IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

LEONARD S. PERRY,

Respondent.

CASE NO. 88,192

PETITIONER'S REPLY BRIEF ON THE MERITS
CROSS-RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the state. Respondent, LEONARD S. PERRY, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name. Respondent raises an additional issue which was not addressed by the district court. References within this issue will be to the parties as they appeared in the district court.

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; "AB" will designate the Answer Brief of Respondent. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts in its initial brief concerning the certified question.

The state accepts cross-petitioner's statement of the case and facts relevant to issue II.

SUMMARY OF ARGUMENT

ISSUE I.

The certified question should be answered no because the amended statute eliminates the statutory provision on which the district court based its decision. Because the arguments presented by both parties on this issue are the same as those presented in State v. Simmons, case 87,618 which the Court has already taken under deliberation without oral argument, the state will not repeat the argument set out in its reply brief to Simmons. A prompt decision in Simmons will moot this and subsequent cases raising the same issue.

ISSUE II.

The district court did not find appellant/defendant's arguments on the state's exercise of its peremptory challenges worthy of comment. This Court should not function as a second tier error review court to review issues disposed of by the

district court which are not themselves the grounds on which this Court granted discretionary jurisdiction. This principle is particularly applicable when as here the district court opinion does not even address the issue raised here, the peripheral issue could not under any reading of the Florida Constitution be the basis for discretionary review, i.e., is a per curiam affirmed, further review of the decision on this issue is of interest only to the parties directly involved, and review of the issue denigrates the constitutional function of the district courts as courts of final jurisdiction.

If this Court does reach the issue not addressed by the district court, it should affirm because cross-petitioner/appellant/defendant has failed to show that the issue was fully preserved in the trial court or that the trial court abused its discretion in determining that the state's peremptory strike of two church ministers was racially neutral.

ARGUMENT

ISSUE I

IS THE RULE IN STATE V. DAVIS, 630 SO. 2D 1059 (FLA. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES? [CERTIFIED QUESTION]

This certified question should be answered no because the revised statute has eliminated the statutory provision on which the district court based its decision. Because this certified question has been fully briefed in State v. Simmons, case 87,618 and is currently in the bosom of the Court without oral argument, the state will not repeat its reply argument from that case. Prompt resolution of this issue will serve to moot this and future cases raising the same issue.

ISSUE II

SHOULD THIS COURT ADDRESS AN ISSUE NOT ADDRESSED BY THE DISTRICT COURT? IF IT DOES SO, HAS CROSS/PETITIONER SHOWN THAT THE TRIAL COURT ERRED IN GRANTING THE STATE'S PEREMPTORY CHALLENGES? [CROSS APPEAL ISSUE]

This Court may discretionarily address issues other than those on which the Court's jurisdiction is based. However, this

discretion should be exercised rarely because doing so negates the constitutional function of the district courts as "courts of final jurisdiction." Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1983). An appropriate exception to this rule, and the state suggests the only true exception which preserves the constitutional role of the district courts, can be found in Bell v. State, 394 So. 2d 979 (Fla. 1981) on which Trushin relies. In Bell, this Court determined that the certified question on which its jurisdiction was based was itself based on an erroneous reading of a statute. Thus, the subordinate or antecedent issue of statutory interpretation mooted the certified question. It was clearly appropriate under those circumstances to address the subordinate issue in lieu of the certified question on which jurisdiction was based. Bell also contains another example of this exception. In rendering the decision under review by this Court, the district court did not have the benefit of a subsequent on-point case from this Court which potentially contradicted the district court's treatment of a jury instruction issue. Under these circumstances, this Court simply pointed out that the opinion of the district court was disapproved to the extent it conflicted with this Court's subsequent decision.

The state maintains that the peremptory challenge issue here, which was not addressed by the district court and thus could not furnish a basis for jurisdiction, is completely unrelated to the sentencing issue on which the certified question and discretionary jurisdiction is based. Additional second tier error review of the district court decision on this point is of interest only to the parties directly involved. Thus, addressing this issue is inconsistent with the appellate system set out in the Florida Constitution; it would be nothing more nor less than simple second tier error review, a role which the Florida Constitution does not contemplate for this Court[1].

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[1]In a recent address to the Appellate Conference of the American Bar Association, Chief Justice Rehnquist made the same point concerning the U. S. Supreme Court by referring approvingly to former Chief Justice William Howard Taft's testimony to Congress concerning the Certiorari Act of 1925 where Taft opined that there is no reason in law or logic to grant parties who have had two hearings, one in the trial court and one in an appellate court, a third hearing in a still higher court unless the issue(s) presented is of major significance to non-parties and other courts. Chief Justice Rehnquist stated that the same principle applies to issues raised by parties which are not the basis for certiorari review. Chief Justice Rehnquist opined that the Court grants certiorari review to hear arguments on a particular issue of general importance and does not wish to be distracted from the important issue on which certiorari review was granted. [Chief Justice Rehnquist's address to the Appellate Judges Conference, American Bar Association, broadcast on C-Span, America and the Courts, 29 June 1996] The same principles apply to this Court's exercise of its discretionary jurisdiction under the Florida Constitution. [In direct appeals where review is a

If the Court chooses to conduct additional error review, the state presents the argument on the merits which it presented to the district court below. References are to the parties as they appeared below.

Appellant argues that the trial court erred by allowing the state to strike two venire members because of their official church positions. Appellant claims that the trial court's determination must not be granted the usual abuse of discretion standard because the trial court erred as a matter of law. Appellant further contends that the trial court erred because the state did not satisfy three of the Slappy[2] factors, and did not critically evaluate the state's reasons. Finally, Appellant claims that McKinnon v. State, 547 So. 2d 1254 (Fla. 4th DCA 1989) is inapposite to the instant case. Thus, Appellant concludes that the trial court reversibly erred by allowing the state's strikes.

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matter of right, the analysis is different] District courts are considered to be courts of final jurisdiction. The state submits that the effectiveness of this Court in performing its role under the Florida Constitution is inversely proportional to the number of cases it hears; the fewer cases this Court reviews, without regard to the quality of the decisions themselves, the more healthy the state of the law.

[2] State v. Slappy, 552 So. 2d 18 (Fla. 1988).

Appellant's argument is without merit because the trial court properly allowed the strikes. First, this appeal must fail for lack of preservation. Second, the trial court ruling must be accorded the abuse of discretion standard because the reasons relied on by the state were valid as a matter of law. Third, the state's reason for the strikes did not violate any of the Slappy factors, and the trial court adequately evaluated the state's reasons. Fourth, McKinnon is directly on point and the trial court did not abuse its discretion by allowing the state's strikes.

Once a Neil[3] objection concerning a specific venire member is made and the state responds with a race-neutral explanation, in order to preserve the issue for appellate review, the defendant must object to the prosecutor's explanation as to that juror. Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990); Cannady v. State, 620 So. 2d 165, 168-69 (Fla. 1993). This Court has held that "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation . . . ." Tillman v.

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

State, 471 So. 2d 32, 35 (Fla. 1985)(citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)); Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987). "To meet the objectives of the contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). When an issue is not objected to with specific legal arguments advanced to the trial court, the appellate court is in a poor position to rule on the legal issue presented because the factual basis upon which the legal question turns is not developed on the record. Troedel v. State, 462 So. 2d 392, 396 (Fla. 1984).

Applying the above rules of law to facts in the instant case, it is clear that Appellant failed to preserve this issue. With respect to venire member Wells, the record clearly shows that after Appellant made a Neil objection, the state proffered a race-neutral reason for the strike and that Appellant failed to object to the state's proffered reason. (T 113). Because Appellant failed to challenge the explanation, in any manner or on any basis, he waived this issue for appeal. Not only was the trial court denied the opportunity to decide this issue, the factual basis upon which the legal issue turns was not developed

as fully as it would have been otherwise, thereby making appellate review difficult.

With respect to venire member Mosley, the record shows that Appellant objected to the state's proffered reason for the challenge stating: "I make the same challenge that he's also a black male. I believe the reason is pretextual." (T 113). First, Appellant failed to object based on lack of record support concerning the state's reason for the challenge. Second, besides stating his objection and "pretex[t]," Appellant wholly failed to advance any arguments to the trial court that could have resulted in the development of the factual basis of the issue, thereby making intelligent appellate review of the question difficult.

In sum, with respect to venire member Wells, because Appellant failed to argue that the state's challenge was unsupported by the record, and was pretextual, Appellant waived the issue. With respect to venire member Mosley, because Appellant failed to object based on lack of record support, and failed to advance any argument that would have resulted into the development of the factual basis for the objection and pretext claims, he waived the issue.

Finally, the specific objections must have been renewed, or the jury must have been accepted with a qualification concerning

the challenged jurors in order for appellate review to follow. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993); Cannady, supra. However, when a defendant fails to specifically renew his previous objections, the Neil issue concerning those venire members is waived. See Floyd, supra; Cannady, supra; Joiner, supra. Here, the record shows that Appellant stated "Judge, for the record we're not accepting the jury because of the Neil challenge. I guess we would like to strike the whole panel for that." (T 114). Because Appellant failed to specify which of the Neil challenges he was trying to preserve, neither are preserved. Cannady, supra. It is not this Court's duty to guess which challenge Appellant was thinking of when he attempted to make a renewal. See id. Accordingly, Appellant twice waived this issue concerning both Wells and Mosley, by failing to properly object to the state's race-neutral reason, and by failing to properly renew the issue before accepting the jury. Thus, Appellant's convictions must be affirmed.

Even if the trial court determines that Appellant preserved this issue with respect to one or both of the venire members, this Court must still affirm his conviction. The trial court is vested with broad discretion in determining whether peremptory

challenges are racially motivated.[4] Fotopoulos v. State, 608 So. 2d 784, 788 (Fla. 1992). Discretion is abused only when the trial court's determination is "arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

Peremptory challenges enjoy an initial presumption of nondiscrimination. Ratliff v. State, 21 Fla. L. Weekly D268 (Fla. 1st DCA 23 January 1996); Windom v. State, 656 So. 2d 432, 437 (Fla. 1995); Neil v. State, 547 So. 2d 481, 487 (1984). After a party makes an objection and states on the record the race of the defendant and venireperson(s), the striking party

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[4] Appellant relies on Files v. State, 613 So. 2d 1301 (Fla. 1992), for the argument that the trial court must not be accorded the abuse of discretion standard. Appellant's argument is meritless because in Files, this Court held that if, based on a facial analysis of the reason offered, the appellate court determines that the reason relied on could never be racially neutral, then as a matter of law the reason is invalid, and the trial court's decision allowing the strike must not be accorded the abuse of discretion standard. Id. at 1304. Here, however, the reason relied on by the state, and allowed by the trial court, was that the venire members were church officials. (T 113). A facial analysis obviously shows that it is race neutral, as the Fourth District expressly found in McKinnon, supra. Thus, the instant trial court determination must be accorded the abuse of discretion standard. Fotopoulos, supra.

must proffer a race neutral and nonpretextual reason for the strike. 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).

> The trial judge has the affirmative duty to evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. These must be weighted in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.

Nunez v. State, 664 So. 2d 1109, 1111 (Fla. 3d DCA 1995)(citations omitted). Specifically, in McKinnon, the Fourth District Court of Appeal held that the trial court properly allowed the state striking of a minister because of ministers' "overly sympathetic" view of criminals. McKinnon, supra at 1257. Based solely on the above information, the McKinnon court further held that "no further inquiry was necessary" for the trial court to properly allow the record based strike. Id. Thus, this Court must determine whether the trial court abused its discretion by allowing the instant strikes based on the venirepersons' official church positions.

Applying the above rules of law to the facts in the instant case, it is clear that the trial court properly allowed the

instant strikes. First, the state's striking of both veniremembers is presumed nondiscriminatory.[5] Second, the reason relied on by the state for both strikes was supported by the record. (T 73, 77, 113). Third, the reason is clearly race-neutral because anyone can be an official in a church. Finally, the reason is clearly nonpretextual because it was applied to all venirepersons who identified their official positions within their churches. Because the determination of pretext is largely a matter of a trial court credibility determination concerning the reason offered and the attorney him/herself, the trial court implicitly made that this determination in favor of the state. The prosecutor obviously reasoned, based on common experience and McKinnon, that contemporary clergy have a tendency to be more forgiving and, therefore, more sympathetic than the average person to wrongdoing. Obviously also, the trial court found both the prosecutor and reason credible. Statutory criminal law does not contemplate forgiveness without punishment for criminal

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[5] Similar to the stated concern in Ratliff, supra, Appellant failed to state any facts that could rebut the initial presumption of nondiscrimination that the State's challenges were entitled.

acts[6]. Juries do not sit as clemency boards, that is left to the Governor and Cabinet[7]. Thus, the trial court did not abuse its discretion by allowing the State to strike two venirepersons based on their uncontroverted official church positions.

Appellant argues that the state strikes violated three of the Slappy factors.[8] Appellant's argument is meritless because it ignores the nature of the reason supporting the strikes. The simple fact of the venirepersons' official church status, a reason already recognized by law as a valid reason for a peremptory challenge, satisfies Slappy factors one, two and four because of the legally recognized bias of this class of people--that they are "overly sympathetic" to criminals[9]. Ministers may have this bias whether or not they admit it, assuming they even

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[6]Section 921.001(4)(a)2, Florida Statute (1995) expresses the Legislature's policy:

"2. The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but it is subordinate to the goal of punishment."

[7]Art. IV, §8, Fla. Const.; ch. 940, Fla. Stat.

[8] Appellant alleges violation of three out of five Slappy factors: "(1) 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 . . . ." (quoting Slappy, supra).

[9]Bearing in mind that reasons for peremptory strikes need not rise to the level of challenges for cause. State v. Neil.

recognize that they have it. The first factor, moreover, makes conducting an in-depth inquiry into their legally recognized bias irrelevant. Furthermore, this reason is inherently applicable to every criminal case. Accordingly, because the reason is record based, is recognized by law, is of a nature that venirepersons might not even recognize the trait within themselves and an inquiry would not necessarily reveal it, and inherently applies to all criminal cases, the trial court's allowing of the state's instant strikes did not violate the Slappy factors. See, e.g., Fotopoulos, supra at 788 (finding no abuse of discretion where trial court allowed state strike of black venireperson based on her grandson's pending criminal prosecution, a reason recognized by precedent, absent record support that the venireperson personally held the bias one might have if a relative was being prosecuted, an in-depth inquiry, and an explanation how that reason was related to the facts of the case); Wimberly v. State, 599 So. 2d 715 (Fla. 3d DCA 1992)(same determination, based on legally recognized reason for peremptory challenge--that venireperson was affiliated with law enforcement--also absent trial court review of strike with respect to above Slappy factors); McKinnon, supra at 1257 (holding that trial court properly allowed state peremptory challenge of minister, based

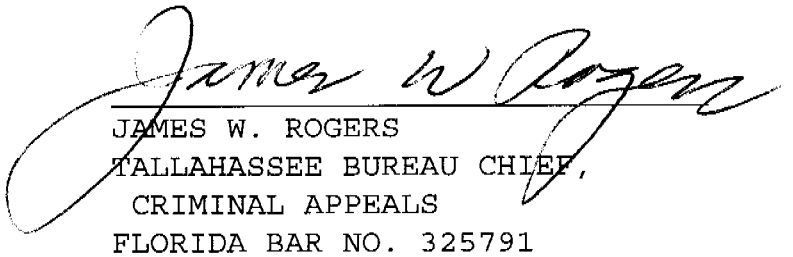
only on record support that venireperson was a minister). The same reasoning contradicts Appellant's argument that the trial court did not critically evaluate the state's reason. Thus, the trial court did not abuse its discretion by allowing the instant challenges.

CONCLUSION

The state respectfully submits that the certified question should be answered no and the district court decision quashed. This Court should not reach the additional issue raised by cross-petitioner but if it does so, it should affirm the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 15th day of July, 1996.

James W. Rogers
Senior Assistant Attorney General

[A:\PERRY.RB --- 7/15/96,9:50 am]