IN THE SUPREME COURT OF FLORIDA

SIDNEY TYRONE RATLIFF,

Petitioner,

v. CASE NO. 87,397

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Sidney Tyrone Ratliff, the appellee in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Petitioner or by his proper name. Respondent, State of Florida, the appellant in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent or the State.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. Each symbol will be followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

With respect to the issue raised on appeal, the State accepts the Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

This Court should answer the certified question by imposing the burden to prove discriminatory intent on the objecting party. Placing the burden to prove discriminatory intent on the objecting party is consistent with the longstanding principle that peremptory challenges are presumptively exercised in a nondiscriminatory manner. Furthermore, placing the burden of proof on the objecting party is also consistent with current federal law and thus has the additional practical advantage of a unified procedure.

Even if this Court instead places the burden to prove nondiscriminatory intent on the party exercising the peremptory challenge, it should affirm the First District's holding that nothing in the record on appeal supports the contention that Flowers was excluded from the jury on account of his race. By explaining that Flowers had trouble reading the factual background history, the State satisfied its burden to prove a race-neutral reason supported by the record and void of pretext. The appellant's argument that the above reason was not supported by the record was waived because he failed to challenge the accuracy of the prosecutor's reason at trial. Therefore, this

Court should find that the trial court did not abuse its discretion in accepting the State's reasons for striking Flowers as race-neutral.

ARGUMENT

ISSUE/CERTIFIED QUESTION

WHEN A LITIGANT OBJECTS THAT AN OPPOSING PARTY SEEKS TO EXERCISE A PEREMPTORY CHALLENGE FOR CONSTITUTIONALLY IMPERMISSIBLE REASONS, WHO HAS THE BURDEN TO PROVE (OR DISPROVE) FACTS ON WHICH THE OBJECTOR RELIES?

The Petitioner argues that his conviction and sentence for burglary with an assault should be reversed by this Court because the trial court improperly allowed the prosecution's peremptory challenge to an African-American venireman. During voir dire, the State sought to exercise a peremptory challenge against David Flowers, an African-American (T. 101). The Petitioner objected stating, "Your Honor, as to Mr. Flowers we'd ask the court to do a Neil inquiry." (T. 101). Called upon to state his reasons for the peremptory challenge of Mr. Flowers, the prosecutor stated the following:

> Judge, Mr. Flowers appears to be single male in his forties with no children. He also needed help, trouble reading through the factual background history. Although the jury selection will reflect we also kept two single females with no children but I would point out those -- both of those females were young in age, one living at home, one apparently young just starting a career, but as to Mr. Flowers that is the only male we've stricken, single, no kids.

(T. 107).

The petitioner did not respond to the above reasons given by the State. At no point in the trial court did the petitioner question the legitimacy or the accuracy of any of the reasons articulated by the State for its challenge to Flowers. The trial court found the State's reasons for striking Flowers to be race neutral and denied the Petitioner's *Neil*[1] challenge.

The Petitioner appealed his conviction and sentence, and the First District affirmed finding no evidence of racial bias in the record. Ratliff v. State, 666 So. 2d 1008, 1015 (Fla. 1st DCA 1996). The First District also certified a question of great public interest "concerning the proper procedure when a litigant objects that an opposing party seeks to exercise a peremptory challenge for constitutionally impermissible reasons." Id at 1010.

In State v. Neil, 457 So. 2d 481, 486 (Fla. 1984), this Court held that Article I, Section 16 of the Florida Constitution guarantees the defendant's right to an impartial jury. In order to protect that right[2], this Court set out a test to be used by

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[1]State v. Neil, 457 So. 2d 481 (Fla. 1984).

[2]"[O]ur decision in *Neil* was unmistakably based upon article I, section 16 of the Florida Constitution." Kibler v. State, 546

trial courts to evaluate an alleged discriminatory use of a peremptory challenge:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. 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.

457 So. 2d at 486-487 [footnotes omitted] [emphasis added].

The above test first places the burden of proof on the objecting party to show that the venireperson being challenged is a member of a distinct racial group and that there is a strong likelihood that the venireperson was challenged solely because of their race. If the trial court finds that the objecting party

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So. 2d 710, 712 (Fla. 1989).

met the above burden and showed a substantial likelihood that the peremptory challenge was exercised solely on the basis of race, the court must then inquire of the complained-about party for its reasons for the peremptory challenge. The burden then shifts to the complained-about party to show that the questioned challenge was not exercised solely because of the prospective juror's race. To meet this burden, the complained-about party must first demonstrate that the reasons given for the challenge are race-neutral and reasonable. State v. Slappy, 522 So. 2d 18, 23 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988). Then, the complained about party "must demonstrate a second factor - record support for the reasons given and the absence of pretext." Id.

In State v. Johans, 613 So. 2d 1319 (Fla. 1993), this Court did away with the objecting party's burden of showing a strong likelihood that the venireperson was challenged solely on the basis of their race. Before inquiring of the complained-about party's reasons for the peremptory challenge, the trial court is no longer required to make the initial determination that there is a strong likelihood that the complained-about party has exercised a peremptory challenge on the basis of the venireperson's race. Taylor v. State, 638 So. 2d 30, n.3 (Fla.),

cert. denied, ___ U.S. ___, 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994) ("In our recent opinion in *State v. Johans*, 613 So.2d 1319 (Fla. 1993), we eliminated the requirement of making a prima facie showing of a strong likelihood of discrimination and held that henceforth a *Neil* inquiry must be initiated whenever such an objection is made."). A trial court is now automatically required to inquire about the complained-about party's reasons for exercising a peremptory strike "when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." Johans, 613 So. 2d at 1321. Thus, in order to trigger a *Neil* inquiry, the only requirements are a timely objection and a demonstration on the record that the challenged person is a member of a distinct racial group. Windom v. State, 656 So. 2d 432, 437 (Fla. 1995).

The above procedures by which Florida courts analyze a claim that a party is exercising a peremptory challenge in a racially discriminatory manner differ in some degree from the procedures set out in the federal system. In Purkett v. Elam, ___ U.S. ___, 115 S. Ct. 1769, 1170-1771, 131 L. Ed. 2d 834 (1995), the United States Supreme Court revisited the procedure by which courts should analyze a claim that a party is exercising a peremptory challenge in a racially discriminatory manner:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful discrimination.

Thus, while under Florida law the burden of proof appears to rest on the party exercising the peremptory challenge to prove that it is not doing so in a racially discriminatory manner, under federal law "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 115 S. Ct. at 1771.

In certifying the question of great public interest in this case, the First District suggested that:

> [N]ow that our supreme court has done away with any prerequisite - beyond timely objection alleging discrimination against a protected class - for an inquiry into the challenger's motives, it may be time to reconsider whether the party exercising the challenge should continue to bear the burden of proof (at least for state constitutional purposes) on the question of discriminatory intent - as opposed to shouldering only the lesser burden to articulate "a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 98 n.20, 106 S.Ct. at 1724 n.20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)).
>
> On one hand, the need for a *prima facie* showing as a prerequisite to inquiry has been eliminated and *Slappy* places the burden of proof on the party exercising the

> challenge. On the other, our supreme court recently "reiterate[d] . . . what w[as] stated specifically in [*State v.*] *Neil*[, 457 So. 2d 481 (Fla. 1984)]: there is an initial presumption that peremptories will be exercised in a nondiscriminatory manner." *Windom v. State*, 656 So.2d 432, 437 (Fla. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995). This presumption implies that the party questioning a peremptory challenge has a burden of proof of some kind, despite language to the contrary in some of the cases.

Ratliff, 666 So. 2d at 1014-1015.

The State urges this Court to reestablish the principle that peremptories are presumptively exercised in a nondiscriminatory manner. Placing the burden of proof on the party exercising the peremptory challenge to show nondiscriminatory intent is in direct conflict with the above principle. Under current Florida law, the only requirements for placing that burden on the party exercising the peremptory challenge are a timely objection and a demonstration that the challenged person is a member of a distinct racial group. Windom. There is no requirement that the objecting party make any showing calling into doubt the principle that the striking party presumptively attempted to remove the venireperson for nondiscriminatory reasons. Thus, on a mere objection by the other side, the party exercising the peremptory challenge must prove a negative, that it is not striking the venireperson on the basis of that person's race. By doing so,

instead of adhering to the principle of presuming nondiscrimination, the procedures under current Florida law in practice assume the opposite by beginning with an assumption that the party is striking the venireperson on the basis of that person's race, i.e., for a discriminatory reason.

The conflict caused by placing the burden of proving nondiscrimination on the striking party can be resolved by instead placing the burden of proving discrimination on, and never removing it from, the objecting party, as in the federal system. The presumption that a striking party is removing a venireperson for a nondiscriminatory reason should remain intact until the objecting party proves otherwise. Thus, placing the burden on the objecting party to prove discrimination adheres to the longstanding principle that peremptory challenges are presumptively exercised in a nondiscriminatory manner.[3]

Adopting the federal standards has the additional practical advantage of a single unified procedure. As the First District stated in its opinion below, there is presently some confusion as to the applicable procedure when there is an allegation that a

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[3]It appears that the Petitioner concurs with the argument that this Court should adopt the federal procedure of placing the burden of proof to prove discrimination on the objecting party. Petitioner's Brief on the Merits, p. 12, 14, 16.

party has used a peremptory challenge in a discriminatory manner "because the *Slappy* opinion cites *Batson* with apparent approval, seemingly with the intention to adopt the federal procedure for the protection of state constitutional rights, as well." Ratliff, 666 So. 2d at 1012. See also Rivera v. State, 21 Fla. L. Weekly D805 (Fla. 4th DCA April 3, 1996). Such confusion can be eliminated by adopting a single set of procedures.

Moreover, it seems readily apparent that we cannot effectively implement the rules governing the exercise of peremptory challenges if there are conflicts in the presumptions and burdens of proof between federal and state law. It is simply impossible to simultaneously follow the conflicting presumption that peremptories are being constitutionally exercised versus the presumption that they are being unconstitutionally exercised. Similarly, it is not possible to simultaneously place the burden of proof on both parties.

Even if this Court were to decline the State's invitation to adopt the federal standards, the trial court's determination in this case that the State did not strike Mr. Flowers for impermissible reasons should nevertheless be upheld under Florida standards. Upon being given a race neutral reason for the peremptory challenge, "[p]art 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." Slappy, 522 So. 2d at 22 [emphasis added]. In Slappy, this Court further explained the trial court's role once it has received the complained-about party's reasons for the peremptory challenge:

> [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.

Id [emphasis added].

Furthermore, once the trial court has conducted a *Neil* hearing and has received and evaluated the complained about party's reasons for using the peremptory challenge, its determination of whether the peremptory challenge was racially motivated is vested with broad discretion. Files v. State, 613 So. 2d 1301, 1303 (Fla. 1992). As explained by this Court in Files, in Florida "an appellate court could rule on the appropriateness of the [striking party's] reason as a matter of law, if the appellate court believed that the reason, on its face, could never be a

racially neutral basis for peremptorily challenging a juror." Id at 1304. Thus, the first question for a Florida appellate court is whether the reason advanced by the striking party is an improper reason as a matter of law because it could be used as a pretext for improperly excluding minorities. Id. If the Florida appellate court finds that the State's reason is not invalid as a matter of law, "the issue then becomes whether the trial judge abused its discretion in accepting the [the striking party's] reasons." Id.

> As stated in *Reed*, we must rely on the superior vantage point of the trial judge, who is present, can consider the demeanor of those involved, and can get a feel for what is going on in the jury selection process. It is difficult, if not impossible, to establish a strict rule of law in this sensitive area and still "achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges." *Reed*, 560 So.2d at 206. The responsibility to apply these principles properly and eliminate racial prejudice in our jury selection process rests largely on our trial judges. Substituting an appellate court's judgment for that of the trial judge on the basis of a cold record is not a solution because it would provide an automatic appeal in every case where a prospective minority juror was challenged.

Id at 1305.

One of the reasons given by the State for striking Mr. Flowers was that he had trouble reading through the factual background history. It cannot be argued, and the Petitioner does not advance the argument, that the above reason is invalid as a

matter of law. Therefore, pursuant to Files, this Court should move on to the issue of whether the trial court abused its discretion in accepting this reason by the State as race-neutral.

Nothing in the record on appeal supports the Petitioner's argument that the trial court failed to critically evaluate the reason that Mr. Flowers had trouble reading the factual background. In support of his argument that the trial court abused its discretion in accepting this reason as race-neutral, the Petitioner argues that the reason lacks record support. However, contrary to the Petitioner's argument, the fact that he remained silent below and did not challenge the accuracy of the State's reason is evidence of the fact that Flowers had trouble reading the factual background. The Petitioner should be precluded from challenging this fact for the first time on appeal. Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991).

In Floyd, the State explained its reason for striking a black potential juror by alleging that when asked about the propriety of the death penalty, that juror had said that twenty-five years' imprisonment was sufficient punishment. 569 So. 2d at 1229. Although it conceded that it did not recall what the juror being

challenged had said on the subject of the death penalty and relying on the fact that the juror's answer was on the record, the trial court accepted the State's explanation as race-neutral. Id. The problem, however, was that the State's explanation was not true. Id. This court held that:

> There is no question that the state's explanation was race-neutral, and if true, would have satisfied the test established in *State v. Neil*, 457 So.2d 481 (Fla.1984), *clarified, State v. Castillo*, 486 So.2d 565 (Fla.1986), and *State v Slappy*, 522 So.2d 18, 22 (Fla. 1988), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). It is uncontroverted, however, that the explanation was *not* true. At oral argument, the state conceded that the record indicates that [the challenged juror] never made such a statement. Thus, we must determine the parameters of the trial court's responsibility to ascertain if the state has satisfied its burden of producing a race-neutral reason for the challenge.
>
> It is the state's obligation to advance a facially race-neutral reason that is supported by the record. If the explanation is challenged by opposing counsel, the trial court must review the record to establish record support for the reason advanced. However, when the state asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged. Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason. Here, the error was easily correctable. Had defense counsel disputed the state's statement, the court would have been compelled to ascertain from the record if the state's assertion was true. 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, and [the challenged juror] could not have been peremptorily excused. Because defense counsel failed to object to the

prosecutor's explanation, the *Neil* issue was not properly preserved for review.

Id. at 1229-1230 [emphasis added]. See also, Bowden v. State, 588 So. 2d 255, 229 (Fla. 1991), cert. denied, 503 U.S. 975, 112 S. Ct. 1596, 118 L. Ed. 2d 311 (1992) ("[B]ecause defense counsel failed to object to the reasons given for the excusal, the *Neil* issue has been waived.").

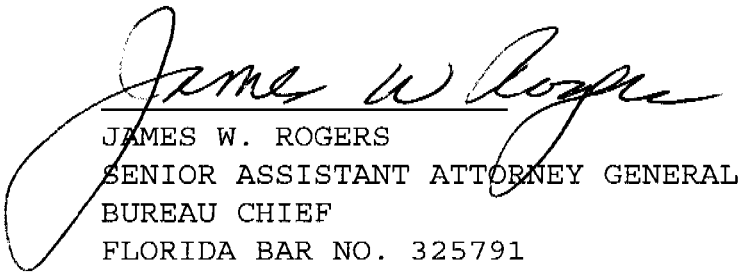
As in Floyd and Bowden, the Petitioner should be precluded from challenging for the first time on appeal the prosecutor's factual statement that Mr. Flowers had trouble reading the factual background history. This Court should find that the trial court did not abuse its discretion in accepting the State's reasons for striking Mr. Flowers and should uphold the First District's holding that nothing in the record supports the contention the Mr. Flowers was excluded from the jury on account of his race.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should answer the certified question as described in this brief and affirm the trial court's judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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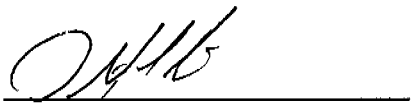

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to James T. Miller, Esquire, Corse, Bell and Miller, P.A., 233 East Bay Street, Suite 920, Jacksonville, Florida 32202, this 13th day of May, 1996

Patrick Martin

[A:\RATLIFF.BA --- 5/13/96,2:50 pm]