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IN THE SUPREME COURT OF FLORIDA

WAYNE FILES,

Petitioner,

v.

CASE NO. 78,552

STATE OF FLORIDA,

Respondent.

\_\_\_\_\_ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Wayne Files was the defendant in the trial court, the appellant in the district court, and will be referred to in this brief as the petitioner or by his proper name. The **State** of Florida was the prosecution below **and** will be referred to herein **as the** state or the respondent. The record on appeal will be referred to by use of the symbol "**R**" and the transcript of the trial proceedings by use of the symbol "T," each followed by the appropriate page number in brackets. All proceedings in this case were in the Fourth Judicial Circuit Court, in and for Duval County, Florida, the Honorable L. Page **Haddock**, Circuit Judge presiding, **as** well as the First District Court of Appeal of Florida. All emphasis in this brief is supplied **unless** otherwise indicated,

11. STATEMENT OF THE CASE AND FACTS

The petitioner relies on his statement of the case and facts as set forth in his initial brief on the merits.

111. SUMMARY OF ARGUMENT

The trial court erred in denying Files' motion to strike the jury panel following the clearly racially motivated use of a peremptory challenge against a black prospective juror in this case involving a black defendant and white victims. Defense counsel **made** the appropriate objections, and the trial court properly found the threshold burden had been met, making the appropriate inquiry; however, the prosecutor gave hollow, pretextual, and unsupported reasons for his exclusion of this **black** prospective juror. The trial court erred in accepting these reasons (that Ms. Williams was divorced and unemployed) at face value without examining the record to determine their validity or veracity. The record indeed reveals these reasons to be a **facade** for the racially discriminatory use of peremptory challenges.

The Petitioner acknowledges that the appropriate standard of appellate review for determining whether the moving party has met his or her threshold burden of demonstrating the likelihood of a racially discriminatory use of peremptory challenges is whether the trial judge abused his discretion. That is not, however, the issue in this case. Here, the trial court found that Files had met his initial burden of demonstrating the likelihood of the racially motivated use of a peremptory strike. Rather, the issue in this case is whether that same standard applies to all aspects of the inquiry, specifically, whether the abuse of discretion standard applies to the factual and the legal question of whether the state's reasons were

reasonable and race neutral, or were instead a mere pretext for racial discrimination.

It is the Petitioner's position that the appropriate standard of appellate review of a trial court's ruling that the state's reasons are race-neutral is whether this ruling is supported by competent and substantial evidence. Because an inquiry into the racial motivations of peremptory challenges is a mixed question of both law and fact, the abuse of discretion standard was improperly applied by the district court majority. Such mixed questions should be reviewed by the competent and substantial evidence test.

The application of this appellate standard mandates these convictions be reversed, as the state's reasons for excluding **Ms. Williams** were mere pretext, designed to cover the violation of Article I, Section 1 of the Florida Constitution, as well as the Fourteenth Amendment to the United States Constitution. While the facts of Ms. Williams' status as a divorced, unemployed woman were supported by the record, there is **no** record explanation for how those factors relate to her ability to sit as **a** fair and impartial juror. Moreover, two other white women who were divorced or unemployed were seated on the jury without challenge from the state.

#### IV, ARGUMENT

THE APPROPRIATE STANDARD OF **APPELLATE REVIEW OF A TRIAL COURT'S FINDING THAT THE STATE'S USE OF PEREMPTORY CHALLENGES AGAINST BLACK PROSPECTIVE JURORS WAS RACE-NEUTRAL IS WHETHER THE FINDING WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.**

Before determining the appropriate standard of appellate review in jury selection cases, it might be beneficial to first separate the factual issues from the legal **ones**, since this seems to be the primary sticking point herein. In this **case**, the overall question is whether Ms. Williams was excused for racially neutral reasons or for reasons that were a mere **pre-**text for racial discrimination.

Within this greater question are the factual questions of whether Ms. Williams is divorced, whether **Ms.** Williams is unemployed, or whether Ms. Williams has some grown children. There is no dispute that Ms. Williams is indeed **a** divorced, unemployed mother of several grown children. The petitioner would concede all of that.

Nonetheless, a **legal** question arises when **we** take those stated reasons, which are factually supported by the record, and we apply them to the legal standards imposed by this Court in State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). The trial court must make the essentially legal determination that, given the veracity of the prosecutor's stated reasons, those reasons are race neutral under Slappy. This legal framework cannot be ignored by invoking "reverse-proof" standard that effectively



eliminates appellate review of legal standards imposed by this Court. That, however, is what the respondent asks this Court to do.

It is a judicial fact that, no matter how competent, no matter how "color blind," and no matter how well-informed, trial judges are human beings, and are thus subject to making the occasional mistake. The very existence of an expansive appellate court system acknowledges this fact. It would be folly to suggest that such mistakes should not be subject to appellate review. Given that there **are** legal determinations to be made **in cases** once the defendant has established the prima facie showing of the likelihood that discrimination exists, it is both necessary and proper that these determinations be subject to a meaningful standard of review.

At page 13 of its brief, the respondent suggests callously that the legal standards expressed by this Court in Slappy were of no legal effect, and that they "were never intended as a substantive standard of review . . ." [Respondent's Answer Brief at 13]. This bizarre point overlooks or ignores the explicit holding by this Court in Slappy that,

where the total course of questioning of all jurors shows the presence of any of the five factors listed in Slappy [referring to the Third District Court of Appeal's opinion] and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext.

Slappy, 522 So.2d at 23 (emphasis added). This language is no the stuff of which mere "indicators" are made. Rather, its clear and express wording dictates that the five Slappy factors

are indeed mandatory and must be complied with **by the trial court** or reversal is required.

As a corollary, the respondent, citing to no record support, **alleges that the final jury was made up of four white** jurors, two African-American jurors and an African-American alternate. This allegation, no matter how irrelevant to a legal determination under Slappy\*, is false. The record clearly **supports the fact that Ms. Williams, Mr. Jefferson, and Ms. Davis** were the only African Americans on the panel (T-72-76). Of those, all three were initially excluded from the panel by the prosecutor. Only Ms. Davis was seated as the alternate after **the** petitioner objected, and the prosecutor's stated reason for striking her was so obviously pretextual that he **was** forced to withdraw **his** peremptory challenge. The challenge to Ms. Davis and the reasons **for** its withdrawal are, alone, substantial and competent evidence that the prosecutor was of a mind to **exercise** his challenges in a racially discriminatory manner.

The respondent cannot overcome the fact that the prosecutor's stated reasons herein violate at least two of the five factors delineated by this Court in Slappy ("**4**) the prosecutor's reason is unrelated **to the facts of the case, and (5) a**

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\*"Indeed, the issue is not whether several jurors have been excused because of their race, but whether **any** juror has been **so** excused, independent on any other." Id. at 21 (emphasis in original). Thus, the state's unsupported allegation, however false, has no bearing on the decision of this court.

challenge based on reasons equally applicable to juror(s) who were not challenged. Id. at 22]. Rather, the respondent prefers to ignore those factors by stating that they are simply not the law but merely "indicators," The respondent makes no effort to establish a connection between the stated reasons and the case, parties, or witnesses. It simply fails to acknowledge that such **a** factor exists, notwithstanding the plain language of Slappy .

Yet the respondent acknowledges the existence and controlling nature of the fifth Slappy factor (reasons for challenge applicable to unchallenged juror), by attempting to distinguish the reasons for challenging Ms. Williams from the other unchallenged jurors who possessed the same characteristics. While some of the unchallenged (white) jurors were divorced, and another was unemployed, none were both divorced and unemployed like Ms. Williams, **a** factor which somehow disqualifies her. This is balderdash. The respondent utterly fails to point out how the combination of not working and not being married has anything to do with this **case**, or renders a person unqualified to sit on a jury. The only thing that rendered this juror unqualified to this prosecutor was that she is an African-American.

Even if this Court were to expand Reed v. State, 560 So.2d 203 (Fla.), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 230, 112 L.Ed. 184 (1990) and adopt the district court's standard of appellate review, the record still indicates an abuse of discretion. **As** the respondent correctly notes, the prosecutor

told the trial court that he challenged **Ms.** Williams because he "like[s] to have jurors that work [T-75]." Yet the prosecutor accepted onto the panel Ma. Coal, an unemployed white woman. This blatant misrepresentation to the trial court by the prosecutor should have put the trial court on notice that the prosecutor was not dealing squarely. Given the record before him, **the** trial court clearly abused his discretion by overlooking this little white lie and denying petitioner's motion to strike the panel.


Nonetheless, because this issue involves both questions of law and fact, the abuse of discretion standard is improper, **as** it seals off any possibility of meaningful review of substantially legal questions. Accordingly, the appropriate standard of review must be something more substantial. Judge Ervin, below, has suggested the competent and substantial evidence standard. It is quite possible that, given the heavy burden placed by this Court on the challenging party to justify his or her actions **a** more appropriate standard ought to be clear and convincing evidence, or even reasonable doubt. Under any standard, the petitioner **was** denied his right to a fair and impartial jury under Article I, section 16 of the Florida Constitution. At the trial court level, the appropriate remedy would have been, **as** requested, the replacement of the jury panel. At this level, the only appropriate remedy is to quash the district court opinion and remand this case for a new trial.

V. CONCLUSION

For the reasons expressed in the foregoing reply brief, as well as those expressed in his initial brief, petitioner respectfully requests this Court to quash the opinion of the First District Court of appeal, **answering** the certified question to require that competent and substantial evidence be the necessary standard of appellate review of a trial court's finding that the state's use of peremptory **challenges** was non-pretextual.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by hand-delivery to Bradley Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Mr. Wayne Files, #B-095200, Dinsmore CCC, 13200 Old Kings Road, Jacksonville, Florida, 32219, on this 8<sup>th</sup> day of November, 1991.

  
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LAWRENCE M. KORN