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FEB 26, 1992

CLERK, SUPREME COURT.

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

CASE NO. 79,046

WARREN A. JOHANS,

Respondent.

ON DISCRETIONARY REVIEW FROM  
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

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### SUMMARY OF ARGUMENT

Point One: In reply: The appropriate remedy in cases reversed on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 18 (Fla. 1988), rather than reversal of the defendant's conviction, is a remand for a hearing to determine if peremptory strikes were improperly exercised. The state does not challenge this court's previous holding that a post-trial hearing is too late when a juror's demeanor is the reason given for a peremptory strike. However, in many cases the reasons given by the challenged party will be verifiable from written or transcribed records of voir dire. In those cases, neither the complaining party's individual rights nor the integrity of the justice system demand a second trial.

Point Two: In reply: The district court improperly applied this court's decision in Reynolds v. State, 576 So.2d 1300 (Fla. 1991), in this case. In Reynolds, seventeen potential jurors participated in voir dire; the state struck the sole black person among the seventeen; this court held that that single strike shifted the burden to the state to announce a race-neutral reason. The rule of Reynolds was born of necessity, as no pattern of apparently race-based strikes can form when only one juror of the relevant race is available for jury service. The present case is distinguishable: here twenty-three venire members participated in voir dire. The record does not show how many were of the same minority **as** the petitioner, but the record **does** show that at least two were of that minority. On those facts, the defense did not show **a** pattern suggesting discrimination.

ARGUMENT

POINT ONE

IN REPLY: THE APPROPRIATE REMEDY IN  
**CASES** LIKE THE PRESENT **CASE** IS A  
REMAND FOR A DETERMINATION WHETHER  
PEREMPTORY STRIKES WERE EXERCISED  
PROPERLY.

The state, in its brief on the merits, relied in part on Fowler v. State, 255 So.2d 513 (Fla. 1971), in support of its argument that after reversal on the Neil/Slappy issue, a hearing, rather than an automatic new trial, should be ordered. In Fowler this court ordered a hearing after remand on the issue of the appellant's competency to have stood trial. **The** respondent argues, in his brief on the merits, that this court's decision in Hill v. State, 473 So.2d 1253 (Fla. 1985), "clearly overruled Fowler, by holding that a competency hearing cannot be held retroactively." (Respondent's Brief at 5) The state disagrees.

In Mason v. State, 489 So.2d 734 (Fla. 1986), this court held that no per se rule exists in Florida forbidding a nunc pro tunc competency determination regardless of the circumstances. 489 So.2d at 737. In Mason, the expert witnesses who evaluated the defendant before trial were available to testify regarding their previous findings in light of new evidence. This court remanded for a nunc pro tunc competency hearing, adding that

[s]hould the trial court find, for whatever reason, that an evaluation of Mason's competency at the time of the original trial cannot be conducted in such a manner **as** to assure Mason due process of law, the court must so rule and grant a new trial.

Id. Accor Brown v. State, 449 So.2d 417 (Fla. 3rd DCA 1984) (approved in Mason); State v. Williams, 447 So.2d 356 (Fla. 1st DCA 1984) (same). Cf. Tingle v. State, 536 So.2d 202 (Fla. 1988) (nunc pro tunc competency hearing not possible; no evaluation conducted before trial); Pridgen v. State, 531 So.2d 951 (Fla. 1988) (similar: no evaluation before penalty phase).

The state submits that the Neil/Slappy issue should be handled after remand in a fashion similar to that announced by this court in Mason. Where the objecting party's interests can be protected by a limited hearing, a new trial should not be ordered. See United States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991); Chew v. State, 317 Md. 233, 562 A.2d 1270, 1273 (Md. 1989). Where the objecting party's interests cannot be protected after the fact--as will be the case when those "juror responses or behavior" *which do not become part of the record* during voir dire **are** at issue--the trial court should order a new trial. Cf. Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988). **When** the trial court should, but does not, order a new trial after a fruitless post-conviction Neil/Slappy hearing, the objecting party's rights will be protected on appeal from that order. See State v. Watkins, 114 N.J. 259, 553 A.2d 1344, 1348 (N.J. 1989) (reversing and remanding for limited hearing on Batson<sup>1</sup> issue); State v. Green, 324 N.C. 238, 376 S.E.2d 727 (N.C. 1989) (same). **See also** People v. Hall, 35 Cal.3d 161, 672 P.2d 854, 860, 197 Cal. Rptr. 71 (Cal. 1983), citing People v. Minor, 104 Cal. App. 3d 194, 163 Cal. Rptr. 501 (Cal. Ct. App. 1980) (similar); cf.

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<sup>1</sup> Batson v. Kentucky, 476 U.S. 79 (1986).

People v. Snow, 44 Cal.3d 216, 746 P.2d 452, 242 Cal. Rptr. 477  
(Cal. 1987).



POINT TWO

IN REPLY: THE DISTRICT COURT  
IMPROPERLY APPLIED THIS COURT'S  
DECISION IN *REYNOLDS V. STATE* IN  
**THIS CASE.**

The respondent, in his brief on the merits on this point, asserts that

[t]he state argues that Reynolds should only apply to situations where the entire jury venire has only one prospective black juror.


(Respondent's Brief at 8) This argument mischaracterizes the state's position on this point. In this case, twenty-three potential jurors were interviewed by the parties during voir dire, in respective groups of fourteen and nine. The defense established that of the first fourteen, only one was of the same minority **as** the petitioner. The racial composition of the other nine jurors was not established on the record. The record **does** show that of the nine jurors who participated last in voir dire, at least one--Bennie Blunt, who was seated on the jury--belongs to that minority. The state's position is that twenty-three venire members were available for jury service in Mr. Johans' trial. Cf. Reynolds, 576 So.2d 1300, 1301 (Fla. 1991) (one minority member available for jury service). Where, **as** here, two *or more* of twenty-three jurors available for jury service are African-American, the fact that one is peremptorily struck does not establish a pattern of strikes which raises an inference of discriminatory intent. See Taylor v. State, 583 So.2d 323 (Fla.1991); cf. Reynolds.

CONCLUSION

The petitioner requests this court to quash the district court's decision and reinstate the trial court's judgment and sentence. In the alternative, the petitioner requests this court to remand this case to the trial court for a hearing on the Neil issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by hand delivery to M.A. Lucas, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 17<sup>th</sup> day of February,, 1992.

  
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