

IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,

Petitioner,

v.

WALTER McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address the constitutional error that occurred at Mr. Willacy's trial when the trial court erroneously granted prosecutors' peremptory strike of Alvin Payne. Prosecutors' use of the peremptory challenge against Mr. Payne was discriminatory in violation of the state and federal constitutions as outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Neil*, 457 So. 2d 452 (Fla. 1984); *State v. Slappy*, 522 So. 2d 18 (Fla. 1988) and the recently decided *Nowell v. State*, 998 So. 2d 597 (Fla. 2008).

Citations to the direct appeal record of Mr. Willacy's trial will be as "R" followed by the page number. All other citations will be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Willacy requests oral argument on this petition.

CLAIM I

MR. WILLACY IS ENTITLED TO RELIEF UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE FLORIDA CONSTITUTION AS HIS CLAIM THAT THE PROSECUTOR'S USE OF A PEREMPTORY CHALLENGE TO STRIKE MR. PAYNE WAS RACIALLY MOTIVATED, AND WAS EQUALLY, IF NOT MORE COMPELLING THAN WAS MR. NOWELL'S CLAIM IN *NOWELL V. STATE*. MR. WILLACY'S RIGHT TO EQUAL PROTECTION OF THE LAW HAS BEEN VIOLATED.

- A. On Direct Appeal, this Court Failed to Conduct the In-Depth Analysis Required in "Ferreting" Out Prosecutors' Genuine Discriminatory Purposes on Direct Appeal as It Did in *State v. Nowell*.**

Mr. Willacy maintained both at trial and on direct Appeal, that prosecutors peremptorily striking Mr. Payne, a black male of similar age to Willacy, were racially motivated, therefore violating Federal and State law. Recently, this Court granted another defendant relief based on a prosecutor's improperly striking a young Hispanic male in *Nowell v. State*. Mr. Willacy respectfully requests this Court to reconsider his claim in light of this new case law. The facts and circumstances surrounding the prosecutor's striking Mr. Payne are comparable to Mr. Nowell's claim. In fact, Mr. Willacy's claim is every bit as meritorious as was Mr. Nowell's.

Federal and State jurisprudence surrounding racially

motivated peremptory challenges has developed with the recognition that racially motivated peremptory challenges must be ferreted out, due to the ease with which discriminatory motives are easily masked in exercising a peremptory challenge. See *State v. Slappy*, 522 So. 2d 18, 20 (1988) citing *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986). This is why this Court has demonstrated a “continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution’s explicit guarantee of an impartial trial.” *Id.* citing Art. I. § 16, Fla. Const. To this end, this Court has crafted a process whereby parties alleging racially motivated peremptory strikes are given broad leeway in making a prima facie showing that the strike was racially motivated and why the burden of proof then shifts to the striking party to provide a race neutral reason. *Id.* at 22.

In analyzing Nowell’s case, this Court held that the “trial court committed reversible error in allowing the State to exercise a peremptory challenge” against Juror Ortega as the “State’s race-neutral reasons were clearly pretextual and not genuine.” *Nowell*, 998 So. 2d at 602. In coming to this conclusion, this Court considered the prosecutor’s injection of race into the voir dire proceedings and compared the prosecutor’s treatment of juror Ortega to his treatment of other jurors - an

analysis that this Court did not conduct in Mr. Willacy's case. Comparing the prosecutors' treatment of Mr. Payne to their treatment of Juror Clark within the context of the prosecutors' other comments and questions regarding race in the voir dire, demonstrates that the race-neutral reasons proffered by the prosecutor were not genuine and were therefore a mere pretext for discriminatory purposes. See Slappy, 998 So. 2d at 602; see also Miller-El v. Dretke, 545 U.S. 231 (2005)(holding due to the difficulty of "ferreting" out discrimination in discretionary selections - side-by-side juror comparisons are one of the most powerful tools in uncovering pretextual basis for peremptory challenges).

B. Prosecutors Peremptorily Challenge Mr. Payne

The parties encountered Mr. Payne while questioning the second panel of prospective jurors, near the end of the first day of jury selection. During preliminary questioning of the entire venire, Mr. Payne stated, "Hi, My name is Alvin Payne. I live in South Melbourne. I'm single. I have three kids, and I work for Pennzoil Ten Minute Oil Change, and the question is yes, I served in the armed forces in the U.S. Navy, and I got out as an E-4." (R. 84). After he was called to the box, he indicated that he knew several persons listed as State's witnesses. Mr. Payne knew potential witnesses Jim Symonette and Doug Fowler as they were ahead of Mr. Payne in school and played football (R. 310-13).

Mr. Payne knew potential witness Oscar Restrepo, whom he graduated with and still considered a friend, though the two had not seen each other in over two years (*Id.*). Symonette and Restrepo were Palm Bay Police Officers (R. 467). Mr. Payne assured the trial court that his knowing these witnesses would not effect his objectivity in weighing their testimony:

THE COURT: My question to you, sir, is if they do testify in this case, would the fact that you know them make it easier or more difficult for you to believe their testimony than it would than of somebody else just because you know them?

MR. PAYNE: I don't think it would have any effect because we've never been that close.

THE COURT: In other words, you can weigh their testimony on the same scale that you would weigh anybody else's testimony?

MR. PAYNE: Yes, sir.

(R. 310-13); See Direct Appeal at 17-18.

During subsequent questioning, the state elicited that Mr. Payne was single, had worked at Pennzoil for about a year, and before Pennzoil, Mr. Payne worked at "Harris" as a shop technician, had never been married, lived in Brevard County most of his life, liked to fish and play basketball in his spare time, did not subscribe to a newspaper or any magazines, and lived with his mother (R. 347-49). Mr. Payne had no knowledge of the case (R. 363). Later, the following transpired:

MR. CRAIG: ... Anyone else have any contact with the court system as a witness in a case or as a party in a lawsuit?

Mr. Payne.

MR. PAYNE: Witness.

MR. CRAIG: "Witness" in a case. Was that a criminal or civil case?

MR. PAYNE: Criminal.

MR. CRAIG: Did you appear in court and give testimony in that case?

MR. PAYNE: Yes, sir.

MR. CRAIG: Were you satisfied with the ultimate resolution of that case? Do you believe that justice was served from what you know?

MR. PAYNE: From what I know, yeah.

MR. CRAIG: How do you feel that you were treated by the court system and by, I presume, the prosecuting attorney?

MR. PAYNE: Good.

MR. CRAIG: Was that here in Brevard county?

MR. PAYNE: Yes, sir.

MR. CRAIG: Can you tell us what the charges were?

MR. PAYNE: Yeah, it was a drug charge.

MR. CRAIG: "Drug charge?"

MR. PAYNE: Uh-huh.

(R. 367-68).

During further questioning, Mr. Payne informed the parties that he had appeared as a witness on the defendant's behalf in that trial (R. 377, 382-4, 388).

Later, Prosecutor Craig asked Mr. Payne the following:

MR. CRAIG: Mr. Payne, I need to pick on you just a moment. I apologize for this. You didn't tell us how old you were, but you graduated from high school in '85 or so?

MR. PAYNE: '84.

MR. CRAIG: It makes you approximately the same age as the defendant. Okay? So I guess we could call both of you young, black males.

Do you feel that fact would in any way affect your ability to listen to the evidence, listen to the Court's instructions on the law and deliberate with the other jurors in the case recognizing that it's not unlikely that you would be seated on a jury with eleven white people?

MR. PAYNE: Well, maybe. Maybe. I don't know. It might make me feel different about it.

MR. CRAIG: Do you think it might make you uncomfortable?

MR. PAYNE: It sure will.

MR. CRAIG: I appreciate your candor.

(R. 395-97).

Defense Counsel responded with questions of her own:

MS. ERLBACH: ... Again, Mr. Payne, none of us are comfortable being here. I'm here probably - you know, we lawyers are here

in this setting a little more often so we act a little more comfortable, a little more sure of ourselves, but are you, sir, willing to do your duty here even though it might make you uncomfortable to be with a group of people you don't know at all and be the only black man? Are you willing to do your duty to sit in this case?

MR. PAYNE: Yes, ma'am.

MS. ERLLENBACH: Do you agree to apply the same standard of belief to a police officer as to any other person who might come before you to testify?

MR. PAYNE: Yes, ma'am.

(R. 426-27).

Mr. Payne later related that he "really [doesn't] think about it that much" when asked about his opinions on the death penalty (R. 432).

According to Assistant State Attorney (ASA) White, he instructed the case officer on this homicide, George Santiago, to contact Palm Bay Police Officers Symonette and Restrepo, whom Mr. Payne went to school with, to inquire as to "what they know of Payne, why they know him, what their contact is of him." (R. 467-68). ASA White did not detail the information provided by those police officers, rather, he merely informed "that information that we got back there generally was that, well, they know him from school; he seems like an okay guy." (*Id.*).

According to ASA White, Officer Santiago offered to run a records check on Mr. Payne. Again, according to ASA White, he

told Santiago that wasn't necessary. ASA White does not claim to have told Santiago not to run the check, nor did ASA White suggest that Santiago run checks on any other prospective jurors. This fact takes on increased significance when viewed in the context of ASA White's very different reaction to learning that Jury Foreman Clark was actually being prosecuted by ASA White for a felony during Mr. Willacy's capital trial.

Prior to beginning the next day's proceedings, the prosecutors related information they obtained about Mr. Payne to the court in an unrecorded conference. Subsequently, the prosecutors moved to peremptorily strike Mr. Payne from the panel (R. 443-44). Defense counsel responded:

[Defense]: We would lodge an objection to striking Mr. Payne on the basis of Neil vs. State, and I believe the striking of Mr. Payne is racially motivated. The predicate would show that the defendant is black. Mr. Payne is also black. Mr. Payne is at present the only black on the panel.

We had a conference in chambers, and if we can recap what was said in chambers, nothing has ever been presented on the record here which shows any disqualifications for Mr. Payne. The basis of the State's strike appears to be a police report that they had received that was never prosecuted, nor an arrest was ever made and which would appear from anything he said does not - is not contrary to anything that he testified to. There's been no evidence presented in this record that shows he could not be fair and I would ask the Court -

And there is nothing different about Mr.

Payne that has not been testified to by other jurors of which the State has not exercised a peremptory, and based on that showing I submit that the State should be required to explain the basis of striking Mr. Payne.

ASA White then offered the following explanation for striking Mr. Payne:

I think there is more than an adequate record for a peremptory challenge of him that is non-rationally motivated, and it would be our request that you make that finding of an adequate predicate and facially valid challenge and allow us to voir dire Mr. Payne additionally as to the police report and as to records that we obtained through the computer showing that he actually was charged for the offense Mr. Erlenbach spoke about and pled nolo contendere to disorderly conduct and also to resisting without violence.

I'd point out to the Court that also when he was asked about his employment, he skipped over his employment at Dip Stix where this event occurred; and while perhaps he didn't out and out lie to us, he misrepresented by not telling us that he had been employed there.

Furthermore, in the jury questionnaire there are questions designed to elicit information about any prior charges against the defendant. He withheld that all along, and also he offered in his voir dire that he testified on behalf of a defendant in a drug charge.

Now, all of those are not rationally motivated. All of those are facts which we assert to the Court are present with regard to him that are substantially different than any other juror in this particular case.

(R. 444-45).

In response to the court's request for the prosecutors to put their evidence on the record, ASA White provided a number of reasons to support the prosecutors' argument that their reasons for exercising a peremptory strike against Mr. Payne were not pre-textual:

(1) ASA White stated that the records check revealed that the drug case Mr. Payne mentioned testifying in concerned ASA White because Mr. Payne testified for the defense and the defense might use Willacy's drug use as mitigation;

(2) Mr. Payne allegedly demonstrated a lack of candor when he informed the court that he worked at Pennzoil and, prior to that, Harris corporation, but did not state that he was employed by Dip Stix Enterprises, Inc. According to prosecutors, Mr. Payne omitted his employment at Dip Stix because his "**white, female** supervisor" made a complaint that Mr. Payne assaulted her to Palm Bay police on 5/22/91 and requested police remove him from the premises which did not result in charges against Mr. Payne and;

(3) Prosecutors alleged Mr. Payne was charged with resisting without violence and disorderly conduct.

ASA White further claimed that he sought to peremptorily strike Mr. Payne because he was not candid in answering voir dire questions posed to him, stating:

... [H]e failed to share any of this information with us during the course of voir dire, and **the questionnaire the Court handed out would seem to indicate that a person should relate to us any sort of connection they may have had with the law and certainly if any charges have been filed against them.**

I recall the Court asked that specific question to the first group. I don't know for sure if you asked the second group, "Have you ever been the subject of any criminal charges?" So I can't stand here and tell you that he didn't answer that truthfully or failed to tell you about that in your own questioning, Judge, but those are the reasons.

(R. 450-53).

Over defense objection, the court agreed with the prosecutors' request to allow further questioning of Mr. Payne in chambers (R. 446). In chambers, Mr. Payne explained:

(1) The Pennzoil oil change business for which he worked was the same operation as the Dip Stix business;

(2) He considered his leaving that business as a resignation, not a firing;

(3) He was unaware of any criminal complaint made against him by his (white, female) supervisor;

(4) In another matter he had pled no contest to disorderly conduct for which he completed community service at the Palm Bay Rec Center; and

(5) He had not been arrested for anything else.

(R. 460-61).

After taking testimony from Mr. Payne, defense counsel highlighted the prosecutors' singling Mr. Payne out for heightened scrutiny vis a vis other white jurors arguing prosecutors were discriminating against Mr. Payne:

MR. ERLBACH: Your Honor, I think it would be appropriate as well to inquire of the State whether they checked on criminal history, checked on residence, checked on any other information regarding Susan Klenck, Shirley Masseron, Frank Mancuso, all of the other white jurors. It appears that Mr. Payne has been singled out for this treatment, and the State did not inquire of -

His explanation here about his employment has been sufficiently explained. Saying that he was a witness for the defendant in a criminal drug case is - you know, when there was not further evidence presented, you know, it could have been - it could have been about, you know, where this man - where a man lives, you know, a person that he saw, and have absolutely no relevance whatsoever, and the State didn't develop that in any way. They developed in no way anything about his participation as a witness for a defendant in a drug case that would in any way affect his ability.

You know, likewise, we have people who were plaintiffs who have otherwise been involved in cases as witnesses, but to single him out and say it's correct that there's been no other witnesses for defendants in criminal drug cases is correct. There's been a number of other people, white people, on this jury who have not been challenged by the defense who have been involved in the criminal system in various manners.

I also want to make sure the record is

clear that I'm not waiving my objection to the further inquiry of Mr. Payne here. I would submit that Mr. Payne, even if the facts that the State has dug up here are a sufficient basis to make up a peremptory challenge, the fact that the State did it only to Mr. Payne and did it to no other prospective jurors here, that fact alone is evidence — in addition to **Mr. Craig's inquiry of Mr. Payne, whether him being the only black roughly contemporary of the defendant on this jury would make him uncomfortable, those facts alone right there show this peremptory has been exercised on the basis of race.**

If the State can show they ran these same checks on these other [white] prospective venire persons, then I would concede that I'm in error, but I don't believe that they're going to do that.

THE COURT: Well, let me ask them.

Were similar checks run as to any of the other venire?

MR. WHITE: No, sir, there weren't.

There was a reason for that which I told Mr. Erlenbach which he chooses not to accept.

This particular prospective juror is the juror who told us he happened to know three people who are witnesses in the case, two of whom are Palm Bay police officers. As a result of that yesterday afternoon I called the case officer in our case, George Santiago, and requested that he contact those persons and ask them what they know about this man, why he knows them, what their contact is of him, which the did provide me; and that information that we got back there generally was that, well, they know him from school; he seems like an okay guy. Okay?

However, Mr. Santiago of his own volition said, "Mr. White, why don't I run a records check on him?"

I said - well, what I told him actually, foolish me, was:

"There's really not a need to do that."

And he said, "I'll go ahead and do it anyway."

And he went ahead and ran a records check under the name I had given him.

THE COURT: Excuse me for interrupting.

Let us assume that everything we have here is true, that he has been, in fact, arrested for this, that and the other, that he got into a brawl over at Dip Stix that led to his discharge. Let's assume that all your concerns are well-founded -

- for purposes of this hearing.

What difference does it make as far as his qualifications to serve as a juror is concerned?

* * *

... Now, tell me directly, succinctly and in simple non-lawyer terms how that affects his qualifications to sit upon the jury. It does not affect his qualifications, I don't have to assume it's racially motivated. ...

* * *

MR. WHITE: . . . It's the State's position that we would peremptorily challenge any person, white, black or of any race, who has these things in his background as to qualifications. Also, we would challenge him on the basis that he's admitted that, as a black person who sat alone on the jury, he would feel uncomfortable and that it might affect how he might look at this case as opposed to the rest of the jury.

* * *

I would submit that **I would not, nor Mr. Craig, nor would Mr. Rappel ever allow any juror, white or black or any other race or sex or whatever, to sit on a case who has been to misdemeanor court and has pled guilty**

-

I'm sorry.

- nolo to disorderly conduct and resisting with [sic] violence, who also had an incident report in which he assaulted a **white female** in his background and also testified as a witness for the defense in a criminal case involving drug charges given the nature of this case, and those are race-neutral reasons which more than merit his challenge peremptorily and I suggest rise to the level of challenging his qualifications as a juror considering all of that background.

(R. 464-77).

The trial court then excused Mr. Payne (R. 477).

C. Prosecutors Did Not Challenge Juror Clark, Did Not Put Clark's Status on the Record, Nor Does Defense Counsel Recall Prosecutor's Even Informing Them of Clark's Conflict.

What defense counsel was not aware of at the time of Payne's excusal, and one of the factors that this Court did not consider when it determined that the reasons offered by prosecutors were genuine and not pretextual, was that another member of the jury, the foreperson, Edward Clark, was actually being prosecuted by ASA White for a felony (grand theft) during Mr. Willacy's pre-trial and trial. When ASA White was made aware of felony charges against foreperson Clark, he did not move to strike him from the

jury. Further, prosecutors did not put Mr. Clark's status on the record and it is questionable as to whether or not ASA White even informed defense counsel of his felony prosecution of Mr. Clark.

Juror Clark was called from the panel during the sixth series, along with a Mrs. Giguere (R. 592). Mr. Clark stated that he was married, lived in Melbourne, had five children with one in college, he was self-employed, and his wife was a mortgage broker (R. 584). When he was called to the box, he indicated that he was a mortgage broker, his wife was a mortgage processor, that he had five children, he sailed and played golf, and did not belong to any organizations (R. 616). Later, the following colloquy occurred:

MR. WHITE: let me ask both of you. Have either of you had any prior experience in the courtroom before in any capacity at all?

MS. GIGUERE: Never.

Mr. Clark remained silent.

MR. WHITE: Have either of you had any sort of contact with a law enforcement agency or officer that left you with a particularly strong feeling about the contact in the way you were treated or the way your matter was handled?

MS. GIGUERE: Never.

MR. CLARK: No.

(R. 621).

Mr. Clark eventually was seated as a juror and sat

throughout the entire guilt and penalty phases of the case. He was selected to serve as foreperson of the jury.

At the time of his participation in the trial, Mr. Clark was actually being prosecuted by the Office of the State Attorney for the Eighteenth Judicial Circuit, in Brevard County, in case number 90-16802 CFA (R. 3516-18). ASA White charged Mr. Clark with grand theft of computer equipment (R. 3519, 3565). Mr. Clark was arrested on February 19, 1991, and bonded out that day on a \$1,000.00 bond. Mr. Clark's case was submitted for pre-trial intervention (PTI) under section 948.08, Florida Statutes (1991) with the approval of Mr. Clark's attorney, and on October 2, 1991, ASA White approved the PTI program's recommendation that Mr. Clark be accepted (R. 3591-92). On October 4, 1991, word of ASA White's approval was sent to Joe Brand, the program coordinator with the Department of Corrections. Three days later, on October 7, 1991, Willacy's jury selection began and Mr. Clark was selected to serve the following day - October 8th (*Id.*).

Mr. Clark received the letter informing him of his PTI signing date sometime after he was selected for Willacy's jury (R. 3520). Mr. Clark contacted Joe Brand to inform him that Mr. Clark might have difficulty making the signing date due to his service on a jury in a capital trial (R. 3520; 3586). This potential conflict concerned Joe Brand enough that he contacted ASA White's office to inform ASA White of it (R. 3575; 3586).

According to ASA White's testimony at an evidentiary hearing held on Willacy's motion for new trial, ASA White did receive a call on one of the early days of the trial informing him that there may be a problem with a juror and that a PTI candidate may be sitting on the jury (R. 3592). ASA White testified that he approached the defense table during a break in the trial and informed either Kurt or Susan Erlenbach, or possibly both of them, that a juror might be on PTI (R. 3593-96). This claim is vigorously denied by both Kurt and Susan Erlenbach (R. 3557; R. 3612). ASA White testified that he was surprised there was no reaction from the defense as he was expecting a serious dispute on the matter given the difficulties with jury selection in general (R. 3594, 3601-02). ASA White did not alert the court of Juror Clark's conflict, nor did he otherwise make his notice to the defense part of the record (R. 3595).

The jury returned its guilty verdict against Mr. Willacy on October 29, 1991. Eleven days after the jury's death recommendation, ASA White signed the necessary documents to place Mr. Clark into the Pretrial Intervention Program. Months later, on May 14, 1992 - ASA White entered a nolle prosequi in Mr. Clark's case.

Kurt Erlenbach testified that had the defense learned of Mr. Clark's prosecution, he would have challenged Mr. Clark for cause and, if the court denied that challenge, he would have

sought to strike Mr. Clark peremptorily (R. 3559). As it was, Kurt Erlenbach did not learn of Juror Clark's prosecution until preparing Willacy's direct appeal, which he authored and filed (R. 3557-58). Erlenbach researched the criminal records of white venirepersons by running their names through the records of the clerk of court from Brevard County, in order to show prosecutors discriminated against Mr. Payne (R. 3558). This knowledge resulted in Erlenbach's filing a motion for new trial and an evidentiary hearing where the facts surrounding Mr. Clark's prosecution were put on the record (R. 3628).

During the jury qualification process, the jury clerk asked the assembled venirepersons questions designed to determine whether they were qualified to serve under section 40.013(1), Florida Statutes (1991), which states in pertinent part: "No person who is under prosecution for any crime ... shall be qualified to serve as a juror." (R. 3534-38). Ms. Rich placed the prospective jurors under oath and asked all of them whether they were under prosecution for any crime, and no one, Mr. Clark included, answered affirmatively, despite being given an opportunity to answer privately (R. 3539).

D. *Nowell v. State* Compared to *Willacy v. State*.

- 1. This Court did not conduct the type of analysis on Willacy's direct appeal that it conducted in Nowell. Mr. Willacy Has**

**Been Denied Equal
Protection of the Law.**

In denying Mr. Willacy relief on his claim regarding the peremptory challenge of Mr. Payne on direct appeal, this Court never considered the prosecutors injection of race into the proceedings nor did the Court conduct the same juror-comparison in Willacy that it conducted in *Nowell* - resulting in disparate treatment of these comparable claims. See *Willacy v. State*, 640 So. 2d 1079, 1082 (Fla. 1994) and *Nowell*, 998 So. 2d at 604-606.

The prosecutor's treatment of Juror Ortega in *Nowell* parallels the prosecutors' treatment of Juror Payne in *Willacy*. In both instances, it was prosecutors who clearly injected the issue of race into jury selection and it is within this context that prosecutors further actions must be judged to reveal their "genuine" motives. Further, both jurors were the only minority members of the venire and both were treated differently by the prosecutor than were their white counterparts. These points are addressed in detail below.

i. Prosecutors inject race into the voir dire proceedings.

The prosecutor in the present case injected the issue of race into the jury selection early on in his questioning of Mr. Payne by asking Payne (exclusively) if the fact that both he and the defendant are "young, black males" "would in any way affect"

his objectivity, even if he was “seated on a jury with eleven white people.” (R. 395-97). Mr. Payne responded that these facts “might make me feel different about it” and agreed with the state attorney that it would make him “uncomfortable.” (*Id.*). The fact that the prosecutor posed questions specifically to Mr. Payne, the only minority on that panel, questioning his objectivity based on his race, demonstrates in and of itself that the prosecutor was concerned about Mr. Payne’s race and places the prosecutor’s further actions in context.

When ASA White inquired as to Palm Bay police officers Restrepo and Symonette’s opinion of Juror Payne those officers confirmed that they knew Mr. Payne from school and that he “seems like an okay guy.” (R. 467-68). Ordinarily, a juror with Mr. Payne’s military service who was friendly with two potential police officer witnesses, who spoke well of Mr. Payne, and who had a “good feeling” for the prosecutor in the prior case he testified in, would be a desirable juror for the prosecution (R. 84, 367-68). The fact that the investigation of Mr. Payne did not end there and that Mr. Payne was the **only juror prosecutors obtained a background check of (or any check for that matter),** demonstrates that prosecutors subjected Mr. Payne to greater scrutiny than the other white jurors. This is evident in light

of the prosecutor's prior questioning of Mr. Payne's objectivity due to his race, age and the fact that he would be on an all-white jury in the trial of another black man. Further, when ASA White was arguing in favor of the strike, he repeatedly stated that Mr. Payne's **"white, female"** supervisor alleged that Mr. Payne assaulted her. Even if this Court were to find prosecutors proffered reasons for striking Mr. Payne "reasonable" these circumstances demonstrate that they were not "genuine." It is not permissible for race to be a factor, even if it is one factor among other reasonable factors, in selecting jurors. *Cochran v. Herring*, 43 F.3d at 1412 (11th Cir. 1995). In the face of these facts, ASA White's attempt to absolve himself of his impropriety in obtaining Mr. Payne's background check rings hollow. There was no reason for ASA White to obtain Mr. Payne's background check and his failure to categorically reject Officer Santiago's offer or to check all of the jurors alone demonstrates that prosecutors subjected Mr. Payne to heightened scrutiny. *Compare Willacy*, 640 So.2d at 1082 (stating "the State's criminal background check was not a contrived plan directed against the sole African-American on the jury panel") with *Nowell*, 998 So.2d at 606 (stating: "We simply cannot ignore that the prosecutor's initial response when asked for a race-neutral reason was essentially that he did not particularly like the juror.").

ii. Comparison of prosecutors treatment of Mr. Payne to Juror Clark.

Any concerns prosecutors had about Mr. Payne's lack of candor during voir dire and Mr. Payne's limited involvement with the criminal justice system should have applied with equal force to jury foreperson Clark. However, prosecutors did not seek to strike Juror Clark when they realized that ASA White was actually prosecuting Juror Clark for grand theft during Mr. Willacy's voir dire and trial. Further, prosecutors failed to investigate the erroneous and misleading information in their records check by questioning Mr. Payne before excising the strike. Even after learning that the records check was misleading and inaccurate¹- as Mr. Payne was not actually convicted of a crime - prosecutors persisted in excluding Mr. Payne.

The reasons offered by prosecutors in support of their peremptory challenge including (1) Mr. Payne's alleged charge of disorderly conduct and resisting arrest without violence; (2) lack of candor when Mr. Payne excluded his employment with "Dip Stix" and (3) his testimony for a defendant on a drug charge, are

¹The "conviction" upon which prosecutors relied on was actually merely a complaint that did not result in arrest or prosecution and prosecutors did not present any evidence that the disorderly conduct misdemeanor to which Mr. Payne pled to resulted in a conviction or whether an adjudication of guilt was withheld (R. 460-61).

all invalid and do not qualify as race-neutral reasons under the circumstances. As for reason (1), Mr. Paynes's alleged criminal record cannot stand as a basis to sustain a strike under the circumstances of this case as prosecutors allowed white Juror Clark to serve while under active prosecution for grand theft - a felony. It is incomprehensible that a single disorderly conduct plea in a black man's past should be disqualifying whereas an active grand theft prosecution of a white man is not. As for reason (2), Mr. Payne did not "lack candor" when detailing his employment. Prosecutors were confused about the name of the company that Mr. Payne worked for. Further, it was Juror Clark who demonstrated a "lack of candor" by failing to inform the court of his grand theft prosecution during voir dire (R. 621). A pretextual reason for a strike may exist when a juror is struck from the jury panel based on a reason equally applicable to an unchallenged juror. See *Daniel v. State*, 697 So. 2d 959 (Fla.2d DCA 1997). As for reason (3), Mr. Payne answered prosecutors questions on voir dire about his participation in the drug trial, however, prosecutors did not follow up with him with any questions, so it is unknown whether his testimony was voluntary or what his involvement entailed. Further, Mr. Payne informed that he had a "good feeling" for the prosecutor in that case and thought that justice had been served (R. 367-68). There is simply no basis for the prosecutors' speculation that, since Mr.

Payne testified on behalf of a drug defendant, Mr. Payne is somehow biased.

E. Conclusion

The Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Florida Constitution forbid a prosecutor from exercising peremptory challenges solely on the basis of race. In Mr. Willacy's case, prosecutors violated those principles by exercising a peremptory challenge against Mr. Payne for discriminatory reasons. That the prosecutor's proffered "race-neutral" reasons for striking Mr. Payne were not genuine is demonstrated by ASA White's injecting race into the jury selection process through specific questions posed to the only black member of the panel; by subjecting the only black member of the panel to greater scrutiny than other white panel members; by pursuing a peremptory challenge against Mr. Payne even after learning information received by the background check was false; and by treating Mr. Payne very differently from white jury-foreperson Clark who was being prosecuted for a crime DURING jury selection and while sitting on Mr. Willacy's jury and who failed to reveal the prosecution. Further, the reasons cited by prosecutors for striking Mr. Payne were not reasonable under the circumstances, as stated above.

This Court denied relief to Mr. Willacy based on the above on direct appeal in 1994. See *Willacy*, 640 So. 2d 1079, 1082

(1994). Mr. Willacy respectfully requested the Court to reconsider his claim in light of the newly decided *Nowell v. State*, 998 So. 2d 597 (2008) and in order to ensure equal protection of the law.

CONCLUSION AND RELIEF REQUESTED

Mr. Willacy, through counsel, respectfully urges that the Court issue its Writ of Habeas Corpus and vacate his unconstitutional convictions and sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114 on September __ , 2009.

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