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THE SUPREME COURT OF FLORIDA

WAYNE FILES,

Petitioner,

v. CASE NO. 78,552

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Wayne Files, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "Respondent." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s) in parentheses. References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with three counts of dealing in stolen property (R 19). The facts pertinent to this case were set forth in the opinion on rehearing below:

> During the course of voir dire examination, the prosecutor excused two black prospective jurors. Defense counsel objected to the state's use of peremptory challenges on these prospective jurors suggesting that they were racially motivated. The court then inquired as to the state's reasons for the exercise of these challenges. The prosecutor responded that although his information sheet indicated that the first black prospective juror challenged had been convicted of a DUI, that juror had failed to respond when he asked if any prospective juror had been convicted of any offense. His articulated reasons for striking the other prospective juror were that she was divorced, had five children, was unemployed and that he preferred jurors who worked or had other visible means of support. After the state's response, defense counsel, calling the stated reasons "superfluous," moved to strike the jury panel. The trial court denied the motion. A jury was seated and sworn and appellant's trial commenced. He was found guilty as charged, adjudicated and sentenced. 16 FLW at D2302 (attached hereto).

On appeal, the Fist District Court of Appeal held that in reviewing the trial court's acceptance of the prosecutor's proffered race-neutral explanations, abuse of discretion is the appropriate standard to be appl ed. The majority of the court determined that the trial court did not abuse its discretion in finding that the prosecutor's

proffered reasons were nondiscriminatory. One judge dissented. The following question was certified as one of great public importance:

> WHAT IS THE STANDARD OF APPELLATE REVIEW OF A TRIAL COURT'S FINDING THAT THE STATE'S USE OF PEREMPTORY CHALLENGES AGAINST PROSPECTIVE BLACK JURORS WAS REASONABLE, RACE-NEUTRAL AND NONPRETEXTUAL?

The appellate court subsequently issued an opinion on rehearing in which the majority and the dissenting judge adhered to their previously stated positions, again certifying the question. The opinion on rehearing is reported as Files v. State, 16 FLW D2301 (Fla. 1st DCA August 30, 1991), and is attached hereto.

SUMMARY OF ARGUMENT

The trial court below properly accepted the prosecutor's proffered reasons for peremptorily challenging two black venire persons where the reasons given were reasonable, race-neutral, and nonpretextual. Trial courts have broad discretion in evaluating a prosecutor's responsive explanations for the challenges, within the limitations imposed by Neil and **Slappy**, infra. As a trial court's finding that peremptory challenges were exercised in a nondiscriminatory manner is a finding of fact **based** in large part on a determination of credibility, such a finding may not be overturned unless the record reflects a clear or palpable abuse of discretion.

ARGUMENT

ISSUE

WHAT IS THE STANDARD OF APPELLATE REVIEW OF A TRIAL COURT'S FINDING THAT THE STATE'S USE OF PEREMPTORY CHALLENGES AGAINST PROSPECTIVE BLACK JURORS WAS REASONABLE, RACE-NEUTRAL AND NON-PRETEXTUAL?

At issue in this case is the question of how much deference is to be accorded to a trial court's factual finding that a prosecutor exercised a peremptory challenge in a racially neutral and nonpretextual manner.

In Neil v. State, 457 So.2d 481 (Fla. 1984), this Court set forth the procedure to be followed by trial courts to determine whether racial discrimination exists in the exercise of peremptory challenges:

> A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's

> inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue.

Neil, supra at 486, 487 (footnotes omitted).

In State v. Slappy, 522 So.2d 18 (Fla.), cert. den., 487 US 1219, 101 L.Ed.2d 909, 108 S.Ct. 2873 (1988), this Court stated that

> Part of the trial judge'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.
>
> We agree with the district court below that a judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext.

Slappy, supra at 22 (emphasis supplied).

This Court has recognized the necessity of relying on a trial judge's factual finding regarding whether peremptory challenges are racially intended, due to the inability of a cold transcript to convey either a prospective juror's

nonverbal characteristics or a prosecutor's credibility. In Reed v. State, 560 So.2d 203, 206 (Fla.) cert. den. _____ U.S. _____, 112 L.Ed.2d 184, 111 S.Ct. 230 (1990), this Court held

> 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.
>
> * * *
>
> In 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 our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

In Reynolds v. State, 576 So.2d 1300, 1302 (Fla. 1991), this Court noted that

> ... the state correctly calls to our attention the fact that our recent opinion in *Reed* vests significant discretion in the trial court on *Neil* issues by requiring appellate courts to show deference to the trial court's conclusions, Specifically, *Reed* states that appellate courts must "rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process," *Reed*, 560 So.2d 206. However, *Reed* rested on the assumption that, in the context of that case, some sort of *Neil* inquiry must have been made in the first instance.

> Here, there was none at all. Deference cannot be shown to a conclusion that was never made.

See also Green v. State, 16 F.L.W. S437, 438 (Fla. June 6, 1991) (the trial judge is in the beat position to determine if peremptory challenges have been properly exercised).

In the instant case, a Neil inquiry was **made,** and the appellate court accorded the trial court's conclusion the proper deference. The discretionary standard of review above has been widely recognized **as** the appropriate standard when dealing with juror challenges.

The California Supreme Court, in People v. Johnson, 767 P.2d 1047 (Cal. 1989), "return[ed] 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." Id., at 1057. **The** court there affirmed 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 and sentenced him to death. The Court said:

> ... 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.

Id., at **1057.** Johnson is relevant to Florida case law by virtue of the relationship between Florida and California decisions on this issue. In Neil, this Court was persuaded, at least in part, to follow the California test that had **been** developed in People v. Wheeler, 583 P.2d **748 (Cal. 1978) to** evaluate **a** claim of discrimination through the exercise of peremptory challenges. More recently in Slappy, this Court noted that "Neil followed the adoption of similar standards in California. **. . .**" **522** So.2d at **18,** fn. 1.

California's advantage over Florida of several years experience with this issue demonstrates an evolution resulting in the "return to the standard of truly great deference."

The requirement of the deference is a long-standing one. In Reynolds v. United States, 98 U.S. 145, **156-157** (1878), the United States Supreme Court said:

> [T]he manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, **therefore,** be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in clear case.

In Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985), the principle was reiterated:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

83 L.Ed.2d at 852, 853.

The United States Supreme Court held in Batson v. Kentucky, 476 U.S. 79. 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), that a finding of intentional discrimination is a finding of fact, citing Anderson v. Bessemer City, 470 U.S. 564, 573, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985). The Court stated that since a trial judge's findings in the peremptory challenge context largely will turn on evaluation of credibility, a reviewing.court should give those findings great deference. Batson, ft. nt. 21.

In Hernandez v. New York, 500 US ____, 114 L.Ed.2d 395, 111 S.Ct. ____ (1991), the U.S. Supreme Court considered a trial court's acceptance of a prosecutor's reasons for

peremptorily challenging hispanic prospective jurors. The Court stated:

> The trial judge in this case chose to believe the prosecutor's race-neutral explanation for striking the two jurors in question, rejecting petitioner's assertion that the reasons were pretextual. In Batson, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal:
>
> > "In a recent Title VII sex discrimination case, we stated that 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). Since the trial judge's findings in the context under consideration here largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. Id, at 575-576." Batson, Supra, at 98, n. 21.
>
> Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases. *See* Hunter v. Underwood, 471 U.S. 222, 229 (1985) (Court of Appeals correctly found that District Court committed clear error in concluding state constitutional provision was not adopted out of racial animus); Rogers v. Lodge, 458 U.S. 613, 622-623 (1982) (clearly erroneous standard applies to review of finding that at-large voting system was maintained for discriminatory purposes); Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 (1979) (affirming Court of Appeals' conclusion that District Court's failure to find the intentional

> operation of a dual school system was clearly erroneous); Akins v. Texas, 325 U.S. 398, 401-402 (1945) (great respect accorded to findings of state court in discriminatory jury selection case); see also Miller v. Fenton, 474 U.S. 104, 113 (1085). As Batson's citation to Anderson suggests, it also corresponds with out treatment of the intent inquiry under Title VII. *See* Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).
>
> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will "largely turn on evaluation of credibility." 476 U.S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing an that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Wainwright v. Witt, 469 U.S. 412, 428 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038 (1984).
>
> * * *
>
> In the case before use, we decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous.

Hernandez, 14 L.Ed.2d at 408-412.

The aforecited cases demonstrate that whether proffered reasons for peremptorily excusing a prospective juror are racially neutral is purely a question of fact. Batson,

Hernandez, supra. Indeed, this Court stated specifically in Slappy, supra, that a trial judge "...must evaluate those reasons as he or she would weigh any disputed fact." Id. at 22 (emphasis supplied).

The Petitioner suggests that this Court should create a new standard whereby the determination of racial neutrality becomes "a mixed question of law and fact." (Petitioner's brief p. 11). According to Petitioner, a trial court should first determine whether the prosecutor's reasons are race-neutral and nonpretextual. Then, the court must engage in a second level of inquiry based on the five factors set forth in Slappy, to wit:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3)singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror who were not challenged. (sic).

Slappy, supra at 22.

It is clear, however; that the factors listed above are intended to serve as examples of possible factual situations which a trial judge should be aware of in making his or her factual determination. These factors were never intended as a substantive standard of review to which automatic reversal

would apply. They are indicators which might weigh against the legitimacy of a race-neutral explanation.

Even where one or more of the above facts are present, a trial court's factual finding must be accorded that level of deference traditionally accorded to findings of fact.[1]

The federal courts will uphold a trial court's findings of fact unless such findings are clearly erroneous. See e.g. U.S. v. Garcia, 741 F.2d 363 (11th Cir. 1984); U.S. v. Shields, 675 F.2d 1152, (11th Cir.), cert. den. 459 U.S. 858, 74 L.Ed.2d 112, 103 S.Ct. 130 (1982). This Court will not substitute its judgment for that of the trial court on questions of fact, the credibility of witnesses, and the weight to be given evidence by the trial court. Demps v. State, 462 So.2d 1074 (Fla. 1984).

Turning to the facts of the instant case, it is evident that the trial court properly concluded that the prosecutor's reasons for peremptorily striking two prospective black jurors were not racially motivated or pretextual, and that the prosecutor's reasons are supported by the record.

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[1] It is important to note.that this is a different situation from the question of the competency of a challenged juror, which is a mixed question of law and fact based on reasonable doubt as to a juror's possessing the state of mind which will enable the juror to render an impartial verdict. See e.g. Singer v. State, 109 So.2d 7 (Fla. 1959). See also Batson 90 L.Ed.2d at 88 (the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause),

Prospective juror Jefferson was first challenged by the prosecutor. When asked by the court to state the reason, 'theprasecutor said:

> ... his record shows a prior DUI conviction. I specifically asked if anybody had any convictions and he didn't volunteer that. So that alone is sufficient in my mind. I don't want him on the jury if he is not giving me truthful answers. (T 74).

Prospective Juror Williams was also challenged. When asked to state his reasons , the prosecutor said:

> ... the fact she is unemployed, divorced has three children (sic),
>
> * * *
>
> To me it means, one, she is unemployed, she doesn't work, like to have jurors that work.[2] (T 75)

The trial court thereupon denied the defense motion to strike the panel, accepting the State's reasons for peremptorily striking the prospective jurors. (T 75). The jury was ultimately composed of four whites, two blacks, and a black alternate. While numbers alone are not dispositive, it is well settled that leaving unchallenged blacks on the venire may be a factor in the initial determination of

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[2] The voir dire record supports that State's asserted reasons (T 27), unlike in Slappy, where there was no record support for the assertion of the challenged juror's liberalism,

whether there is a strong likelihood that challenges have been made for racial reasons. Reed, supra.

The Petitioner challenges the reasons offered for Ms. Williams' excusal with an assertion that the **State** did not strike "similarly situated" white jurors who were divorced and/or unemployed. This version of events is incomplete however and the reasons for the challenge of Ms. Williams were not equally applicable to those of other jurors who were divorced and/or "unemployed". Ms. Devose and Mr. Wright, while **divorced,** were both employed. Moreover, Ms. Devose had no children and all of Mr. Wright's "children" were adults. (T 25, 29). The juror whom Petitioner **claimed** was "unemployed" like Ms. Williams, was Ms. Coal, a housewife not employed outside the home. (T **23).** Thus, **Petitioner's** argument that other jurors were similarly situated as Ms. Williams is incorrect. None of the other jurors who were divorced were also unemployed. In fact, the "unemployed" housewife was simply not "employed" outside the home, thus, none of the accepted jurors were divorced and unemployed parents. This means that none were similarly situated as Ms. Williams, as Petitioner erroneously claims.

Petitioner asserts that Slappy requires that "... **the** reasons proffered must be related **to** the facts **of** the case or to the parties or witnesses." (Petitioner'sbrief at p. 15). This is an erroneous assertion, as Slappy imposes no such mandatory requirement, nor does Batson **impose such a**

requirement, as Petitioner also alleges. If there are reasons relating to the facts of the case, the parties, or witnesses, this could potentially be the basis for a challenge for cause, or a further reasons to support a peremptory challenge.

In approving the trial court's ruling, the majority opinion below states:

> As to the first prospective black juror challenged, it is apparent from the record that the prosecutor asked not only whether any of the jurors had had dealings with the state attorney's office or contacts with law enforcement officials, but also whether anyone present or any of their relatives had ever been arrested for any type of crime. Although several jurors admitted having previaus convictions or experiences with law enforcement officers, this prospective jurar said nothing. Although the prosecutor did not produce the information sheet indicating that the juror had actually been convicted of DUI, his representation of a prior felony conviction was a valid reasons for exercising a peremptory challenge. *Roundtree v. State*, 546 So.2d 1042 (Fla. 1989); *Tillman v. State*, 522 So.2d 14 (Fla. 1988); *Stephens v. State*, 599 So.2d 687 (Fla. 1st DCA 1990), *approved an other grounds*, 16 F.L.W. S128 (Fla. Jan. 15, 1991); *Knight*, 599 So.2d at 327 (Fla. 1st DCA), *review dismissed*, No, 76,084 (Fla. Oct. 25, 1990).
>
> As to the second prospective black juror challenged, it is apparent from the record that while two other jurors were divorced and one other juror was unemployed, none of the other jurors selected were both unemployed and divorced with five children. Had the prosecutor offered only unemployment or divorce as an explanation for the

> exercise of this peremptory challenge, we may have been required to find that the trial judge abused his discretion by accepting the reasons as nondiscriminatory. *See Slappy v. State*, 522 So.2d 22 (Fla. 1988). But, because the combination of unemployment, *and* divorce may arguably indicate some prospect of a level of detachment from the proceedings not based on race, we cannot say that reasonable persons would not differ as to the propriety of this reason for excusing the juror.

1 F.L.W. at D2303 (Footnote omitted).

Slappy requires that the prosecutor's reasons be reasonable, supported by the record, and nonpretextual. Id at 23. It cannot be said that in this case the trial court's finding constituted an abuse of discretion in this regard. In any event, both the majority and the dissent below agree that the evidence presented at trial was sufficient to convict.

The Respondent fully concurs with this Court's efforts to eliminate racial bias in the jury selection process, as well as in all other aspects of the judicial process, but in this case there is simply no basis for a finding that Ms. Williams was excused for purely racial reasons.

The United States Supreme Court has made it perfectly clear that a trial court's determination that peremptory challenges were exercised in a reasonable and racially neutral manner is a finding of fact subject to review pursuant to the "clearly erroneous" standard. Batson,

Hernandez, supra. Regarding bias in the jury selection process, this Court has held that trial courts have "broad discretion", and their findings will not be disturbed "unless error is manifest". Singer v. State, 109 So.2d 7 (Fla. 1959); State v. Williams, 465 So.2d 1229 (Fla. 1985).

The two standards are in reality the same standard with different labels. In answering the certified question, this court should clarify that a trial court's factual determination that peremptory challenges were exercised in a nondiscriminatory manner comes to the appellate court with the presumption of correctness, and that such a finding will be upheld unless a manifest abuse of discretion is evident.[3]

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[3] This Court has adopted the following test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial caurt. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Delno v. Market Street Railway Company, 124 F.2d 956, 957 (9th Cis. 1942).

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could

Such a clarification is in harmony with this Court's previous rulings on the subject (Reed v. State; State v. Slappy; Reynolds v. State; Green 3. State, supra), and is in harmony with the above cited rulings of the U.S. Supreme Court.

> differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails *to* satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

CONCLUSION

Based on the above arguments and citations of legal authority, Respondent urges this Honorable Court to affirm *the* Petitioner's conviction and clarify that a trial court's factual finding that peremptory challenges are exercised in a nondiscriminatory manner is reviewable pursuant to the abuse of discretion standard applicable to factual findings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Lawrence M. Korn, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, Tallahassee, Florida 32301, this 21st day of October, 1991.

Bradley R. Bischoff
Assistant Attorney General

she stated on cross examination that he had probably actually said that it was committed by "Mike." Similarly, Dr. England first testified that the victim told him that "Michael" had assaulted him, then admitted on cross examination that his report indicated the victim had actually said "Mike." Pat Meredith testified, as did Sanbourer on direct examination, that the victim told her that "Little Mike" had assaulted him. To make matters even more confusing, Sanbourer first testified that she and her son called the appellant "Little Mike" and called Michael Rogers "Mike," then stated on cross examination that she called the appellant "Mike" and that her son called him "Michael, Mike." Pat Meredith testified that she called the appellant "Little Mike," but that the victim called him "Mike." Further, appellant testified that the victim called him "Mike" and called Michael Rogers either "Mike" or "Dad." The evidence is undisputed that all three "Mikes"—Michael McNemar, Michael McNemar, Sr., and Michael Rogers—were at the party on March 14, 1990, and that none of the witnesses who testified saw the appellant, Michael McNemar, alone with the victim at any time.

Even assuming that the victim told everyone that "Mike" abused him, the evidence is completely conflicting as to whether he would have been referring to the appellant, to Michael Rogers, or to appellant's father, Since the evidence is also conflicting as to whether the victim said that Mike, Little Mike, or Michael abused him, there is no way to determine whether he was referring to the appellant. Last, the testimony of the Child Protection Team member who interviewed the victim indicates that, during the March 15 interview, the victim said that the incident had occurred not at the birthday party, but at his house, and that it had occurred on four separate occasions, During the March 19 interview, the victim stated that it had happened at the birthday party in the bathroom.

In sum, even assuming that the victim's statements to Sanbourer, Meredith, and Dr. England were all admissible under an exception to the hearsay rule, the greater weight of the evidence fails to establish that the appellant violated the conditions of his community control as alleged. We therefore reverse the trial court's order revoking community control.

REVERSED. (KAHN, J., CONCURS, ZEHMER, J., CONCURS, WITH *AN* OPINION.)

(ZEHMER, J., concurring). I fully concur in the court's opinion. However, I also would treat the statements made to Doctor England as clearly inadmissible hearsay because the state made no effort to lay the proper predicate to have this testimony admitted as an exception to the hearsay rule, Moreover, I would note that the doctor's examination failed to disclose any injury to the child that required treatment, so that the child's statement to Dr. England was completely lacking any corroboration by physical evidence.

* * *

Criminal law—Sentencing—Correctionof sentence—Charge of conspiracy to traffic in cocaine properly classified as first-degree felony—Trial court not precluded from imposing mandatory minimum term as part of guidelines sentence—Description of chnrge established that citation to wrong statute in information in count charging conspiracy to traffic constituted scrivener's error

JOHN THOMAS JANES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-986. Opinion filed August 30, 1991. An Appeal from the Circuit Court for Escambia County. Joseph Q. Tarbuck, Judge, Appellant pro se. No appearancefor Appellee.

ON MOTION FOR REHEARING
[Original Opinionat 16 F.L.W. D1822]

(JOANOS, Chief Judge.) The opinion of this court in the above styled case, dated July 11, 1991, is hereby withdrawn, and the following opinion substituted therefor.

John Thomas Janes has appealed an order of the trial court denying his motion to correct illegal sentence, filed pursuant to Rule 3,800(a), Florida Rules of Criminal Procedure.[1] We affirm, albeit on a different ground than cited by the trial court. However, we remand for correction of the judgment and sentence to indicate. as to Count II of the information, a conviction under section 893.135(1)(b), Florida Statutes.

In 1987, Janes was convicted and sentenced within the guidelines for trafficking in cocaine, and conspiracy to traffic. His conviction was affirmed on appeal, in which no sentencing errors were raised. The instant motion was filed in February 1990, alleging that: 1) the conspiracy charge was incorrectly scored as a first-degree felony, resulting in a higher sentencing range, and 2) the trial court improperly imposed a mandatory minimum term, in that the recommended guidelines sentence exceeded the mandatory sentence. The trial court denied the motion, finding that this court had already addressed the issues on direct appeal.

Contrary to the trial court's order, Janes did not raise any sentencing errors on direct appeal, We nevertheless affirm, in that denial was appropriate on the merits of the issues raised. See § 893.135(5), Fla.Stat. (1987) (any person who conspires with another person to commit trafficking in cocaine is guilty of a felony of the first degree), and *McNair v. State*, 540 So.2d 896, 897 (Fla. 1st DCA 1989) (the rules do not preclude imposition of a mandatory penalty as part of a guidelines sentence).

As to the allegation regarding the charge of conspiracy to traffic, we note appellant's argument that Count II of the information cites section 893.13 as authority therefor, rather than section 893.135(1)(b). However, given the description of the charge, this was clearly a scrivener's error. Therefore, we affirm, but remand for correction of the judgment and sentence to indicateconviction, as to Count 11, under section 893.135(1)(b).

Affirmed. (WIGGINTON, J., and WENTWORTH, SENIOR JUDGE, CONCUR.)

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[1] In its motion for rehearing, the state alleges that this court erred in disposing of this appeal without first requesting briefing from the state, citing *Toler v. State*, 493 So.2d 489 (Fla. 1st DCA 1986). However, *Toler* is applicable only in appeals from summary denials of motions for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P. *See also* Rule 9.140(g), Fla.R.App.P. (no briefing shall be required in appeals from such orders). In appeals from orders denying a Rule 3.800(a) motion, the parties must comply with the procedural requirements applicable to all plenary appeals, including the filing of briefs. *Dowling v. State*, 545 So.2d 521, 523 (Fla. 5th DCA 1989). *See also Kelton v. State*, 548 So.2d 778, 779 n. 4 (Fla. 1st DCA 1989); *McMahon v. State*, 567 So.2d 988 (Fla. 1st DCA 1990). Therefore, the state should not anticipate that this court will delay the disposition of appeals under Rule 3.800(a) in which reversal appears appropriate in order to give the state an opportunity to file an answer brief out of time. The procedure for filing answer briefs already set forth in Rule 9.210, Fla.R.App.P., should be followed in such cases.

* * *

Criminal law—Jurors—Peremptory challenge—Racial discrimination—State's challenge of two black prospective jurors on ground that first juror had prior DUI conviction and second juror was unemployed and divorced with five children—Appeals—Standard of review—Abuse of discretion is appropriate standard by which appellate court should review trial court's inquiries into noncomplaining party's proffered race-neutral explanations for peremptory challenges—Trial court did not abuse its discretion when it found that state's proffered reasons were nondiscriminatory—Question certified as to appropriate standard of review of trial court's finding that state's use of peremptory challenges against prospective black jurors was reasonable, race-neutral, and non-pretextual

WAYNE FILES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 89-1080. Opinion filed August 30, 1991. An appeal from the Duval County Circuit Court, Lawrence Page Haddock, Jr., Judge. Michael E. Allen, Public Defender; Lawrence M. Korn, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Wayne Mitchell, Certified Legal Intern, Bradley R. Bischoff, Assistant Attorney General, for Appellee.

ON MOTION FOR REHEARING
[Original Opinionat 16 F.L.W. D1416]

We deny the state's motion for rehearing, filed June 10, 1991, to strike the certified question in this case. However, the original majority and dissenting opinions are withdrawn and the following opinions are substituted therefor:

(MINER, J.) Wayne Files appeals his convictions on three counts of dealing in stolen property, contending that the trial court erred in denying his motion to strike the jury panel following the state's allegedly discriminatory use of peremptory challenges, and that the evidence was insufficient to support his convictions. We find that the evidence was sufficient to support the convictions, and that the trial court did not abuse its discretion in denying the motion to strike the jury panel. Accordingly, we affirm appellant's convictions.

During the course of voir dire examination, the prosecutor excused two black prospective jurors. Defense counsel objected to the state's use of peremptory challenges on these prospective jurors suggesting that they were racially motivated. The court then inquired as to the state's reasons for the exercise of these challenges. The prosecutor responded that although his information sheet indicated that the first black prospective juror challenged had been convicted of DUI, that juror had failed to respond when he asked if any prospective juror had been convicted of any offense. His articulated reasons for striking the other prospective juror were that she was divorced, had five children, was unemployed and that he preferred jurors who worked or had other visible means of support. After the state's response, defense counsel, calling the stated reasons "superfluous," moved to strike the jury panel. The trial court denied the motion. A jury was seated and sworn and appellant's trial commenced. He was found guilty as charged, adjudicated and sentenced. This appeal then ensued.

In *Reed v. State*, 560 So.2d 203, 206 (Fla.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990), the Florida Supreme Court observed:

> 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. . . 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.
>
> * * *
>
> In 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 our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

See also *Knight v. State*, 559 So.2d 327, 328 (Fla. 1st DCA), *review dismissed*, No. 76,084 (Fla. 1990).

In *Reynolds v. Stare*, 16 F.L.W. S159 (Fla. Jan. 31, 1991), the court noted:

> *Reed* vests significant discretion in the trial court on Neil issues by requiring appellate courts to show deference to the trial court's conclusions. Specifically, Reed states that the appellate courts must "rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process." However, Reed rested on the assumption that, in the context of that case, some sort of *Neil* inquiry must have been made in the first instance.

Id. at S160 (citations omitted).

Case law indicates that appellate review of trial court rulings concerning the alleged discriminatory use of peremptory challenges seems to depend upon how the trial court responded to the initial objection. In cases like *Reynolds*, where the trial court chooses not to conduct a *Neil* inquiry, the reviewing court is presented with no conclusion to which deference can be shown, and the case may well be reversed. But where a trial court, exercising its broad discretion in considering whether a party has established the required "strong likelihood," asks the noncomplaining party to explain its peremptory challenges and determines that those explanations are reasonable, race-neutral and non-pretextual, its findings are entitled to great deference.

The "abuse of discretion" standard has found application in both civil and criminal contexts. Justice Overton explained in *Canakaris v. Canakaris*, 382 So.2d 1197, 1202-03 (Fla. 1980), that a reviewing court must give great deference to findings of fact in family law matters:

> Judicial discretion is defined as:
>
> The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.
>
> 1 Bouvier's Law Dictionary and Concise Encyclopedia 804 (8th ed. 1914). Our trial judges are granted this discretionary power because it is impossible to establish strict rules of law for every conceivable situation which could arise in the course of a domestic relation proceeding. The trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial.
>
> We cite with favor the following statement of the test for review of a judge's discretionary power:
>
> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
>
> Delno *v.* Market *Street Railway Company*, *124* F.2d 965, 967 (9th Cir. 1942).
>
> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

The widely recognized *Canakaris* standard was applied in *Huff v.* Stare, 569 So.2d 1247 (Fla. 1990), wherein the trial judge struck a motion for postconviction relief on the ground that the attorney signing the motion was not admitted to practice law in Florida prior to ruling on counsel's motion to admit him pro hac vice. The court held that a denial of the latter motion would have been an abuse of discretion because nothing appeared of record which cast doubt on the standing of the attorney from another jurisdiction, and that striking the rule 3.850 motion prior to a ruling on the motion pro hac vice violated the appellant's due process rights.

Just as the *Neil* inquiry is designed to ferret out impermissible bias in voir dire selection, the Richardson' inquiry is designed to expose procedural prejudice occasioned by a party's discovery violation. In *Lucas v. Stare*, 376 So.2d 1149 (Fla. 1979), the court held that it is within the "broad discretion" of the trial judge, after an adequate inquiry, to determine whether a defendant has been prejudiced by a discovery violation? In *Parce v. Bryd*, 533 So.2d 812 (Fla. 5th DCA 1988), *review denied*, 542 So.2d 988 (Fla. 1989). the court applied the *Canakaris* standard in holding that the trial court improperly granted mistrial for an alleged Richardson violation.

The *Canakaris* standard was also applied in determining the propriety of a departure sentence in Booker *v. State*, 514 So.2d 1079 (Fla. 1987):[3]

> Inquiring into whether the trial court abused its discretion necessarily turns on the specific facts presented in each case. If, based upon the entire set of circumstances presented, the reviewing court finds the sentence so excessive as to shock the judicial conscience, this will likely evidence an abuse of discretion, Reviewing courts which have held that they possess the power to review a sentence on these grounds have articulated a variety of phrases which, in fact, comport to the abuse of discretion standard adopted by this Court in *Canakaris*.

Id. at 1085(citations omitted).

The abuse of discretion standard has been applied in ***Slappy*** and in other Florida cases reviewing ***Neil*** inquiries.[4] Federal courts likewise apply a "great deference" standard of review, under which a trial court's findings in determining whether peremptory challenges were exercised in a discriminatory manner will not be disturbed unless "clearly erroneous.''[5] Several states have followed the federal standard.[6] Based upon the foregoing analysis, we hold that the abuse of discretion standard, as discussed in *Canakaris*, is the appropriate standard by which an appellate court should review lower court ***Neil*** inquiries into the "'*Slappy*worthyness' ''[7] of proffered explanations for peremptory challenges. Here, the judge implicitly concluded that the prosecutor's explanations were race-neutral, reasonable and non-pretextual by denying the defendant's motion to strike the Jury panel. This court must therefore determine whether the trial judge's Neil-inquiry conclusions fell within his vested breadth of discretion as espoused in the *Reynolds* - Reed paradigm.

It is clear that in conducting a ***Neil*** inquiry, the trial judge is engaged primarily in fact finding. This court's review of such a case is therefore limited to determining whether the basis for the judge's findings of fact "appear of record" and whether the complaining party has shown a clear and palpable abuse of discretion by demonstrating the judge's conclusions to be clearly erroneous. This court is not authorized to conduct a de *novo* review of the voir dire examination. In the instant case, we are presented with the trial court's exercise of discretion in accepting the state's reasons within the confines of a ***Neil*** inquiry. Applying the principles in ***Neil, Slappy,*** Reed and ***Reynolds*** to this trial judge's ruling, we cannot say that the judge abused his discretion.

As to the first prospective black juror challenged, it is apparent from the record that the prosecutor asked not only whether any of the jurors had had dealings with the state attorney's office or contacts with law enforcement officials, but also whether anyone present or any of their relatives had ever been arrested for any type of crime. Although several jurors admitted having previous convictions or experiences with law enforcement officers, this prospective juror said nothing. Although the prosecutor did not produce the information sheet indicating that the juror had actually been convicted of **DUI,** his representation of a prior felony conviction was a valid reason for exercising a peremptory challenge.' Roundfree *v.* ***State,*** **546** So.2d 1042 (Fla. **1989);** ***Tillman v. State,*** 522 So.2d **14** (Fla. 1988); *Stephens v.* ***Srate,*** 559 So.2d 687 (Fla. **1st** DCA **1990),** *approved on other grounds*, 16 **F.L.W.**S128 (Fla. **Jan.** 15, 1991); *Knight,* 559 So.2d at **327** (Fla. 1st DCA), review dismissed, No. 76,084 (Fla. **Oct. 25,** 1990).

As to the second prospective black juror challenged, it is apparent from the record that while *two* other jurors were divorced and one other juror was unemployed, none of the other jurors selected were *both* unemployed ***and*** divorced with five children. Had the prosecutor offered only unemployment or divorce as an explanation for the exercise of this peremptory challenge, we may have been required to find that the trial judge abused his discretion by accepting the reason as nondiscriminatory. ***See Slappy v. Stare,*** 522 So.2d *22* (Fla. 1988). But, because the combination of unemployment, ***and*** divorce may arguably indicate some prospect of a level of detachment from the proceedings not based on race, we cannot say that reasonable persons would not differ as to the propriety of this reason for excusing the juror.

Just as a trial judge has broad discretion, within the limitations imposed by ***Neil,*** in factually determining whether a complaining party has met the initial burden of showing a "strong likelihood" that the peremptory challenge was exercised in a discriminatory manner,[8] he also has broad discretion within those same limits in evaluating the state's responsive explanations for the challenge ~ . It is not the function of an appellate court to substitute its judgment for that of the trial judge on the issue of credibility of the state's reasons unless the record reflects a clear or palpable abuse of discretion.

To reverse the trial judge's conclusions on this record would require us to second guess his evaluation of the prosecutor's credibility as well as the reasons given for challenging the two jurors. In the total context of the record, we find that reasonable persons could arguably agree with the trial court's action. Appellant has therefore shown no clear or palpable abuse of discretion exercised by the trial judge in finding that the state's explanations for exercising the two peremptory challenges against prospective black jurors were reasonable, race-neutral and nonpretextual. ***See*** also Hernandez ***v. New*** York, Case No. 89-7645 (May 28, **1991),** and *Green* ***v. State,*** 16 **F.L.W.**S437 (Fla. June 6, 1991).

While we affirm the convictions appealed from, we note that the Florida Supreme Court has not yet clearly defined the standard of review when ***Neil-Sluppy*** issues are raised on appeal. Since such issues frequently recur, we certify the following question as one of great public importance:

> WHAT IS THE STANDARD OF APPELLATE REVIEW OF A TRIAL **COURT'S** *FINDING* **THAT *THE* STATE'S USE OF PEREMPTORY CHALLENGES AGAINST PROSPECTIVE** BLACK **JURORS** WAS **REASONABLE, RACE-NEUTRAL AND** NON-PRETEXTUAL?

AFFIRMED. (WENTWORTH, SENIOR JUDGE, CONCURS and ERVIN, J., CONCURS **and** DISSENTS WITH WRITTEN OPINION.)

(ERVIN, J., concurring **and** dissenting.) While I fully agree with the majority that the evidence presented was sufficient to convict, I disagree, however, in regard to the peremptory challenge issue; I believe the majority has in part failed to apply the correct standard of review in assessing a court's rulings as to the proferred reasons by the state for peremptorily challenging a black juror. Because of the, importance of the latter issue **and my** fear that certain appellate decisions, not **only** from this court but other appellate districts, have failed to take proper account of essential constitutional guarantees in the **jury** selection system," I feel the need to restate some fundamental constitutional principles.

Amendment XIV, Section 1 of the Constitution of the United States of America provides in part: **"No** State shall **. . .** deny to any person within its jurisdiction the equal protection of the laws." In addition, our own state constitutionstates: ''No person shall be deprived of **any** right because of race, religion or physical handicap." Art. I, § 2, Fla. Const. In light of these directives, it is axiomatic that where procedures implementing a neutral statute regarding juror qualifications operate to exclude certain persons from the venire on racial grounds, a denial of **equal** protection occurs. *Batson* ***v. Kentucky,*** 476 U.S. 79, 88, 106 S.Ct. 1712, 1718, 90 L.Ed.2d 69, **82** (1986). Accordingly, the purposeful and deliberate exclusion of blacks as jurors based on race violates **equal** protection. *Id.* at ***84,*** 106 S.Ct. at 1716, 90 L.Ed.2d at 79 (quoting ***Swain v. Alabama, 380*** **U.S.** 202, ***85*** S.Ct. 824, **13** L.Ed.2d 759 (1965)). In fact, the striking of a single black juror for a racial reason violates the **equal** protection guarantee, even if other black jurors are seated, **and** even if there are valid reasons for striking other black jurors. ***State v. Slappy,*** 522 So.2d 18, 21 (Fla.) (quoting *United States v.* Gordon, 817 F.2d 1538,1541(11th Cir. 1987)), *cert.* ***denied,*** 487 **U.S.** 1219, 108S.Ct. 2873, 101L.Ed.2d 909 (1988); ***Reynolds v. State,*** 576

So.2d 1300,1301(Fla. 1991).

The need to protect against bias is particularly important in the selection of a jury in a criminal proceeding, because the accused is entitled to be judged by a fair cross-section of the community, and because citizens cannot be precluded improperly from jury service. *Slappy*, 522 So.2d at 20. See Art. I, § 16, Fla. Const. Unfortunately, the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives. *Slnppy*, 522 So.2d at 20; *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. Abuses have occurred in the past from the unconstitutional use of the peremptory challenge, resulting in the appearance of impropriety. *Reynolds*, 576 So.2d at 1302. Accordingly, the state's privilege to strike individual jurors through the use of peremptory challenges is subject to the commands of the Equal Protection Clause, *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719, 90 L.Ed.2d at 82, and prosecutors in the state of Florida are accountable for their actions in the exercise of such challenges, *Reynolds*, 576 So.2d at 1301-02, For if the method of peremptorily challenging jurors is to remain in our trial system, there must be accountability for its use at every proceeding. *Id.* See *also Batson*, 476 U.S. at 102-08, 106 S.Ct. at 1726-29, 90 L.Ed.2d at 91-95 (Marshall, J., concurring).

As in any equal protection case, the burden is on the party claiming discriminatory selection of the venire, usually the defendant in criminal cases, to establish the existence of purposeful discrimination. *Batson*, 476 U.S. at 93, 106 S.Ct. at 1721, 90 L.Ed.2d at 85. Thus, "[a] party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." *Neil v. State*, 457 So.2d 481, 486 (Fla. 1984) (footnote omitted). Broad leeway should be accorded to parties in making a prima facie showing that a likelihood of discrimination exists, and any doubt as to whether the complaining party has met this burden should be resolved in that party's favor. "If we are to err at all, it must be in the way least likely to allow discrimination." *Slnppy*, 522 So.2d at 22. *See also Williams v. State*, 574 So.2d 136, 137 (Fla. 1991).

Once the trial court is satisfied that the complaining party's objection is proper, the burden then shifts to the state to rebut the inference that its challenges were used for discriminatory purposes. *Slappy*, 522 So.2d at 22. The state must come forward with a neutral explanation for challenging the minority jurors that is *related to thepanicular care being tried. Batson, 476* U.S at 98, 106 S.Ct. at 1724, 90 L.Ed.2d at 88. If the explanation is challenged by the opposing counsel, the trial court must review the record to establish record support for the reason proffered. *Floyd v. State*, 569 So.2d 1225, 1229 (Fla. 1990) *cert. denied*, __ U.S. __, 111 S.Ct. 2912, __ L.Ed.2d __ (1991). *See also* Sepler, "Discrimination in the Jury Selection Process: Trial and Appellate Perspectives," Vol. LXV, No. 7 *The Fla. Bar J.*, July/Aug. 1991, at 56.

In determining whether the reasons advanced by the state are acceptable, the federal sector has recognized that a trial judge's findings in that regard turn on evaluation of credibility, and that a reviewing court should ordinarily give those findings great deference. *Batson*, 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21, 90 L.Ed.2d at 89 n.2 1. *And see Hernandez v. Stare*, __ U.S. __, __, 111 S.Ct. 1859, 1868-69, 114 L.Ed.2d 395, 408-09 (1991). The state of Florida, on the other hand, has tempered that discretion. This is because, as recognized in *Slnppy*, the *Neil* test, based on Article I, Section 16 of the Florida Constitution, "preceded, followed and exceeds the current federal guarantees." *Slappy*, 522 So.2d at 20-21 (footnote omitted). Thus, Florida has prohibited its trial judges from merely accepting the reasons proffered at face value, and has directed those judges to evaluate the state's reasons for its use of the challenges as they would weigh any disputed fact. *Slappy*, 522 So.2d at 22. The trial judge is to evaluate both the credibility of the person offering the explanation and the credibility of the reasons proffered. *Tillman v. Stale*, 522 So.2d 14, 16 (Fln. 1988). Accordingly, in order to accept the challenge in Florida, the trial court must conclude that the proffered reasons are first, neutral and reasonable, and, second, not a pretext. *Slappy*, 522 So.2d at 22.

Perhaps in recognition of the difficult task trial judges face in determining whether the proffered reasons are legitimate,[12] and certainly in an attempt to aid trial judges with that burden, our supreme court has set forth five nonexclusive factors upon which the trial judges can rely in assessing the legitimacy of the proffered explanation. Thus, the presence of one or more of the following factors will weigh against a finding of a race-neutral, reasonable, and non-pretextual reason:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

Sloppy, 522 So.2d at 22 (citing *Slnppy v. State*, 503 So.2d 350, 355 (Fla. 3d DCA 1987)). *See also Roundtree v. State*, 546 So.2d 1042,1044 (Fla. 1989).

I believe that it is reasonably clear that the correct standard for reviewing rulings in regard to whether the defendant has established a prima facie showing that a strong likelihood of race discrimination existed is abuse of discretion. *Reed v. State*, 560 So.2d 203,206 (Fla.), *cert. denied*, __ U.S. __, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). I similarly believe, in the absence of one of the five *Slappy* factors, that the trial judge's findings as to whether the reasons proffered are race-neutral, reasonable, and non-pretextual are entitled to deference. *Green v. State*, 16 F.L.W. S437 (Fla. June 6, 1991). I do not believe, however, that it is reasonably clear that the same standard of review applies to rulings made by the trial court when one or more of the above *Slnppy* factors are present. Unfortunately our supreme court has yet to clearly set forth the proper standard of review. While it speaks of "deference on appeal"[13] and reliance on the "color blindness of our trial judges,"[14] it has set forth the five *Slnppy* factors which must be considered when assessing the credibility of the proffered reasons and directed that the trial judge's findings be supported by the record.[15]

Most telling is the *Slappy* court's own application of the facts to the law. In *Slappy* the reason the prosecutor offered for excusing two of the black jurors was that they were schoolteachers and therefore liberal and would be more lenient toward the defendant than to the state's case. *Slnppy*, 522 So.2d 19-20, 23. While the court found this reason to be race-neutral and reasonable, it stated that neutrality and reasonableness alone were not enough, because the state is also required to demonstrate the second factor: record support for the reasons offered and the absence of pretext. *Id.* at 23. "Thus, where the total course of questioning of all jurors shows the presence of *any* of the five factors listed in *Slappy* [503 So.2d at 355] and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext." *Id.* (emphasis added)." The *Slappy* court concluded that the state's reasons were a pretext, because the state failed to establish that the jurors were in fact liberal by asking the few questions that would have established the existence of that trait. *Id.* The court also observed that the prosecutor excused one black juror due to the juror's purported ill health, and that a single question to that juror would have established the existence or nonexistence of illness, however, the prosecutor asked no such question. *Id.* at 23 n.3.

When each of those five *Slappy* factors is examined, it is evident that each will either be established or disproved by an examination of the record. Thus it is my belief that the proper

standard of review to be applied to rulings when a *Slappy* factor is involved is one of competent, substantial evidence within the record. Certainly case law from the Florida Supreme Court supports such a standard. For example, if the record fails to support the proffered reason, the trial judge must find the reason to be unacceptable, or the appellate court will find error. *See Williams v. State*, 574 So.2d 136, 137 (Fla. 1991) (juror improperly excused for the reason that he failed to understand the felony murder doctrine, because record revealed no questions were asked of that juror in regard to that doctrine); *Tillman v. State*, 522 So.2d 14, 17 (Fla. 1988) (prosecutor challenged jurors on the ground that they lacked sufficient education to understand the proceedings, however, the record showed that each had a high school education, and since there is no requirement that a juror have a college education to serve, the reason was not supported by the record). *Compare* Floyd *v. State*, 569 So.2d 1225, 1229 (Fla. 1990) ("Had the court determined that there was no factual basis for the challenge, the state's explanation no longer could have been considered a race-neutral explanation[.]"), *cert. denied*, __ U.S. __, 111 S.Ct. 2912, __ L.Ed.2d __ (1991).

It is equally clear that if the reasons proffered are not related to the facts-of the case or to the parties or witnesses (the fourth *Slappy* factor), the trial judge must find the reasons to be pretextual. *See Roundtree v. State*, 546 So.2d 1042, 1045 (Fla. 1989) (prosecutor challenged one juror for the reason that she was thirty years old, single, and had never worked—the court found this reason pretextual, especially since the state had allowed a white, unemployed woman to sit). Consequently, while it would appear that the trial judge retains discretion to determine whether the proffered reasons are neutral, reasonable, and nonpretextual, once a Slappy factor exists, the abuse of discretion standard is no longer applicable, and the ruling on the challenge can only be upheld if competent, substantial evidence in the record exists to support both the challenge and the trial judge's ruling thereon." *Compare Green v. State*, 16 F.L.W. S437, S438-39 (Fla. June 6, 1991) (abuse of discretion standard applied in absence of Slappy factor).

If the correct standard were applied to the facts at bar, reversal in my judgment would be clearly mandated as to one of the two rulings on the state's two challenges. The state used peremptory challenges to strike two black jurors—Mr. Jefferson and Ms. Williams, the only two blacks in the first group of eight venire members.[18] Defense counsel properly objected, pointing out that the defendant is also black.[19] There is really no serious argument that appellant did not satisfy his initial burden of showing a likelihood of discrimination, and the trial court obviously considered that the initial burden was satisfied, because it required the state to provide an explanation for the use of the challenges. *See Williams*, 574 So.2d at 137.

In regard to the first juror, the state gave the following reason:

> Mr. Jefferson, his record shows a prior DUI conviction. I specifically asked if anybody had any convictions and he didn't volunteer that. So that alone is sufficient in my mind. I don't want him on the jury if he is not giving me truthful answers.

The record clearly shows that the prosecutor asked whether anybody had had any dealings with the state attorney's office, and whether any prospective juror or relative of theirs had ever been arrested for any type of crime. Consequently, it cannot be said that the reason proffered was not supported in the record. Moreover, the weight of authority has held that such a reason for striking a juror is valid without requiring the prosecutor to produce a certified copy of the conviction for the record. *Tillman*, 522 So.2d at 17 n. 1; *Roundtree v. State*, 546 So.2d 1042, 1045 n.2 (Fla. 1989); *Knight v. State*, 559 So.2d 327, 328 (Fla. 1st DCA), *review denied*, 574 So.2d 141 (Fla. 1990). Therefore, I agree that the trial judge did not err by accepting the prosecutor's reason for striking Mr. Jefferson.

Once, however, the state was asked the reason for challenging juror Williams, the following exchange occurred:

> MR. TOOMEY [the prosecutor] On her, well just the fact she is unemployed, divorced has five children.
> THE COURT: What's that mean to you?
> MR. TOOMEY: To me it means, one, she is unemployed, she doesn't work, like to have jurors that work. Unless they have some means of support.

Later the prosecutor added:

> MR. TOOMEY: Judge, on Ms. Williams just to supplement the record a little bit I don't think it makes sense what I said unless I also say she is divorced.
> THE COURT: You said that.
> MR. TOOMEY: I did?
> MR. CASCONE (defense counsel): Other people are divorced.
> MR. TOOMEY: If she was married, stayed home with five kids, makes a lot [sic] more sense.

In reviewing the reason proffered by the state," we are limited to the reason actually tendered by the state,[21] and in this case, the basic objection was that Ms. Williams was unemployed and divorced with five children. These reasons, while supported by the record," have nothing to do with the particular case being tried: appellant was charged with three counts of dealing with stolen property. No connection between the facts involved, the parties, or the witnesses and the status of an unemployed divorcee with five grown children appears in the record. Thus, this reason falls under the fourth *Slappy* criterion, because it is unrelated to the facts of the case.

Moreover, if indeed this particular status typified some objectionable basis, the state failed to develop it in the record." Additionally, the record clearly shows that the prosecutor accepted other jurors who were likewise unemployed or divorced." Thus, the reason also falls under the fifth Slappy factor—a challenge based on reasons equally applicable to a juror who was not challenged. *Roundtree*, 546 So.2d at 1045 (single, thirty-year-old black woman who had never worked was improperly challenged on facts showing that the state allowed an unemployed white woman to sit).

To summarize, because the state's reasons for striking juror Williams are not supported by Competent, substantial evidence in the record, I conclude that the reasons advanced were pretextual. Although I would reverse and remand the case for new trial, I concur with the majority in certifying the question to the Florida Supreme Court. If the supreme court chooses to answer the question, I consider it would be helpful for it to determine whether the same standard or different standards of review are applicable to each part of the *Neil-Slappy* review process, as discussed in this dissent.

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

[2] *See also* Bands v. State, 536 So.2d 221 (Fla. 1988), *cert. denied*, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989); Ross v. State, 474 So.2d 1170 (Fla. 1985); Ducst v. State, 462 So.2d 446 (Fla. 1985); Justus v. State, 438 So.2d 358 (Fla. 1983). *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984); McGee v. State, 435 So.2d 854 (Fla. 1st DCA 1983), *review denied*, 444 So.2d 417 (Fla. 1984).

[3] *See also* Albritton v. State, 476 So.2d 158 (Fla. 1985); Riggins v. State, 477 So.2d 643 (Fla. 5th DCA 1985); Steiner v. State, 469 So.2d 179 (Fla. 3d DCA), *review denied*, 479 So.2d 118 (Fla. 1985).

[4] Green v. State, 16 F.L.W. S437, S438-39 (Fla. June 6, 1991) ("After reviewing the record, we cannot say the trial judge abused his discretion in finding that the exercise of these peremptory challenges was racially neutral and not a pretext.").

In *Slappy*, the court observed:

> The function of the trial judge'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.
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> * * *
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> The function of the trial court in determining the existence of reasonableness is not to substitute its judgment for that of the prosecutor, but merely to decide if the state's assertions are such that some reasonable persons would agree.

522 So.2d at 22-23. See *also* Mitchell v. State, 548 So.2d 823 (Fla. 1st DCA 1989); McCloud v. State, 536 So.2d 1081 (Fla. 1st DCA 1988); Spillis Candela

& Partners, Inc. v. The Association of School Consultants, Inc., 16 F.L.W. D103 (Fla. 3d DCA Dec. 28, 1990); Bohannon v. State, 557 So.2d 680 (Fla. 3d DCA), *review denied*, 569 So.2d 1278 (Fla. 1990).

[3]Hernandez v. New York, 500 U.S. __, 111 S.Ct. 1859, __ L.Ed.2d __, (19[illegible]Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (19[illegible]Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); United States v. Grandison, 885 F.2d 143 (4th Cir. 1989). ccn. *denied*, __ U.S. __, 110 S.Ct. 2178, 109 L.Ed.2d 507 (1990); United States v, Baker, 855 F.2d 1353 (8th Cir. 1988). *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989).

[6]In State v. Artwine, 743 S.W.2d 51, 66 (Mo. 1987). *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988), the Missouri Supreme Court opined:

> A finding of discrimination, or a finding of no discrimination, is a finding of fact. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). In a *Batson* context, the Supreme Court observed that because the trial judge's findings "largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98, n. 21, 106 S.Ct. at 1724, n. 21. "[F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." *Anderson*, 470 U.S. at 573, 105 S.Ct. at 1511, *quoting* F.R.C.P. 52(a).
>
> "[A] finding is 'clearly erroneous' when although here is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. 573, 105 S.Ct. at 1511, *citing United States v. United States Gypsum*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). Thus, if the trial court's "account of the evidence is plausible in light of the record viewed in its entirety, [an appellate] court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed theevidencedifferently." Id., 105 S.Ct. at 1512.
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> In Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376, 1380, (1989), the Pennsylvania Supreme Court opined:
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> [T]he decision whethtr to disqualify a juror is within the sound discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion. *Commonwealth v. Hardcastle*, 519 Pa. 236, 256, 546 A.2d 1101,1110 (1988); *Commonwealth v. Colson*, 507 Pa. 440,490 A.2d 811 (1985). *cert. denied*, 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986).

[illegible]tate v. Young, 569 So.2d 570 (La. Ct. App. 1990), a Louisiana court ap[illegible]the *Batson* "great defcrence" standard.

[illegible]quoting term coined by Chief Judge Schwartz in Smith v. State, 16 F.L.W. D460, D461 (Fla. 3d DCA Feb. 12,1991).

'In Tillman v. State. 522 So.2d 14, 17 n.1 (Fla. 1988), the Florida Supreme Court, in reviewing the trial court's acceptance of a prosecutor's reasons, observed:

> This 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. 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 produce a certified copy of the judgment of conviction for the record. Furthermore, a judge is certainly permitted to place in the record his observations to support a prosecutor's reasons for striking a juror. If a prosecutor strikes a juror because the juror has been glaring at or using a hostile tone of voice with the prosecutor, the judge may state for the record that he has observed this behavior from the juror.

[9]Bryant v. State, 15 F.L.W. S483 (Fla. Sept. 6. 1990); Reed v. State, 560 So.2d 203 (Fla. 1990); State v. Williams, 566 So.2d 1348 (Fla. 1st DCA 1990); Dinkins v. Stale, 566 So.2d 859 (Fla. 1st DCA 1990). City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA), *cause dismissed*, 469 So.2d 748 (Fla. 1985).

[10]Bohannon v. State, 557 So.2d 680 (Fla. 3d DCA), *review denied*, 568 So.2d 1278 (Fla. 1990). *See* Huff v. State. 569 So.2d 1247 (Fla. 1990)[Where the action of the trial court is discretionary, the order of the lower court will not bc disturbed on appeal unless an abuse of discretion is clearly shown]. *See generally* Booker v. State, 514 So.2d 1079 (Fla. 1987); Albritton v. State, 476 So.2d 158 (Fla. 1985); Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

"See, for example, Jefferson v. State. 549 So.2d 222, 223 (Fla. 1st DCA 1989) ("[T]he court . . . did not abuse its discretion in ruling that the reasons the state offered in support of peremptory challenges were race neutral and reasonable."); McCloud v. State, 536 So.2d 1081, 1082 (Fla. 1st DCA 1988) ("[illegible]not the function or prerogative of an appellate court to substitute its judg[illegible]r that of the trial judge on the issue of the credibility of the state's reasons unlear the record reflects a clear abuse of discretion."); Spillis Candela & Partners, Inc. v. Association of School Consultants, Inc., 16 F.L.W. D103, D103 (Fla. 3d DCA Dec. 28, 1990) ("[W]e find no abuse of discretion by the trial court in conducting the *Neil* inquiry and accepting the explanations for the challenges offered by appellees."); Bohannon v. State, 557 So.2d 680, 681 (Fla. 3d DCA) ("[W]e conclude that the trial court did not abuse its discretion in concluding that the state's peremptory challenge of a single black juror . . . was not unconstitutionally based upon her race."), *review denied*, 569 So.2d 1278 (Fla. 1990); Thomas v. State, 502 So.2d 994,996 (Fla. 4th DCA) ("[W]e find that the record supports the exercise of the court's discretion."), review *denied*, 509 So.2d 1119 (Fla. 1987).

[12]As Justice Marshall wrote in *Batson*, 476 U.S. at 105-06, 106 S.Ct. at 1728, 90 L.Ed.2d at 94,

> [T]rial courts face the difficult burden of assessing prosecutors' motives. Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the jumr had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess tho sensitivities necessary to realistically look at the issues and decide the facts in this case[.]"

(Citations omitted.)

[13]*Reynolds*, 576 So.2d at 1301.

[14]*Reed*, 560 So.2d at 206.

"Sloppy, 522 So.2d at 24; Floyd, 569 So.2d at 1229.

[16]*See also Reynolds*, 576 So.2d at 1302, wherein the court directed that the qualities of neutrality, reasonableness, and non-pretext must be judged by using the nonexclusive list of factors set forth in Sloppy.

"For a somewhat similar analysis, see Mitchell v. State, 548 So.2d 823, 824-25 (Fla. 1st DCA 1989).

[17]The state later sought to strike a third black venire member, but ultimately accepted her as the alternate juror when confronted in regard to that challenge by defense counsel and the court.

[19]A strong likelihood of discrimination is created if the state eliminates every member of the minority. *Reynolds*, 576 So.2d at 1301.

[20]There is no question that the issue was not properly preserved for appeal in that defense counsel stated that the reason given was superfluous and moved to strike the panel. *Compare* Floyd v. State, 569 So.2d 1225 (Fla. 1990) (defendant failed to object to reason offered by the state and therefore failed to preserve error for appellate review), *cert. denied*, __ U.S. __, 111 S.Ct. 2912, __ L.Ed.2d __ (1991).

[21]As stated previously, the rule is clear that once the trial court determines that the defendant has satisfied the initial burden of showing a strong likelihood that the challenge was used in a discriminatory fashion, the burden shifts to the *state* to rebut the inference. Yet the majority, in an attempt to validate what occurrcd here, ignores that burden and goes so far as to *create* a reason for the state, i.e., that "the tandem of unemployment and divorce may arguably indicate some prospect of a level of detachment from the proceedings not based on race[.]" Clearly. this is improper.

[22]Williams stated: "I'm not employed. I'm divorced. I have five children outside of the home, none inside of the home."

[23]I refuse to speculate regarding how divorced women with grown children are somehow incompetent to be jurors. I likewise decline to speculate that divorced, unemployed people would be lenient to defendants accused of dealing in stolen property. If indeed such a status does indicate the "prospect of a level of detachment from the proceedings," as the majority argues, this trait was simply not developed on the record. If the prosecution was in fact worried about how Ms. Williams existed financially, he had merely to ask. Perhaps she was retired, or independently wealthy. Certainly those conclusions are just as legitimate as the inference that she was a thief herself, or that she dealt in stolen property, for which there was no evidence.

[24]Ms. Elaine Coal, a white married woman with one child, who was not employed, was accepted, as was Ms. Christeen Devose, a white woman, who was divorced with no children and employed. Ms. Davis, a black woman who was employed but divorced with two children, was ultimately accepted by the state as the alternate juror, after it attempted to strike her, offering the reason that the prosecutor would rather have the next juror, a white male IRS employee, as a juror.

* * *

Wrongful death—Sufficientexport evidence was presented that automobile seat belt was operational to permit seat belt defense to be submitted to jury—No requirement that operability be proven by showing that seat belt clicked when fastened and that it was anchoredto the vehicle

ETHEL LOUISE HOWELL as personal representative of the Estate of Talley Murdock Howell, deceased, Appellant, v. ROADRUNNER TRUCKING, INC., ROADRWNNER ENTERPRISES, INC., and MARTIN ROPER, Appellees. 1st District. Case No. 91-111. Opinion filed September 4, 1991. An Appeal from the Circuit Court for Santa Rosa County. George Lowrey, Judge. Virginia M. Buchanan and Fredric G. Levin of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell. Pensacola, for Appellant. William L. Lee, Jr., of Shell, Fleming, Davis and Menge, Pensacola, for Appellees.

ON REHEARING

(PER CURIAM.) In this wrongful death action, appellant, Ethel Louise Howell, as Personal Representative of the Estate of