IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 87,397

SIDNEY TYRONE RATLIFF,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL,
A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

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PRELIMINARY STATEMENT

Petitioner, Sydney Tyrone Ratliff, was the Appellant in the First District Court of Appeal and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the First District Court of Appeal and prosecuted Petitioner in the Circuit Court. References to the opinion of the First District Court of Appeal (attached to this brief as Appendix I) will be "Appendix I," followed by the appropriate page number(s). Reference to the relevant parts of the trial transcript will be "T.," followed by the appropriate page number(s). References to the Record on Appeal, which includes the pleadings and orders filed in this cause, will be "R.," followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal certified to this Court the following question of great public importance:

> "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?" (Appendix I, pg. 15)

The opinion below contains most of the relevant facts for the certified question. However, some facts from the record below are necessary for the complete factual context of this case. Consequently, Petitioner will present the facts as stated in the opinion, coupled with relevant additions from the Record on Appeal.

During the voir dire in this case, the prosecutor sought to exercise a peremptory challenge against David Flowers who, like Petitioner, is African-American. (Appendix I, pg. 2). Defense counsel promptly asked the court to do a State v. Neil, 457 So. 2d 481 (Fla. 1984), inquiry. After Petitioner objected to the challenge of Mr. Flowers, the trial court made Petitioner give reasons for his challenge of several white jurors. (T. 101-107). The trial court then asked the prosecutor to give reasons for the peremptory challenge; the prosecutor responded:

> "Mr. Flowers appears to be [a] 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 accept 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 prosecutor did not ask Mr. Flowers any questions during voir dire. (T. 59-70). Petitioner asked Mr. Flowers if he had children living with him; he answered, "No." (T. 90). After the State gave its reasons as to Mr. Flowers, the trial court found the reasons were racially neutral; the court made no comments or factual findings about the reasons given by the State.

The State argued Mr. Flowers had trouble reading the biographical questionnaire (name, employment, marital status, etc. prior to jury service) during voir dire. The trial transcript establishes the following on this point:

> "My name is David Flowers. I live on the westside [of Jacksonville]. I have lived in Jacksonville for 34 years. 20 year in Alabama. I'm employed Lannie and Buck, warehouse storage. The kind of work I does forklift operation and supervision. I am single, I own my own home. I have no relatives or friends working in law enforcement and I have never served on a jury." (T. 44).

There was no discussion on the record about Mr. Flowers having trouble reading the questionnaire; the State did not ask the court to find, for the record, that Mr. Flowers did have trouble reading the questionnaire. The defense offered no evidence or comment on the propriety of the challenges. (Appendix I, pg. 3). The State had filed an Information charging Petitioner with sexual battery, attempted sexual battery and burglary. (R. 7-8). The victim was a 13 year old girl. (T. 133). The jury convicted Appellant of

burglary; there was a hung jury on the sexual battery charges. (T. 406-07). The trial court accepted the guilty verdict on burglary and the State entered a nolle prosequi as to the sexual battery charges. (T. 408). The Circuit Court sentenced Petitioner to 20 years as a habitual felony offender. (T. 433-34;R. 80-88).

SUMMARY OF ARGUMENT

The certified question asks who has the burden to prove or disprove facts concerning the reasons given to justify a peremptory challenge objected to on the basis of race. The opinion below suggests this Court reconsider its prior holdings which hold that once a party objects to a peremptory challenge, the trial court must make an inquiry under State v. Neil, 457 So. 2d 481 (Fla. 1984), and State v. Slappy, 522 So. 2d 18 (Fla. 1988). The opinion below also suggests that under State v. Slappy, supra, the burden of proof is upon the party making the challenges, not the party objecting to the challenge. In this case, the reasons given for a peremptory challenge of a black male (Petitioner is a black male) were either not related to this case, related to the ability of the juror to serve or were not supported by the record. (The trial court made no factual findings on the proffered reasons, including the fact that the juror apparently had trouble reading.) The First District Court of Appeal ignored controlling precedent and found that Petitioner did not carry his burden to establish the challenge was based upon race.

The real problem with this case is not which party had the burden to prove/disprove facts, but that the trial court failed to critically evaluate the reasons for the challenge and to make factual findings on the factual basis for the challenge (the juror had trouble reading the juror questionnaire). This Court should answer the certified question in the following manner: 1) Once any party objects to a peremptory challenge, the trial court must require race-

neutral reasons. This procedure is a bright-line rule which is easy to apply and avoids automatic reversals of a case when the trial court erroneously fails to make an inquiry. **See** State v. Johans, 613 So. 2d 1319 (Fla. 1993).; and 2) Once an inquiry begins, the party making the challenge will have to give neutral, reasonable and nondiscriminatory reasons. The trial court must critically evaluate the reasons and make any necessary factual findings; the trial court shall also consider the factors delineated in State v. Slappy to determine if the reasons are pretextual, not supported by the record nor related to the facts of the case. The party objecting to the challenge shall have the ultimate burden of persuasion on this issue.

For the reasons discussed in this brief, the above-described procedure will promote the fair use of peremptory challenges by all parties. The decision below was erroneous because under the present state of law, the State did not establish reasonable, race-neutral reasons which were in the record and related to the facts of this cause. Consequently, even if this Court does modify Florida law in the way suggested by the decision below, it should not apply it to this case.

ARGUMENT

ISSUE I

THE PARTY SEEKING TO EXERCISE A PEREMPTORY CHALLENGE, AFTER AN OBJECTION PURSUANT TO State v. Johans, 613 So. 2d 1319 (Fla. 1993), SHOULD RETAIN THE BURDEN OF PROOF TO DEMONSTRATE RACE-NEUTRAL REASONS FOR THE CHALLENGES, SUBJECT TO A TRIAL COURT'S CRITICAL EVALUATION OF THE REASONS BASED UPON FACT-FINDINGS SUPPORTED BY THE RECORD PURSUANT TO Files v. State, 613 So. 2d 1301 (Fla. 1992), AND State v. Slappy, 522 So. 2d 18 (Fla. 1988).

A. The issue presented by the certified question.

Petitioner respectfully submits the certified question in this case directly presents or indirectly implicates the following issues for this Court: 1) Should this Court recede from the opinion in State v. Johans, supra; what must a party demonstrate to require an inquiry into the reasons for a peremptory challenge pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984)?; 2) Once a party gives an explanation for a peremptory challenge, who has the burden to prove or disprove any factual support for the alleged nondiscriminatory reason (as in this case, the fact that a juror had difficulty reading a questionnaire)?; and 3) Once a party has given a reason for a peremptory challenge, how must the trial court evaluate the reason given and any arguments/contrary evidence against the proffered nondiscriminatory reason?

Petitioner will address each of these issues as they relate to the certified question. An answer to these three questions is necessary to answer the

certified question. Once Petitioner has discussed these issues, he will apply them to the facts of this cause.

B. This Court should adhere to its ruling in State v. Johans, 613 So. 2d 1319 (Fla. 1993).

As the First District Court of Appeal noted in its opinion, unless there are race-neutral reasons for excusal already on the record, a trial court must make an inquiry if a party objects on the grounds that even a single peremptory challenge is racially motivated. **See** Taylor v. State, 638 So. 2d 30 (Fla.); cert. denied, ___ U.S. ___, 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994); State v. Johans, 613 So. 2d 1319 (Fla. 1993); Reynolds v. State, 576 So. 2d 1300 (Fla. 1991). The decision below unquestionably used the opinions above to pose the certified question of what burden does an objecting party have when a simple objection requires the party exercising the challenge to offer a nondiscriminatory reason for the challenge - in other words, in light of State v. Johans, et. al, what burden, if any, does the objecting party have? The opinion of the First District Court of Appeal below discussed, in great detail, Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and proof of racial discrimination in employment cases (Title VII actions) concerning the issue of the burden of proof of the objecting party. Baston v. Kentucky, supra, is not directly controling for this cause because this Court has decided these issues under the Florida Constitution, not under the United

States Constitution. Florida is free to give greater protection in this area than the United States Supreme Court. As Petitioner will discuss below, the Title VII cases are not applicable to a *voir dire* situation where the opportunity of the objecting party to discover direct or indirect evidence of racial discrimination is extremely limited.

The First District Court of Appeal did not directly suggest that this Court overrule State v. Johans, supra. However, the opinion below held that because a need for a *prima facie* showing as a prerequisite for an inquiry has been eliminated, the burden of proof is placed upon the party exercising the challenge. (Appendix I, pg. 14). Petitioner will address this point below.

The opinion below also recognized the practical advantages in the procedure of requiring an inquiry if an objection is raised. (Appendix I, pg. 13). This Court should adhere to its ruling in State v. Johans, supra. This procedure is a bright line rule which gives clear and certain guidance to the trial courts. This bright line rule eliminates the need for any party to demonstrate a substantial likelihood that racial discrimination was the reason for the challenge. This procedure eliminates *per se* reversals when a trial court erroneously refuses to conduct an inquiry. It is better to err on the side of an inquiry so that the record will then reflect whether a challenge was appropriate. If no inquiry is made, then an appellate court must reverse because it will have no method to evaluate whether the challenge was appropriate. In addition, such a procedure will not unfairly place any burden

of proof as Petitioner will demonstrate below. The procedure established by State v. Johans is not compatible with any burden of proof in this area because the trial court has the primary responsibility to resolve the question, as a matter of fact, of whether a party is discriminating on the basis of race.

C. This Court should adhere to its holding in State v. Slappy, supra.

The opinion below states that because the objecting party need not make out a *prima facie* case of discrimination, this Court's opinion in State v. Slappy, supra, shifts the burden of proof to the party exercising the challenge. Petitioner does recognize that in State v. Slappy this Court presumed that the objecting party had raised a sufficient inference of discrimination so as to require the party exercising the challenge to provide specific racially neutral reasons for the challenge. Consequently, this fact raises the question of whether State v. Slappy and State v. Johans, supra, are compatible? Stated another way, is it fair to require the party exercising the challenge to rebut a possible inference of discrimination when the objecting party has not had to make out a *prima facie* case of an inference of such discrimination? The holdings of this Court that there is a presumption that a party will exercise a peremptory challenge in a nondiscriminatory manner complicates the resolution of these questions. **See** Windom v. State, 656 So. 2d 432 (Fla. 1995).

In State v. Slappy, supra, this Court devised guidelines for the trial court to evaluate whether proffered nondiscriminatory reasons for peremptory

challenges were in fact racially motivated. This Court noted that part of the trial judge's role in evaluating the prosecution's explanation for a peremptory challenge is to evaluate the credibility of the person offering the explanation as well as the credibility of the asserted reasons in light of the circumstances of the case and the total course of the voir dire in question; the trial court had to determine, as a matter of fact, that the proffered reasons were race-neutral and reasonable and not a pretext - the trial judge must not merely accept the proffered reasons at face value.

Petitioner suggests there is a way to reconcile any inconsistencies between State v. Johans, supra, and State v. Slappy, supra. Given the invidious and sometimes subtle and difficult to detect nature of racial prejudice, this Court should continue to permit a party to request a Neil inquiry by an objection. This Court in State v. Slappy, supra at 20, noted:

> "The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws. Unfortunately, the nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives." **See** Batson, 476 U.S. at 96, 106 S. Ct. at 1722-23.

It is simply sometimes impossible to establish, in the context of a voir dire, that a party is exercising a peremptory challenge based upon race. The hidden motive of the party making the challenge may not be apparent or obvious; the objecting party may have to guess as to whether the other party

is making a discriminatory challenge. The analogy to employment discrimination cases used in the opinion below is not applicable to this case. In an employment discrimination case, the plaintiff will have some direct and indirect knowledge of the alleged discrimination. A plaintiff can use discovery devices (interrogatories, requests for admissions, depositions) to establish proof of discriminatory intent. In the context of voir dire, the objecting party simply cannot usually establish such direct evidence of intent.

Once a party objects, the other party should have the burden to offer a nondiscriminatory reason. If the party is not discriminating, then this task should be relatively easy. Petitioner agrees with the opinion below that the burden of persuasion should remain with the objecting party. The objecting party must convince the trial court that the proffered reasons, based upon the facts in the record, are not racially-neutral or reasonable.

The certified question states who has the burden to prove (or disprove) facts on which the objector relies. Petitioner respectfully suggests that the certified question is awkwardly and imprecisely worded. Even under the cases cited in the opinion below, the opposite party does not have any burden to prove facts proffered by the other party. For example, if the State proffers a certain reason for a challenge, then that reason must be reasonable, not a pretext and supported by the record. Consequently, the issue of who must "prove" the facts is not dispositive of the question. This Court in State v. Slappy, supra, developed factors for the trial court to use to determine whether

the proffered reason is race-neutral, reasonable and not a pretext. Factual support for the reason must be in the record. Consequently, the answer to the question of who must prove (disprove) facts relied upon must be the party asserting the fact, coupled with record support for that fact.

The question of who has the burden to "prove" a fact is somewhat irrelevant in this context because this Court has resolutely held that the trial court must: 1) evaluate the credibility of the person offering the reasons for the challenge; and 2) evaluate the credibility of the reasons themselves in light of the facts and circumstances of the case and the factors delineated in State v. Slappy. **See** Turner v. State, 645 So. 2d 446 (Fla 1994).

D. The trial court has the ultimate responsibility to decide whether a peremptory challenge is nondiscriminatory.

The ultimate arbiter of whether there has been racial discrimination is the trial court. This Court has held that the trial court is in the superior vantage point to consider the demeanor of those involved. Files v. State, 613 So. 2d 1301 (Fla. 1992). The trial court must also evaluate the credibility of the person offering the explanation as well as the credibility of the asserted reasons. The trial court has the duty to evaluate critically the reasons given and make any necessary factual findings which support the finding concerning the reasons. **See** Givens v. State, 619 So. 2d 500 (Fla. 1st DCA 1993), (proffered reason that juror was not able to read juror form correctly was

improperly accepted at face value with no critical evaluation or factual support in the record); **See Also** Gooch v. State, 605 So. 2d 570 (Fla. 1st DCA 1992); Brown v. State, 597 So. 2d 369 (Fla. 3d DCA 1992).

Once the trial court critically evaluates the proffered reasons and makes any necessary factual findings attendant to the critical evaluation, then the ultimate burden of persuasion will rest upon the party objecting to the peremptory challenge. A requirement that the objecting party prove or disprove a fact relied upon by the party exercising the challenge is illogical and impractical. Given the factual circumstances of voir dire and this Court's requirement that all factual support for arguments for/against a challenge must be on the record, then the party asserting such a fact has the burden to produce it. Once the party produces such a "fact," the trial court must then critically evaluate the fact to see if it is supported by the record and not a pretext under State v. Slappy, supra.

The First District Court of Appeal, in its opinion, discussed, in some detail, the fact that defense counsel did not question nor comment on the legitimacy or the accuracy of any reason given by the State, especially the reason that Mr. Flowers had trouble reading the juror questionnaire. Perhaps this concern led the First District to certify the question regarding the burden to prove (disprove) facts relied upon for a peremptory challenge.

The First District Court of Appeal misanalyzed this problem. If the trial court had performed its duty and made a critical evaluation of the reason

(inability to read the questionnaire) and made any necessary factual findings (Mr. Flowers did have trouble reading the questionnaire), then there would be no issue in this case. Assume that, in this case, defense counsel argued that Mr. Flowers did not have any trouble reading the questionnaire. In such a case, if the court simply stated (as he did in this case) the reason was neutral, then there would still be no factual finding as to whether the proffered reason had support in the record.

The opinion below seems to require defense counsel to dispute the assertion by the State. Although defense counsel should have probably done so, the lack of a dispute does not relieve the trial court of its duty to evaluate the reason. What if defense counsel was busy or distracted and did not hear whether Mr. Flowers had trouble reading the questionnaire? What if defense counsel and the State Attorney had a difference of opinion as to whether Mr. Flowers had difficulty reading the form. The court reporter apparently had no difficulty transcribing Mr. Flowers' reading of the questionnaire.

The ultimate duty to resolve these factual matters should always be with the trial court. If the State proffers a reason for a peremptory challenge, then the trial court should critically evaluate it.

In summary, Petitioner asserts this Court should answer the certified question in the following manner by establishing these procedures: 1) A trial court must still make a Neil inquiry upon the valid objection of any party, unless there are race-neutral reasons for excusal already on the record.; 2)

Once a party objects to a peremptory challenge, the party exercising the challenge must come forward with a reasonable, race-neutral and nondiscriminatory reasons. The party exercising the challenge must establish, by record evidence, any factual support for the proffered reason. The objecting party may offer any contrary record support against the challenge.; and 3) Once the party exercising the challenge proffers a nondiscriminatory reason, the trial court must critically evaluate the reasons under State v. Slappy, supra, and make any necessary factual findings to support the acceptance/rejection of the peremptory challenge. The ultimate burden of persuasion as to the ruling on the peremptory challenge rests with the party objecting to the peremptory challenge.

E. The case law applied to the facts of this case.

The First District Court of Appeal essentially ruled against Petitioner because there was no record support for the contention that the State excluded Mr. Flowers on account of his race. This view significantly misinterprets this Court's holding in State v. Slappy, supra, and its progeny. Under the current state of the law, once Petitioner objected to the challenge of Mr. Flowers, the State had to produce neutral, reasonable, nondiscriminatory reasons for the challenge. Under the present state of the law, the trial court had to critically evaluate these reasons and determine that they were reasonable, not a pretext and supported by the record and related to the facts

of this cause. Consequently, even if this Court were to accept the opinion of the First District Court of Appeal concerning the burden of proof of the objecting party, this Court should not apply this change in the law to this case. At the time of the trial in this case, the law in Florida was well-established that once a party objected to a peremptory challenge, the party using the challenge had to carry its burden under State v. Slappy.

In this case, the State did not carry its burden of providing reasonable, nondiscriminatory reasons supported by the record. The opinion below stated, "While we agree that some of the reasons offered bore no relationship to the prospective juror's ability to sit, we find no evidence of racial bias." (Appendix I, pg. 1). This statement apparently concedes that the fact that Mr. Flowers' age and that he was single and had no children were not reasonable, race-neutral reasons related to this case. Marital status, if not connected to the facts of a case, is not a race-neutral reason. **See** Givens v. State, 619 So. 2d 500 (Fla. 1st DCA 1993); Knight v. State, 559 So. 2d 327 (Fla. 1st DCA); rev. den., 574 So. 2d 141 (Fla. 1990). The fact that Mr. Flowers had no children is simply not logically connected to this case. **See** State v. Slappy, supra, at 22 (State's reason which is unrelated to facts of case tends to show impermissible pretext or lack of support in the record); Givens v. State, supra, at 502.

In this case, the trial court simply did not critically evaluate these reasons. After the State gave its reasons, the trial court found, without

comment nor explanation, that the reasons were racially-neutral. (T. 108). Although these reasons are facially race-neutral, this Court has required some critical evaluation of the reasons to prevent the parties from using facially race-neutral reasons as a pretext. **See** Turner v. State, supra; Green v. State, 583 So. 2d 647 (Fla. 1991). The fact that these reasons (single, no children) applied to other jurors not challenged by the State and that these reasons did not reasonably and logically relate to the facts of this case is strong evidence of a pretext under State v. Slappy.

The State in this case also stated that Mr. Flowers had trouble reading through the juror background questionnaire. (T. 107). There is no record support for this assertion. The trial transcript indicates no trouble by Mr. Flowers. (T. 44). The trial court made no factual finding on this issue. The trial court in this case abandoned its duty to weigh the credibility of the reasons and critically evaluate them to determine if the record supported them. If the trial court had done its job in this case, most likely this case would not be before this Court. Once Petitioner objection to the State's challenge of Mr. Flowers, the trial court first made Petitioner (without an objection from the State) give reasons for his challenges. This procedure is evidence that the trial court did not critically evaluate the objection to the challenge of Mr. Flowers. Once the State gave its reasons, the court simply found the reasons to be neutral, without any further comment.

Pursuant to the cases cited and discussed above, the State did not

carry its burden to establish that its challenge was reasonable, race-neutral and not a pretext. Consequently, this Court should reverse the judgment of the First District Court of Appeal and remand this cause for a new trial.

CONCLUSION

This Court should answer the certified question as described in this brief and remand this case for a new trial.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been delivered, by mail, to the Patrick Martin, Office of the Attorney General, Department of Legal Affairs, The Capitol Building, Tallahassee, FL, this 18th day of March, 1996.

James T. Miller

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 87,397

SIDNEY TYRONE RATLIFF,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX I
Opinion of First District Court of Appeal
Dated 1/23/96

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SIDNEY TYRONE RATLIFF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 94-2644

Opinion filed January 23, 1996.

An appeal from the Circuit Court for Duval County.
R. Hudson Olliff, Judge.

James T. Miller of Corse, Bell & Miller, P.A., Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General; Patrick Martin, Assistant Attorney General, Tallahassee, for Appellee.

BENTON, J.

Convicted of burglary with assault, Sidney Tyrone Ratliff seeks reversal on grounds the trial court erred in allowing a peremptory challenge to an African-American juror designate, and in accepting as racially neutral the reasons the prosecutor advanced for the challenge. While we agree that some of the reasons offered bore no relationship to the prospective juror's ability to sit, we find no evidence of racial bias. We also reject appellant's contention that the trial court erred in excluding certain testimony from trial as irrelevant (a contention we do not believe merits further discussion), certify

a question concerning the proper procedure when a litigant objects that an opposing party seeks to exercise a peremptory challenge for constitutionally impermissible reasons, and affirm.

Peremptory Challenge

During voir dire, the prosecutor sought to exercise a peremptory challenge against David Flowers, who like Mr. Ratliff is African-American.[1] Defense counsel promptly "ask[ed] the court to do a Neil inquiry."[2] Called upon to state reasons for the peremptory challenge to Mr. Flowers, the prosecutor responded: "Judge, Mr. Flowers appears to be a single male in his forties with no children. He also needed help, trouble reading through the factual background history."

Defense counsel did not respond by questioning the legitimacy[3] or accuracy of any reason articulated by the state

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[1]Mr. Ratliff's race is immaterial to our analysis. See J.E.B v. Alabama, __ U.S. __, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); Barwick v. State, 547 So. 2d 612 (Fla. 1989); Kibler v. State, 546 So. 2d 710 (Fla. 1989). That the victim was also African-American is likewise immaterial.

[2]In State v. Neil, 457 So. 2d 481, 486 (Fla. 1984), the supreme court interpreted Article I, Section 16 of the Florida Constitution ("the accused . . . shall have the right to . . . trial by impartial jury") to require judicial inquiry into the reasons motivating peremptory challenges whenever there was "a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race." On finding such a likelihood, the court held, "the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race." Id. at 486-87.

for its challenge to Mr. Flowers. The trial court ruled: "I find the reasons given by both state and defense[4] are racially neutral reasons and . . . I deny your challenge [to the prosecutor's right to exercise the peremptory challenge]." The record does not reveal the race of the juror who sat in Mr. Flowers' stead.

Before the jury from which Mr. Flowers was excluded was sworn and before other members of the venire had been dismissed, defense counsel accepted the jury panel "subject to [our] previously stated objections." "[A]ccepting a jury subject to an earlier Neil objection is sufficient to preserve the issue of alleged racial bias in the exercise of peremptory challenges." Suggs v. State, 620 So. 2d 1231, 1232 (Fla. 1993); Mitchell v. State, 620 So. 2d 1008 (Fla. 1993). See Joiner v. State, 618 So. 2d 174 (Fla. 1993).

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[3]Gender, by itself, is not a legitimate reason for a peremptory challenge. J.E.B.; Abshire v. State, 642 So. 2d 542 (Fla. 1994). But appellant makes no contention that Mr. Flowers was wrongfully excluded on account of his gender. In the trial court, Mr. Ratliff never stated any objection to the striking of Mr. Flowers on the basis of his gender. We do not, therefore, reach any question concerning Mr. Flowers' gender.

[4]The defense offered no evidence on the propriety of the prosecution's challenges. The trial court required defense counsel to give reasons for each peremptory challenge the defense had exercised, even though the prosecutor had not questioned any of the defense challenges. We are aware of no authority for inquiring of a party as to the basis for an unquestioned peremptory challenge.

On appeal, Mr. Ratliff contends that the trial court erred in allowing the peremptory challenge, arguing that the reasons the state advanced for the challenge--identified in appellant's brief as Mr. Flowers' age, marital status, lack of children, and purported difficulty in reading the juror questionnaire--had no bearing on the facts of the case, that there was no record basis for the assertion that Mr. Flowers had difficulty reading,[5] and

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[5]Defense counsel did not attempt to alert the trial court to any factual dispute about Mr. Flower's reading ability. The present case is, therefore, distinguishable from Givens v. State, 619 So. 2d 500, 501 (Fla. 1st DCA 1993), where "defense counsel's response was sufficient to put the trial judge on notice that the state's [purported] basis for exercising its peremptory challenges upon certain jurors, and its explanations thereof, were being questioned." There defense counsel, whose "apparent attempt to challenge the state's reasons was abruptly cut off by the trial judge's remark, 'I have ruled on it,'" id., "took an exception to that ruling." Id.

The record does not reflect the "trouble reading" Mr. Flowers supposedly experienced. But "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." Floyd v. State, 569 So. 2d 1225, 1229 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991). State v. Fox, 587 So. 2d 464, 464-65 (Fla. 1991).

In Bowden v. State, 588 So. 2d 225 (Fla. 1991), cert. denied, 503 U.S. 975, 112 S. Ct. 1596, 118 L. Ed. 2d 311 (1992), too, our supreme court found that a factual issue had not been preserved for review:

> Although the fact that a juror has a relative who has been charged with a crime is a race-neutral reason for excusing that juror, Bowden complains that this reason is not supported by the record. The state counters that the information concerning the juror's relative was gleaned from the jury questionnaire. We are unable to determine whether such information was contained in the questionnaire because the jury questionnaires were not made a part of the record.

that the trial court accepted the proffered reasons without critical evaluation.

Inquiry Necessary

Unless there are "race-neutral reasons for excusal . . . already on the record," Taylor v. State, 638 So. 2d 30, 33 (Fla.), cert. denied, __ U.S. __, 115 S. Ct. 518, 130 L. Ed. 2d. 424 (1994), a trial court must make inquiry if a party objects on grounds that even a single peremptory challenge is racially motivated. State v. Johans, 613 So. 2d 1319 (Fla. 1993); Reynolds v. State, 576 So. 2d 1300 (Fla. 1991). That is what happened here. "[U]nless a court can cite specific circumstances in the record that eliminate all question of discrimination, it must conduct an inquiry." Valentine v. State, 616 So. 2d 971, 974 (Fla. 1993). In Florida courts, defense counsel as well as prosecutors may be called upon to justify peremptory challenges, State v. Aldret, 606 So. 2d 1156 (Fla. 1992), and the issue may also arise in civil cases. Hall v. Daee, 602 So. 2d 512 (Fla. 1992).

Reviewing courts "must rely on the superior vantage point of the trial judge, who is present, can consider the demeanor of

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> However, we find that, because defense counsel failed to object to the reasons given for the excusal, the Neil issue has been waived.

Bowden, 588 So. 2d at 229. Under Bowden, Fox, and Floyd, when the trial court relies on an uncontested factual predicate, an appeals court cannot make a de novo determination that the predicate is factually inaccurate.

those involved, and can get a feel for what is going on in the jury selection process." Files v. State, 613 So. 2d 1301, 1305 (Fla. 1992). Whether the prosecutor is discriminating on the basis of race is a question of fact, one which the trial court has primary responsibility to resolve.

> 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.

State v. Slappy, 522 So. 2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988). "While these issues encompass more than 'basic, primary or historical facts,' their resolution depends heavily on the trial court's appraisal of . . . credibility and demeanor." Thompson v. Keohane, __ U.S. __, 64 U.S.L.W. 4027, 4030 (Nov. 29, 1995). Unless clearly erroneous, the trial court's findings concerning discriminatory intent will be upheld.

Florida Procedures

The Florida Supreme Court laid down procedures initially to protect the right of the accused under the Florida Constitution to an impartial jury. State v. Neil, 457 So. 2d 481 (Fla. 1984). See Kibler v. State, 546 So. 2d 710, 712 (Fla. 1989) (declaring Neil "unmistakably based" on the Florida Constitution). Antedating Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the decision in Neil put the burden of proof

on the proponent of a peremptory challenge--the party denying racial discrimination--"to show that the questioned challenges were not exercised solely because of the prospective jurors' race," 457 So. 2d at 486-87, but only if the questioning party first showed "a substantial likelihood" that the challenge sprang from racial prejudice.

By the time the court decided Slappy, Florida case law required no inquiry or evaluation until and unless the party questioning the challenge proved a substantial likelihood that racial discrimination was the reason for the questioned challenge, but the decision in Batson had come down. The Slappy court said:

> Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts. At this juncture, Neil imposes upon the other party an obligation to rebut the inference created when the defense met its initial burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its peremptory challenges. Batson, 476 U.S. at 96-98 & n.20, 106 S.Ct. at 1722-24 & n.20. While the reasons need not rise to the level justifying a challenge for cause, they nevertheless must consist of more than the assumption
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> > that [the veniremen] would be partial to the defendant because of their shared race.... Nor may the [party exercising the challenge] rebut the defendant's case merely by denying that he had a discriminatory motive or "affirming his good faith in individual selections." ... If these general assertions were accepted as rebutting a

> ... prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." Id. at 97-98, 106 S.Ct. at 1723, (quoting Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972), and Norris v. Alabama, 294 U.S. 587, 598, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935)).

Slappy, 522 So. 2d at 22 (emphasis added). The court has since reiterated that a "Neil inquiry requires the person exercising the questioned peremptories to show that the challenges were not exercised solely on the basis of the prospective juror's race." Alen v. State, 616 So. 2d 452, 453 (Fla. 1993) (emphasis added).

Batson v. Kentucky

In Batson, the Court spelled out different procedures for vindication of prospective jurors' federal rights to equal protection of the laws. See Purkett v. Elem, ___ U.S. ___, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995) ("the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike"); Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); Batson. Shifting the burden of proof in the manner set out in Slappy is inconsistent with the procedure prescribed in Batson. Confusion arises 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. Certainly a unified procedure has practical advantages.

In the employment context,[6] Florida courts have long been

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[6]Where racial discrimination in employment is alleged, it is incumbent on the plaintiff or petitioner--the party claiming racial discrimination--to establish a prima facie case. Failure to establish a prima facie case of race discrimination ends the inquiry. Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987). "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981). But the mere articulation of a racially neutral, legitimate reason for the employer's action dispels the presumption.

With respect to discharge, nonhire, and the like, the defendant or respondent need only articulate a legitimate, nondiscriminatory reason for the termination or other action, in order to place upon the plaintiff or petitioner the burden of going forward with proof that the asserted reason is pretextual. National Indus., Inc. v. Commission on Human Relations, 527 So. 2d 894 (Fla. 5th DCA 1988). Like plaintiffs in Title VII actions, petitioners for relief under Florida's Human Relations Act bear the burden of persuasion at all times on the ultimate fact of discrimination. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991).

> Pursuant to the Burdine formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which once established raises a presumption that the employer discriminated against the employee. If the presumption arises, the burden shifts to the employer to present sufficient evidence to raise a genuine issue of fact as to whether the employer discriminated against the employee. The employer may do this by stating a legitimate, nondiscriminatory reason for the employment decision; a reason which is clear, reasonably specific, and worthy of credence. Because the employer has the burden of production, not one of persuasion, which remains with the employee, it is not required to persuade the trier of fact that its decision was actually motivated by the reason given. If the employer satisfies its burden, the employee must then persuade the fact finder that the proffered reason for the employment decision was a pretext for

familiar with the procedure the federal supreme court adopted in Batson for deciding whether particular prosecutorial peremptory challenges effect invidious discrimination:

> In Batson, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. . . . First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Id., at 96-97, 106 S.Ct., at 1722-1723. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Id., at 97-98, 106 S.Ct., at 1723-1724. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Id., at 98, 106 S.Ct., at 1723.

Hernandez, 500 U.S. at 358-59, 111 S. Ct. at 1865-66 (emphasis added). Upon a prima facie showing that racial prejudice

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> intentional discrimination. The employee may satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief. If such proof is adequately presented, the employee satisfies his or her ultimate burden of demonstrating by a preponderance of evidence that he or she has been the victim of intentional discrimination.

Chandler, 582 So. 2d at 1186. Ever since the decision in School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981), federal cases have been looked to for guidance in this area. See Anderson v. Lykes Pasco Packing Co., 503 So. 2d 1269 (Fla. 2d DCA 1986). Claims of intentional race discrimination in the employment context are treated within the procedural framework set out in Burdine and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

motivates peremptory challenges, the party exercising the questioned peremptory challenges has an "obligation to advance a facially race-neutral reason that is supported in the record." Floyd v. State, 569 So. 2d 1225, 1229 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); Williams v. State, 574 So. 2d 136, 137 (Fla. 1991). But see, e.g., State v. Fox, 587 So. 2d 464 (Fla. 1991). The requirement to advance such a reason[7] does not, however, under Batson, entail any shifting of the burden of proof.

Once the prosecutor offers a racially neutral basis for his exercise of peremptory challenges, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination," Batson, 476 U.S. at 98, 106 S. Ct. at 1724, assuming evidence of discrimination has been adduced. Under Batson, only if there is evidence[8] that the reasons advanced are

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[7] A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.
Hernandez, 500 U.S. at 360, 111 S. Ct. at 1866.

[8] The trial court must decide whether reasons offered for the challenges are pretextual when the evidence (whether adduced before or after the inquiry) makes out a prima facie showing. See United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994), cert. denied, __ U.S. __, 115 S. Ct. 1439, 131 L. Ed. 2d 318 (1995); United States v. Vasquez-Lopez, 22 F.3d 900, 901 (9th Cir.), cert. denied, __ U.S. __, 115 S. Ct. 239, 130 L. Ed. 2d

pretextual is the critical evaluation about which Slappy and other cases teach necessary. Only then, under the federal cases, is it "not sufficient that the state's explanations for its peremptory challenges are facially race neutral [so that t]he state's explanations must be critically evaluated by the trial court to assure they are not pretexts for racial discrimination." Roundtree v. State, 546 So. 2d 1042, 1045 (Fla. 1989). "It is not until the third step that the persuasiveness of the justification becomes relevant--the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. Batson, supra, at 98, 106 S.Ct., at 1723; Hernandez, supra, at 359, 111 S.Ct., at 1865 (plurality opinion)." Purkett, __ U.S. at __, 115 S. Ct. at 1771 (emphasis added).

In describing shifting burdens of proof, Slappy proceeded on the assumption that the initial presumption of nondiscrimination had already been overcome. Since the decision in Slappy,

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162 (1994); United States v. Branch, 989 F.2d 752, 755 (5th Cir.), cert. denied sub nom. Thompson v. U.S., __ U.S. __, 113 S. Ct. 3060, 125 L. Ed. 2d 742 (1993); United States v. Casper, 956 F.2d 416, 418 (3d Cir. 1992); United States v. Moore, 895 F.2d 484, 485 (8th Cir. 1990); United States v. Grandison, 885 F.2d 143, 146 (4th Cir. 1989), cert. denied, 495 U.S. 934, 110 S. Ct. 2178, 109 L. Ed. 2d 507 (1990). See generally United States v. Krout, 66 F.3d 1420, 1428 (5th Cir. 1995) (seven of eleven jurors stricken peremptorily were Hispanic); Cochran v. Herring, 43 F.3d 1404, 1410-12 (11th Cir.) (seven of fourteen peremptory challenges used to strike seven of nine blacks on forty-two-member venire), modified on reh'g., 61 F.3d 20 (11th Cir. 1995); United States v. Cooper, 19 F.3d 1154, 1159 (7th Cir. 1994) (four of five peremptory challenges directed to blacks).

however, in order to lay down "a procedure that gives clear and certain guidance to the trial courts in dealing with peremptory challenges," Johans, 613 So. 2d at 1321, our supreme court has held that "a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." Id. Moving straight to the inquiry streamlines the procedure.

Dispensing with the initial requirement of a prima facie showing of racial discrimination, the Florida cases sanction a procedure which resembles what in fact transpired in the Hernandez case:

> The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). The same principle applies under Batson. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

Hernandez, 500 U.S. at 359, 111 S. Ct. at 1866. Beginning with step two moves the trial forward more expeditiously. The lack of a requirement to make a prima facie showing before making inquiry does not render the Florida procedure incompatible with the federal procedure.

But, now 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. __, 1995

WL 588769 (Dec. 4, 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. Accordingly, we certify the following as a question of great public interest:

> 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?

Here appellant made neither a preliminary nor any other showing that racial prejudice contributed in any way to the only peremptory challenge he questioned on grounds of racial discrimination. That the challenge to Mr. Flowers was allowed affords no basis for overturning appellant's conviction, since nothing in the record supports appellant's contention that Mr. Flowers was excluded from the jury on account of his race.

Affirmed.

ERVIN and VAN NORTWICK, JJ., CONCUR.