IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 88,192

LEONARD S. PERRY,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Perry v. State, 21 Fla. L. Weekly D1286 (Fla. 1st DCA May 20, 1996). The certified question is also before this Court from Simmons v. State, 668 So. 2d 654 (Fla. 1st DCA 1996), *review pending*, case no. 87,618.

Respondent will also bring a trial issue to this Court, which was affirmed by the lower tribunal without comment.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation. Respondent wishes to add the following facts, which are relevant to Issue II.

At jury selection on December 4, 1995, the state was permitted to exercise a peremptory challenge against Mr. Wells:

> MR. TRENT: I'll strike Mr. Wells.
>
> MS. PAQUETTE: I want to make a Neil challenge and note for the record that my client is a black male and so is Mr. Wells. I would ask the state to give a race neutral reason for striking this juror.
>
> MR. TRENT: He is a pastor of a church. I do not want a minister on the jury.
>
> THE COURT: The court finds that to be a race neutral reason. (T 114).

Mr. Wells lived on the north side of town for 22 years. He was employed by JEA as an operator with repair, but also was a pastor (T 73). He had served on a civil jury before (T 74). His church was the Circle of Faith Ministry, and he had been an associate minister of other churches (T 84). He had a friend who had been arrested eight years ago, but who had been fairly treated by the system (T 91-92). He had had a home burglary, but that would not affect his ability to serve on the jury (T 94).

The state also exercised a peremptory challenge against

Mr. Mosley:

> MR. TRENT: I guess that would put us in the same position for Mosley.
>
> MS. PAQUETTE: I make the same challenge that he's also a black male. I believe the reason is pretextural. (T 114).

Mr. Mosley lived on the west side of town for 25 years. He too was a minister (T 78). His church was on the south side of town, and he had been there for 20 years (T 84). His church had been burglarized, and that would not affect his ability to serve on the jury (T 96-97).

At the end of jury selection, the court denied respondent's motions for mistrial and to strike the panel:

> THE COURT: Then that's the jury. How about the alternate? The alternate would be Tolliver.
>
> MR. TRENT: That's fine.
>
> MS. PAQUETTE: We have no objection. Judge, for the record we're not accepting the jury because of the Neil challenge. I guess we would move to strike the whole panel for that.
>
> THE COURT: Your motion is denied.
>
> MS. PAQUETTE: Then we would move for a mistrial.
>
> THE COURT: Your motion for mistrial is denied. (T 114).

The lower tribunal affirmed this procedure without comment.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that petitioner's request for relief should be denied. Respondent's sentence of 12 months in jail and community control under the 1994 sentencing guidelines was illegal, because it exceeded the recommended sanction of nonstate prison, and no reasons for departure were given.

While the law is not quite as clear under the 1994 guidelines as it was under the pre-1994 guidelines, a reading of the new rule shows the intent of the framers to preclude both county jail and community control when the scoresheet calls for nonstate prison sanctions.

The four pillars, which supported this Court's decision under the former sentencing guidelines in State v. Davis, 630 So. 2d 1059 (Fla. 1994), carry over to the new rule.

This Court should answer the certified question in the affirmative and approve the decision of the lower tribunal.

Respondent will also bring a trial issue to this Court, since this Court has jurisdiction to reverse on other issues when it accepts review of a certified question. Feller v. State, 637 So. 2d 911 (Fla. 1994).

The trial court should not have accepted at face value the prosecutor's reason for using two peremptory challenges on two black ministers. The reason that he did not want any ministers

on the jury is not race-neutral and lumps them in the same category with schoolteachers and social workers. The reason that he did not want any ministers on the jury cannot be critically evaluated because the prosecutor never asked how that vocation would affect the jurors' ability to serve.

The remedy for the racially discriminatory exercise of a prosecutor's two peremptory challenges is to grant respondent a new trial.

IV ARGUMENT

ISSUE I

THE RULE IN STATE v. DAVIS, 630 So. 2d 1059 (FLA. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, IS APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES.

Petitioner does not dispute that the law in effect prior to January 1, 1994, prohibited one in respondent's position from receiving community control and jail time when the scoresheet called for any nonstate prison sanction. In State v. VanKooten, 522 So. 2d 830 (Fla. 1988), this Court held that when the guidelines cell calls for community control or incarceration, either community control or incarceration may be imposed, but not both. Otherwise, the sentence constitutes a departure for which written reasons are absolutely required. Pope v. State, 561 So.2d 554 (Fla. 1990).

This Court reaffirmed the viability of VanKooten in State v. Davis, *supra*, and in Felty v. State, 630 So. 2d 1092 (Fla. 1994). Respondent submits the four pillars supporting State v. Davis carry over to the new rule.

State v. Davis was founded upon four pillars. First, this Court in State v. VanKooten, *supra*, had interpreted "or" to mean "or," where the guidelines called for community control or 12-30 months, and this Court in State v. Davis reaffirmed that view. *See also* Felty v. State, *supra*.

Second, under the one peculiar range in the former

guidelines rule, which called for community control or 12-30 months, when a defendant fell into that recommended range, he could either receive 12-30 months incarceration or community control, but not both.

There is no similar "community control or 12-30 months" provision in the new rule. But according to the new guidelines rule, a point total of less than 40 calls for a nonstate prison sanction. Fla. R. Crim. P. 3.702(d)(16) provides:

> If the total sentence points are less than or equal to 40, the recommended sentence, absent a departure, shall not be state prison.

Thus, nonstate prison sanctions still mean nonstate prison sanctions.

Third, State v. Davis was also founded upon the committee note to the old guidelines rule, Fla. R. Crim. P. 3.701(d)(8), which defined "nonstate prison sanction" as:

> any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone, or any nonincarcerative disposition.

There is no definition of "nonstate prison sanction" in the new guidelines rule, so we may use the former definition in construing the new rule.

Fourth, State v. Davis was also founded upon the committee note to the old guidelines rule, Fla. R. Crim. P. 3.701(d)(13), which cautioned that:

> Community control is not an alternative sanction from the recommended range of any nonstate prison sanction ... .

After examining the committee notes, this Court in State v. Davis concluded:

> Thus, nonstate prison sanctions, which include county jail time, community control, and incarceration are disjunctive sentences. Combining any or all of them creates a departure sentence for which written reasons must be given.

630 So. 2d at 1060.

There is no similar committee note regarding the definition of "community control" in the new rule, so we may use the former definition in construing the new rule.

The new rule provides that caselaw which existed at the time the new guidelines were adopted is superseded by the new rule if that caselaw is in conflict with the new rule. Fla. R. Crim. P. 3.702(b). The converse should also be true. Since there is no definition of "nonstate prison sanction" or "community control" in the new rule, to be in conflict with State v. Davis, then the existing caselaw should carry over to the new rule.

Since the existing caselaw carries over to and is not in conflict with the new rule, all four of the pillars supporting the court's holding in State v. Davis are still valid. First, we must continue to assume that "or" means "or," because the new rule does not overrule State v. VanKooten.

Second, although there is no "community control or nonstate prison sanction" cell, Fla. R. Crim. P. 3.702(d)(16) calls for a nonstate prison sanction for one who has 40 points or less.

Third and fourth, there is no conflicting definition of "nonstate prison sanction" or "community control" in the new rule.

Thus, since the four pillars supporting State v. Davis carry over to the new rule, respondent should not have received community control in addition to his county jail sentence, since community control is still not a nonstate prison sanction.[1]

The lower tribunal decided the issue correctly, as did the court in Marotto v. State, 21 Fla. L. Weekly D1329 (Fla. 4th DCA June 5, 1996). This Court must agree.

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[1]This Court should ignore petitioner's footnote on page five, for four reasons.

First, counsel for petitioner went on record in this Court in pleadings filed and in oral argument presented in *Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 21 Fla. L. Weekly S290 (Fla. June 27, 1996), with his position that the Criminal Appeal Reform Act of 1996 is wholly substantive. If that is true, it cannot be applied to cases arising before its effective date of July 1, 1996.

Second, the Act retains the right of a defendant to appeal a departure sentence under §924.06(1)(e), Fla. Stat.

Third, an objection has never been required for a defendant to appeal a departure sentence. *State v. Whitfield*, 487 So. 2d 1045 (Fla. 1986).

Fourth, Issue II was preserved below.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXERCISE PEREMPTORY CHALLENGES AGAINST MR. WELLS AND MR. MOSLEY.

Respondent will also bring a trial issue to this Court, since this Court has jurisdiction to reverse on other issues when it accepts review of a certified question. Feller v. State, *supra*.

At jury selection, the state was permitted to exercise a peremptory challenge against Mr. Wells:

> MR. TRENT: I'll strike Mr. Wells.
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> MS. PAQUETTE: I want to make a Neil challenge and note for the record that my client is a black male and so is Mr. Wells. I would ask the state to give a race neutral reason for striking this juror.
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> THE COURT: The court finds that to be a race neutral reason. (T 114; emphasis added).

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> MR. TRENT: **I guess that would put us in the same position for Mosley.**
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At the end of jury selection, the court denied respondent's motions for mistrial and to strike the panel:

> THE COURT: Then that's the jury. How about the alternate? The alternate would be Tolliver.
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> MR. TRENT: That's fine.
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> MS. PAQUETTE: We have no objection. Judge, for the record we're not accepting the jury because of the Neil challenge. I guess we would move to strike the whole panel for that.
>
> THE COURT: Your motion is denied.
>
> MS. PAQUETTE: Then we would move for a mistrial.
>
> THE COURT: Your motion for mistrial

is denied. (T 114).

Thus the issue is fully preserved under Joiner v. State, 618 So. 2d 174 (Fla. 1993), and Mitchell v. State, 620 So. 2d 1008 (Fla. 1993).

The state may argue that we must defer to the trial court's findings as an exercise of his discretion. This is not entirely true. Under Files v. State, 613 So. 2d 1301 (Fla. 1992), the appellate court never gets to apply the abuse of discretion test where the state's reasons are invalid as a matter of law under State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988):

> We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) **alleged group bias not shown to be shared by the juror in question**, (2) **failure to examine the juror or perfunctory examination**, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) **the prosecutor's reason is unrelated to the facts of the case**, and (5) a challenge based on reasons equally applicable to juror who were not challenged.

(emphasis added). The state's reason for striking two jurors because they were ministers is bogus and not racially neutral, because the state violated three of the five Slappy factors.

In Slappy, the state excused two schoolteachers because

that group was perceived by the prosecutor to be too liberal to sit on a carrying a concealed firearm case. In the instant case, the prosecutor excused two ministers because he did not want them to sit on a cocaine case.

Even if ministers are perceived to have an "alleged group bias" against the state, there is nothing in the record to demonstrate that these two particular ministers had a bias against the state, so a violation of the first Slappy factor has occurred. All we know about the two ministers is set forth above. No one ever asked them if their ministry somehow affected their ability to sit on a crack cocaine case.

A violation of the second Slappy factor also occurred. When the state conducts a cursory examination of a juror and does not question the juror about the particular characteristic or how it is related to the issues at trial, the prejudicial taint of the peremptory challenge goes unrefuted. Here the prosecutor never asked either minister whether that calling would affect his ability to sit as a juror in a cocaine case. *See also* Gibson v. State, 603 So. 2d 711 (Fla. 4th DCA 1992).

A violation of the fourth Slappy factor also occurred. Apparently the prosecutor believed that all ministers somehow make bad jurors. But we will never know how this is so, since the record contains nothing related to the facts of this case. Gibson v. State, *supra*.

The prosecutor's reasons are clearly pretextual, under the test set forth in Slappy:

> Thus, where the total course of questioning of all jurors shows the presence of any of the five factors listed in *Slappy* and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext. In the present case, the utter failure to question two of the challenged jurors on the grounds alleged for bias, 503 So.2d at 355, renders the state's explanation immediately suspect. Moreover, we cannot accept the state's contention that all elementary school assistants, and these two in particular, were liberal. If they indeed possessed this trait, the state could have established it by a few questions taking very little of the court's time.

522 So. 2d at 23; footnotes omitted. The same is true in the instant case. The prosecutor made no showing that ministers in general make bad jurors, nor that these two particular ministers made bad jurors, nor that these two ministers were unfit to sit on a crack cocaine case.

These Slappy principles were applied in the following recent cases to grant a new trial for the reasons stated: Ponder v. State, 646 So. 2d 286 (Fla. 2nd DCA 1994) (woman excused because she was a woman); Drawdy v. State, 644 So. 2d 593 (Fla. 2nd DCA 1994) (prosecutor excused all men in capital sexual battery trial); Reeves v. State, 632 So. 2d 702 (Fla. 1st DCA 1994) (prosecutor had a policy of always striking HRS workers); Stroder v. State, 622 So. 2d 585 (Fla. 1st DCA 1993)

(elementary school teacher of emotionally disturbed students); House v. State, 614 So. 2d 647 (Fla. 2nd DCA 1993) (prosecutor perceived all mental health workers as too liberal); and Hicks v. State, 591 So. 2d 662 (Fla. 4th DCA 1991) (elementary school music teacher married to high school band director).

Moreover, the trial court has the duty to critically examine the prosecutor's reasons, and not just accept them at face value. Gooch v. State, 605 So. 2d 570 (Fla. 1st DCA 1992). This is particularly true where the prosecutor has not asked sufficient questions to find out if his perception of the juror's alleged bias is correct: Gibson v. State, *supra* (prosecutor failed to question black fruit picker about his alleged bias against Haitian fruit pickers); Stroud v. State, 656 So. 2d 195 (Fla. 2nd DCA 1995) (prosecutor failed to ask further questions about juror's views of the criminal justice system); and Nunez v. State, 664 So. 2d 1109 (Fla. 3rd DCA 1995) (prosecutor failed to confirm his belief that a juror would be "looking for glitches" in the state's case by asking further questions).

The state may argue that McKinnon v. State, 547 So. 2d 1254 (Fla. 4th DCA 1989), sanctions the excusal of all ministers from the jury. Not so. It is distinguishable from the instant case. There the prosecutor excused a black female evangelic minister because of the prosecutor's belief that

ministers are generally sympathetic to a defendant. The court held that such a belief was "reasonable and supported by the record." *Id.* at 1257. Apparently there was record support for that belief to satisfy the second prong of the Slappy test:

> As to the first requirement in this instance, we agree that the state demonstrated that "liberalism" was neutral and reasonable. The prosecutor argued that political liberals were more likely to be lenient to defendants than conservatives, and thus less favorable to the state's position at this particular trial. Although others might argue, as does this petitioner, that liberals also are more likely to convict someone for violating gun-control laws, we do not believe the state's assertion should be set aside merely because opinions may differ among reasonable men. The function of the trial court in determining the existence of reasonableness is not to substitute its judgment for that of the prosecutor, but merely to decide if the state's assertions are such that some reasonable persons would agree.
>
> However, **reasonableness alone is not enough, since the state also must demonstrate a second factor--record support for the reasons given and the absence of pretext.** Thus, where the total course of questioning of all jurors shows the presence of any of the five factors listed in *Slappy* and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext.

State v. Slappy, 522 So. 2d at 23; emphasis added. While there must have been record support for the prosecutor's views

in McKinnon, there is nothing in this record to demonstrate that one full-time and one part-time minister were so sympathetic to respondent that they were unable to fairly sit on respondent's cocaine case.

In Haile v. State, 672 So. 2d 555 (Fla. 2nd DCA 1996), the following occurred:

> During voir dire, when the prosecutor challenged the sole remaining African American member of the panel, the defense attorney objected. The prosecutor explained his challenge:
>
> > The problem I have with Ms. King is the same problem I have with Ms. Walker and the same problem I have with Mrs. Platt is, Judge, they read the Bible. Judge, I don't want people on this jury in a forgiving mood. I know from my own personal experience, people who read the Bible also believe in forgive and forget. Based on that, I don't want them and if the Court wants me to, I'll strike Mrs. Platt now, but any of these people that read the Bible, I want nothing to do with.
>
> Without much more discussion, the prosecutor's reasoning was accepted and he was allowed to strike Ms. King. The defense attorney's objection set in motion the requirement for the conduct of an inquiry pursuant to *State v. Neil*, 457 So. 2d 481 (Fla. 1984). The judge, however, merely accepted the state's reason--that Ms. King reads the Bible--as nondiscriminatory.

Id. at 556. The court held:

> **The court erred by failing to inquire more deeply into the reasons advanced by**

> **the state** for exercising a peremptory challenge aimed at Ms. King. The court should have conducted a more penetrating inquiry into what appears to be a pretextual reason; the defendant is entitled to a new trial.
>
> In *State v. Slappy*, 522 So.2d 18 (Fla. 1988), the Florida Supreme Court listed five nonexclusive factors that "weigh against the legitimacy of a race-neutral explanation." **Of these factors, three are present in this case: "(1) the alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, . . . and (4) the prosecutor's reason is unrelated to the facts of the case**. . . ." As in *Slappy*, **the "utter failure" to question Ms. King about her religious beliefs and their possible effect on her ability to serve as a juror is a source of immediate suspicion**. Furthermore, this court cannot conclude, without evidence related to the facts of the case, that the reading of the Bible, a practice embraced by a significant percentage of the American public, would render that portion of the population inherently partial.

Id.; emphasis added.

Because the prosecutor's reasons for excusing the black ministers were invalid, this Court must reverse and grant respondent a new trial.

V CONCLUSION

Based upon the foregoing, this Court should answer the certified question in the affirmative and approve the decision of the lower tribunal. In addition, this Court should also grant respondent a new trial.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and Vincent Altieri, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and to respondent, this 8 day of July, 1996.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

IN THE FLORIDA SUPREME COURT

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ATTORNEY FOR RESPONDENT
FLA. BAR #197890

21 Fla. L. Weekly D1286a

Criminal law--Sentencing--Guidelines--Error to impose departure sentence without written reasons--Question certified: Is the rule in *Davis v. State*, 630 So. 2d 1059 (Fla. 1994), requiring written reasons for departure when combining nonstate prison sanctions, applicable under the 1994 sentencing guidelines?

LEONARD SYLVESTER PERRY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-4628. Opinion filed May 20, 1996. An appeal from Circuit Court for Duval County. Peter Fryefield, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Vincent Altieri, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant raises two issues for our review. We affirm the first issue without further discussion. We reverse and remand for resentencing on the second issue.

Appellant was convicted of possession of cocaine and sentenced under the 1994 guidelines to one year in county jail followed by two years on community control based on a guidelines scoresheet total of 34 points. As we explained in our opinion in *Simmons v. State*, 668 So.2d 654 (Fla. 1st DCA 1996), the trial court has imposed a departure sentence without written reasons. Accordingly, we remand for resentencing. We also certify the same question that we certified in *Simmons*:

> IS THE RULE IN *DAVIS v. STATE*, 630 So. 2d 1059 (Fla. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES?

(MINER and WEBSTER, JJ., and SMITH, Senior Judge, CONCUR.)

* * *