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IN THE SUPREME COURT OF FLORIDA

ALMERTIS STEPHENS,

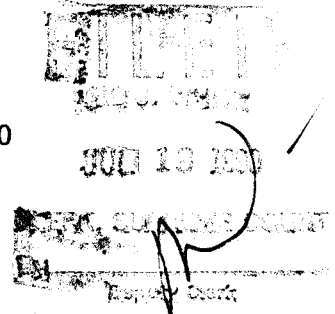
Petitioner,

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 REPLY BRIEF

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IN THE SUPREME COURT OF FLORIDA

ALMERTIS STEPHENS, :
 Petitioner, :

v.

CASE NO. 76,030

STATE OF FLORIDA,
 Respondent.

PETITIONER'S REPLY BRIEF

I PRELIMINARY STATEMENT

This brief is filed in reply to Respondent's Answer brief,
which will be referred to as "AB".

II ARGUMENT

ISSUE II

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.

The District Court upheld the trial court's acceptance of the prosecutor's reason for excluding juror **169**, despite the lack of record support for the prosecutor's assertion that this juror had "a record." The petitioner asserts that the District Court erred in that this Court's decisions in State v. Neil, **457 So.2d 481** (Fla. **1984**) and State v. Slappy, **522 So.2d 18** (Fla. **1988**) require the state to provide record support for the asserted peremptory challenges of a black juror.

The respondent argues that "[n]othing in the record, however, contradicts the state's assertion, or renders the stated reason suspect.'" (AB **14**). This statement contains two flaws. First, the respondent repeatedly states that the record does not refute the prosecutor's stated reason for challenging this juror (R **14, 15, 19**). This, however, is not the issue. The issue is whether anything in the record supports the asserted reason for exclusion. This Court held in Slappy that once the trial court determines there is a substantial likelihood that the juror was challenged solely because of his race, the burden shifts:

. . . to the state to present specific reasons based on the jurors' responses at voir dire or other facts evident from the record. . . .

However, reasonableness [of the state's explanation] alone is not enough, since the state also must demonstrate a second factor - record support for the reasons given and the absence of pretext. .

▪ ▪
We find that, when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanation with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself.

Slappy, at 23.

In Tillman v. State, 522 So.2d 14, 16-17 (Fla. 1988), this Court held:

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.

Thus, the respondent is turning the test on its head. This is not just a matter of semantics. If the test were whether the record refuted the asserted reason for exclusion, a prosecutor could avoid making any kind of a record by declining to ask any questions of the black veniremen. The result would be that the record would never dispute any given reason for the exclusion of the black jurors.

This Court expressly considered this possibility in Slappy and recognized that it would render Neil meaningless, in that the state could excuse blacks from the jury by simply declining to ask any questions at all. Slappy, at 23, fn. 2.

The second flaw in the respondent's argument is that the failure to question a challenged juror on the grounds alleged

for his exclusion "renders the state's explanation immediately suspect." Slappy, at 23. Here, as in Slappy, the "record was far from clear that any such characteristic existed" and "{a} single question posed to the juror could have established the existence or nonexistence of" the characteristic. Id., fn. 3. The prosecutor asserted that the juror had a record but that she was not "able to find it", nor did she "**know** what it {was}" (R 54). The prosecutor, however, did not inquire of the juror whether he in fact did have a record, thus, rendering suspect the alleged reason for challenging this juror.

The respondent's argument that the prosecutor had "significant and valid" reasons for not asking the juror whether he had a criminal record is simply conjecture. There is nothing in the record to show that the reasons listed by the respondent were those of the prosecutor.

The respondent characterizes the asserted reason for challenging juror 169 as a "fact" (R 14). The petitioner would argue that the prosecutor's belief that the juror had a record is far from "fact", especially when the prosecutor admits her inability to confirm this "fact".

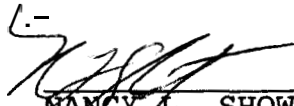
The racially motivated exclusion of a black juror violated the petitioner's rights under the Equal Protection Clause, Amendment 14, Section 1, of the United States Constitution and Article I, Section 2 of the Florida Constitution and his right to a fair trial under Article I, Section 16 of the Florida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

III 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been furnished by hand delivery to Laura Rush, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, ALMERTIS STEPHENS, #116406, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida, 32014, this 18th day of July, 1990.



NANCY L. SHOWALTER