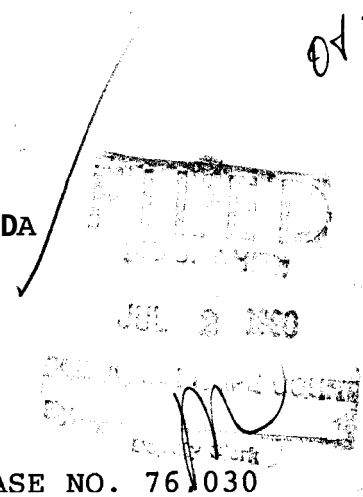
IN THE SUPREME COURT OF FLORIDA



ALMERTIS STEPHENS,

PETITIONER,

-VS-

CASE NO. 76,030

STATE OF FLORIDA,

RESPONDENT.

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

RESPONDENT'S BRIEF ON THE MERITS

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TOPICAL INDEX

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement of the case and facts with the following additions:

Defense counsel objected to proceeding with sentencing in this case on grounds that "there are other cases pending." (R 286) Following this objection, defense counsel and the trial court discussed the fact that Petitioner at the time of the sentencing hearing already was under sentence in two other cases, Case Nos. 88-12000 and 88-12002. (R 287)

SUMMARY OF ARGUMENT

Rule 3.701(d)(1), Florida Rules of Criminal Procedure, clearly states that one guidelines scoresheet should be used for all cases pending for sentencing. The rule itself suggests the most reasonable bright line for courts to follow when determining whether one scoresheet should be used for sentencing in multiple cases. The court in Gallagher v. State, infra, clearly defined a pending case for purposes of Rule 3.701(d)(1) based on the language of the rule. Deferral of sentencing in a case for the merely probable occurrence of trial or entry of pleas in other cases at some unknown point in time, as suggested by the diistrict court and as argued by Petitioner, will create chaos in the judicial system. The courts should not be required to accommodate a defendant's desire for the lowest possible sentence under the guidelines by deferring, perhaps indefinitely, sentencing in one case until all other cases are adjudicated, unless the circumstances of the case establish that combined proceedings are involved in the multiple cases, and sentencing in those cases is to be conducted on the same day. Render, infra.

In that nothing in the record contradicted the factual correctness of the reason proffered for the state's challenge of potential juror 169, and the proffered reason was a fact known about the potential juror's background, as opposed to a mere inference drawn from facts elicited during voir dire, the trial court properly accepted the proffered reason as sufficient, and

the district court properly applied the abuse of discretion standard referenced in this court's decision in Reed ~~II~~, infra, in finding the trial court properly exercised its discretion with regard to the second inquiry required under Neil v. State, infra.

ISSUE I

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 UNDULY BURDEN THE COURT OR PREJUDICE THE DEFENDANT?

Petitioner argues that the certified question should be answered in the affirmative, and the case should be remanded for resentencing. Respondent disagrees.

The court in Gallagher v. State, 476 So.2d 754 (Fla. 5th DCA 1985) defined "pending" cases under Rule 3.701(d)(1), Florida Rules of Criminal Procedure, as those in which a plea has been entered or a conviction obtained at the time of sentencing in the first case, noting also that under the Committee Note to the rule, the trial court has a duty to ensure that all of a defendant's cases pending for sentencing in a particular county at the time of the first sentencing hearing are disposed of using one scoresheet. Cases pending for sentencing at the time of the first sentencing hearing are scored as additional offenses at conviction on the scoresheet. Rule 3.701(d)(4), defining "additional offenses at conviction" supports the Gallagher court's interpretation of "pending" under Rule. 3.701(d)(1). Rule 3.701(d)(4) provides:

> All other offense for which the offender is convicted and which are pending before the court for sentencing at the same time shall be scored as additional offenses based upon their degree and the number of counts of each.

The sentencing scheme set forth under Rule 3.701 clearly indicates that where a defendant is charged in multiple cases, the trial court is required to include in one sentencing guidelines scoresheet only those cases which are pending for sentencing at the time of the first sentencing hearing.

Petitioner's contention that the district courts' interpretations of the language in Rule 3.701(d)(1) are in disagreement is not supported by a review of the pertinent case law. The definition of pending set forth in Gallagher repeatedly has been applied by the district courts. See Stokes v. State, 512 So.2d 290 (Fla. 1st DCA 1987); Boston v. State, 481 So.2d 550 (Fla. 2d DCA 1986). Petitioner's assertion that the Second District in Render v. State, 516 So.2d 1085 (Fla. 2d DCA 1987) "expanded" the Gallagher definition of pending is without merit. Render instead involved application of Rule 3.701(d)(1) to explicitly limited circumstances in which a probation revocation and sentencing hearing was held simultaneously with trial in the new offenses constituting the violation of probation. The court held that under these particular circumstances, combined trial and hearing proceedings, and sentencing in two cases on the same day, the "spirit" of Rule 3.701(d)(1) required that one

scoresheet be used in both cases. Bembow v. State, 520 So. 2d 312 (Fla. 2d DCA 1988), decided on authority of Render, involved virtually identical circumstances of combined proceedings in two cases, and sentencing on the same day in both cases.

In Parrish v. State, 527 So.2d 926 (Fla. 2d DCA 1988), the court relied on Gallagher to find that the trial court was not required to use one scoresheet where two cases were set for trial on the day of sentencing in the first case. The court reasoned that the second and third cases were not pending for sentencing at the time of sentencing in the first case. The Parrish court specifically noted that the holding in Render was not applicable to the facts in that case:

> It was significant to the decision in Render that there were combined proceedings and sentencing on the same day. In the case before us, the trials in #2 and #3 were only set on the same day that sentence was pronounced in #1. Thus, the latter two cases were not in any 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. There are many reasons which could have delayed the trial of cases #2 and #3. There is no requirement that the trial court delay sentencing on the completed case while awaiting the outcome of these future trials. We recognize the potential for manipulation of these procedures on the part of the state but find this potential contemplated by the sentencing rules.

Id., at 927-928.

In Clark v. State, 519 So.2d 1095 (Fla. 1st DCA 1988), the court applied Rule 3.701(d)(1) to circumstances that did not involve combined proceedings, but did involve sentencing in two cases on the same day. Critical to the court's determination that the trial court was not required to use a single scoresheet in both cases was the fact that defense counsel did not argue until sentencing in the second case, BR-7, that sentences in the two cases should not run consecutively. At that time, sentencing in the first case, BR-8, already had been completed, and the court reasoned that BR-8 therefore was not pending for sentencing at the time of the later sentencing in BR-7. The court noted "apparent conflict" with Render, seemingly because sentencing in both cases in Clark occurred in a single day, as in Render. The facts in Clark therefore lay between those in Gallagher and Parrish, and those in Render and Bembow.

Petitioner urges this court to answer the district court's question in the affirmative, and to reject the "strict" definition of pending set forth in Gallagher. The district court suggests that the trial court should be required to delay sentencing in one case until adjudication of all other cases in which a defendant is involved, unless such deferral would cause "unreasonable delay" or would "unduly burden the court or prejudice the defendant." (A 9) Respondent submits that indefinite delay of sentencing in a case until the adjudication

of other cases would create chaos in the court system. As the court noted in Parrish, the adjudication of guilt in a defendant's other cases may be delayed indefinitely for numerous reasons. As the court noted in Jacobs v. State, 533 So.2d 911,913 (Fla. 2d DCA 1988), a trial court should not be required to "wait to sentence a defendant to see if that defendant will be convicted of other crimes." Such indefinite delays would be burdensome to the court system and prevent orderly disposition of cases. A defendant's desire for the lowest possible sentence under the guidelines scheme should not dictate the manner in which the courts dispose of cases. The definition of a pending case set forth in Gallagher tracks the language of Rules 3.701(d)(1) and 3.701(d)(4). That definition presents the trial courts with a workable and reasonable interpretation of a pending case where combined proceedings and sentencing on a single day in multiple cases is not involved. Where such circumstances are present, application of the ruling in Render is appropriate.

Petitioner urges this court to interpret the "language of Rule 3.701(d)(1) regarding the use of a single scoresheet 'covering all offenses pending before the court for sentencing'" to "include the instant facts." Petitioner's Brief at 7. In that the facts pertinent to this issue are unknown, Petitioner requests this court to perform an impossibility. Defense counsel objected to proceeding with sentencing in this case on grounds that other cases were "pending." Nothing in the record

establishes what cases were pending, and whether these cases were pending for trial, entry of pleas, or sentencing, or whether, as in Clark, sentencing already had been completed. In the absence of such critical facts, Petitioner, in effect, requests this court to infinitely expand the Gallagher definition of a pending case beyond the suggestion of the district court that sentencing in a case should be deferred until adjudication of other cases in which the defendant has been charged where such deferral would not involve "unreasonable delay." Clark at 1097. The facts in this case cannot establish whether deferral of sentencing would result in "unreasonable delay," or would "unduly burden" the court.

Under the above circumstances, Respondent submits that the district court's affirmance of the trial court's sentence in this case should be approved, and the certified question should be answered in the negative.

ISSUE II

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

Petitioner argues that the district court erred in failing to find that the trial court abused its discretion in accepting the state's reason for striking a black juror in the absence of record support for that reason, and that the district court's misapplication of language from this court's decision in Reed v. State, 15 F.L.W. 5115 (Fla. March 1, 1990) to the second inquiry required under Neil v. State, 457 So.2d 481 (Fla. 1984) effectively negated the requirement that a proffered reason for a peremptory strike be supported by the record. Respondent disagrees.

Initially Respondent notes that the record establishes that the state provided two reasons for its challenge of potential juror 169, Robert Warren:

> 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. Also with the length of jury instructions that we have, he had a hard time reading the jury -- answering the questions and we struck him for that area.

(T 55)

The First District Court of Appeal upheld the trial court's acceptance of the state's proffered reason for striking Mr. Warren, stating that the question before it was "whether the record reflects that the trial court abused its discretion in finding the prosecution's reasons for a peremptory challenge to be sufficient." (A 5) The district court stated that it was not persuaded that the trial court erred in allowing potential juror **169** to be excused despite the lack of record support for the prosecution's assertion that he had a criminal record.

The district court correctly found under controlling precedent that the trial court's acceptance of the state's proffered reason was not an abuse of discretion.

In Tillman v. State, 522 So.2d **14** (Fla. **1988)** this court discussed the state's burden of rebuttal when the defense has established a strong likelihood that peremptory challenges are racially-motivated:

> Moreover, the trial judge must 'evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons." Id. In other words, 'a judge cannot merely accept the reasons proffered at face value.' Id. In essence, the proffered reasons must be—not only neutral and reasonable, but they must be supported by the record. 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.

Id., at **16-17.**

The court clarified the above language in a footnote, stating that "[T]his is not to say that every assertion made by a prosecutor to support the peremptory striking of a juror must find support within the record." Id. The court went on to state that

> There will be occasions where statements of fact (not conclusions drawn from fact) made by counsel, concerning a juror's background can be accepted by the court without the need to examine the record. For example, if a prosecutor represents to the court that a juror has, in the past, been convicted of a crime, the court may accept this as a reason for striking the juror without requiring the prosecutor to provide a certified copy of the judgment of conviction for the record.

Id.

Tillman thus establishes that while proffered reasons for peremptory strikes generally must be supportable by facts on the record, there are explicitly limited circumstances in which the trial court may accept a party's good faith motive in striking a juror without requiring verification of the correctness of the stated reason. Tillman defines those exceptional circumstances as when the reason proffered is a statement of fact, as opposed to a conclusion drawn from a fact, concerning the potential's juror's background. A comparison of the facts in Tillman and State v. Slappy, 522 So. 2d 18 (Fla. 1988) with those in this case illustrates the difference between application of the general rule and the exception. In Tillman, the trial court proffered reasons for the state's peremptory strikes of several

black potential jurors. Finding error in the trial court's usurpation of the state's burden, this court also noted that even if the state had proffered the reasons given by the trial court, the record facts were clearly contrary to one of the proffered reason. The trial court had stated that the stricken jurors lacked the educational background to carry out their duties. The record, however, established that each of the stricken jurors had high school educations or greater. In that no requirement existed that jurors have college degrees to serve on a panel, the court found an absence of record support for the proffered reason.

In Slappy, similarly, the prosecutor proffered as a reason for the striking of two potential jurors his conclusion that the two were politically liberal and sympathetic toward people who go astray. The prosecutor drew this conclusion merely from the fact that the two held jobs as teaching assistants, rather than from responses indicating that the potential jurors actually possessed the trait of "liberalism." This court found that the prosecutor's conclusion that teaching assistants are liberal was unsupported by the record in the absence of such responses. The facts in Slappy also established that the state permitted a nonblack schoolteacher to serve on the jury.

The state in this case asserted that prospective juror 169 had a criminal record. The state possessed this information from a source other than the venireman's responses to questions.

Nothing in the record, however, contradicts the state's assertion, or renders the stated reason suspect. A review of the entire voir dire reveals that no Slappy factor was impacted in the state's questioning of Mr. Warren. The state questioned no potential jurors as to whether they had a criminal record. The state struck another potential juror on information that that individual had been arrested for a crime. The state's reason for its challenge of Mr. Warren therefore was based on a statement of fact, as opposed to a conclusion drawn from a fact, as in Slappy, concerning Mr. Warren's background. The state had significant and valid reasons for not asking Mr. Warren whether he had a criminal record, including potential humiliation of Warren in front of the other jurors, and the possibility that that question would be perceived by the venire as harassing and intimidating, and would therefore alienate potential members of the panel.

The facts in Tillman and Slappy establish that the proffered reasons in those cases were contrary to known facts or mere conclusions which were unsupportable by facts ascertained during the course of voir dire. The state in this case possessed information that Mr. Warren had a criminal record. Nothing in the record contradicted that information. The state did not merely draw an inference that Mr. Warren had a criminal record from observation of him, or from his answers to questioning.

As Judge Zehmer noted in his concurrence in the district court's opinion in this case, the purpose of the trial court's

inquiry is to determine the good faith motives of the prosecutor exercising the peremptory challenges, not simply to determine whether the stated reason is factually correct. Thus, the state's good faith belief in the correctness of the reason stated, if facially neutral as in this case, is sufficient to obviate the defendant's objection even though there is a possibility that it might be factually incorrect. Where facts disproving or contradicting the proffered reason are shown on the record, or the reason is merely an unsupportable inference drawn from known facts, the state's good faith belief in the accuracy of its reason is properly brought into question, and the reason then should be found invalid as unsupported by the record. Respondent submits that where, as in this case, nothing in the record contradicts the accuracy of the proffered reason, the reason is not merely an inference drawn from the facts, and nothing in the voir dire process calls into question the state's motive in proffering the reason, the stated reason should be found to be sufficient even in the absence of verification.

Under Slappy, the trial court is to evaluate more than the correctness of a proffered reason in determining whether the challenge is racially motivated. The trial court's role is to

> evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. These must be weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.

Id., at 22.

A review of the total course of the voir dire in this case establishes that the state challenged another potential juror on information that that juror was arrested for a crime similar to that charged in this case. The record also establishes that the state challenged Mr. Warren on the additional ground that he appeared to have difficulty in reading the jury questionnaire and in answering questions. The state struck another potential juror on the same ground. The record reveals that three of the six seated jurors were black. The course of the entire voir dire thus supports the state's good faith motive in challenging Mr. Warren on the basis of its information that he had a criminal record.

Under these circumstances, the district court properly found no abuse of discretion in the trial court's acceptance of the state's proffered reason for its strike of Mr. Warren.

Petitioner argues that the district court improperly applied language from Reed II [Reed v. State, 15 F.L.W. S115 (Fla. March 1, 1990)] to the trial court's required determination as to whether the proffered reason for the strike of Mr. Warren was race-neutral, reasonable and supported by the record.

While Reed II involved the question of whether the trial court abused its discretion in finding that defense counsel had failed to made a prima facie showing that there was a substantial

likelihood that the jurors were challenged because of their race, it is clear that the abuse of discretion standard referenced in Reed II is applicable to the entire process, in all its phases, of the trial court's determination of whether peremptory challenges are racially intended. Courts have explicitly applied the abuse of discretion standard to the second inquiry required under Neil v. State, 457 So.2d 481 (Fla. 1984). See McCloud v. State, 536 So.2d 1081,1082 (Fla. 1st DCA 1988) ("It is not the function or prerogative of an appellate court to substitute its judgment for that of the trial judge on the issue of the credibility of the state's reasons unless the record reflects a clear abuse of discretion"); Lannon v. State, 560 So.2d 308 (Fla. 1st DCA 1990); Adams v. State, 559 So.2d 436 (Fla. 1st DCA 1990) (referring the parties to ~~Reed~~ II — regarding the question of whether the trial court erred in finding the state's proffered reason for a peremptory challenge valid).

In Slappy, this court noted that "Neil followed the adoption of similar standards in California, ..." 522 So.2d at 18, n.1. The California Supreme Court in People v. Johnson, 767 P. 2d 1047, 1057 (Cal. 1989) recently "returned to a standard of truly giving great deference to the trial court in distinguishing bona fide reasons [for peremptorily challenging prospective jurors] from sham excuses." In that case, the trial court's finding that the prosecutor properly used nine peremptory challenges to exclude all blacks, Jews, and Asians from the jury, which

ultimately convicted the black defendant of murder, was affirmed. The court noted that there was racial diversity in the jury, and offered the following explanation for its affirmance of the trial court's ruling and its return to a standard of according great deference to the trial court's determination on a claim of improper use of peremptory challenges:

> The dissent's use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training , employment, prior jury service, and experience of the prospective jurors.
>
> It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different

> weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about "spending" his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to try an even better juror from the remaining panel.
>
> It should be apparent, therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. The dissent's attempt to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected.

In that nothing in the record contradicted the correctness of the state's proffered reason for its strike of prospective juror 169, and the reason given was a fact about the prospective juror's background rather than a mere conclusion drawn from facts, the district court properly found under the standard enunciated in Reed II that the trial court did not abuse its discretion in accepting the proffered reason as sufficient.

CONCLUSION

Based on the foregoing argument and citations of authority, Respondent requests this court to answer the certified question in the negative, and to approve of the result reached by the district court as to Issue I and Issue 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been forwarded to Nancy L. Showalter, Assistant Public Defender, Fourth Floor North, Leon County Courthouse, **301** South Monroe) Street, Tallahassee, FL **32301**, via U. **S.** Mail, this 2nd day of' July 1990.

Laura Rush
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