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IN THE SUPREME COURT
STATE OF FLORIDA

ANTHONY LAWRENCE WRIGHT,

Petitioner,

v. CASE NO. 67,445

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The language employed in State v. Neil, 457 So.2d 481 (Fla. 1984) contemplates only a prospective application of the decision. This result is correct as the Neil decision constitutes a clear break with the past. Retroactive application of Neil to pipeline cases would not serve the purpose of deterring the forbidden conduct. This court acknowledged extensive reliance on the previous standards and the effect of a retroactive application on the administration of justice would be substantial.

ARGUMENT

THE DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE PETITIONER'S CONVICTIONS AS STATE V. NEIL, 457 So.2d 481 (Fla. 1984) SHOULD ONLY BE PROSPECTIVE IN APPLICATION AND PETITIONER FURTHER FAILED TO DEMONSTRATE A STRONG LIKELIHOOD THAT BLACK PROSPECTIVE JURORS WERE CHALLENGED SOLELY ON THE BASIS OF THEIR RACE.

Inasmuch as this court has the sole power to determine whether its decisions should be prospective or retroactive in application, since retroactive application is not constitutionally required, this court may make a decision prospective in effect only. Tampa v. G.T.E. Automatic Electric Inc., 337 So.2d 844 (Fla. 2d DCA 1976); Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975). Criminal cases in which courts are called upon to determine the effect of an overruling decision are subject to similar considerations. 20 Am Jur 2d, Courts § 236. Generally, a Florida Supreme Court decision is applied to any pending appeal and the appeal is decided upon the law as it stands at the time of the decision in the appeal. McGoff v. State, 450 So.2d 321 (Fla. 2d DCA 1984); Williams v. State, 366 So.2d 817 (Fla. 3d DCA 1979). Nevertheless, a decision may not be retrospective, although prospective in its operation, when declared by the opinion to have a prospective effect only. Black v. Nesmith, 475 So.2d 963, 964 (Fla. 1st DCA 1985).

The language in State v. Neil, 457 So.2d 481 (Fla. 1984), contemplates only a prospective application of the decision:

> Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of

> trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral proceedings as set out in Witt v. State, 387 So.2d 922 (Fla.) cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.wd 612 (1980). (Emphasis added).

457 So.2d at 488.

Analyzing the above language, the Fifth District Court of Appeal reasoned that "the difficulty of trying to second-guess records that do not meet the standards set out herein" as well as "the extensive reliance on the previous standards" are reasons that apply equally to "pipeline" cases as to cases tried and appeals completed before the decision in Neil was announced. Wright v. State, 471 So.2d 1295, 1296 (Fla. 5th DCA 1985). The Neil decision also speaks of "retroactivity" as a concept apart from that of "collateral" applicability.

Although the issue of whether Neil should be applied to so-called "pipeline" cases is the subject of the present debate, there is no controversy at all on the issue of relief in collateral proceedings. The court's opinion makes it unmistakably clear that Neil does not apply to collateral proceedings. The question then arises as to whether a distinction should be made at all between direct and collateral challenges for purposes of retroactivity.

Although applying a new rule to one case on direct appeal (the decisive case), but not to another, involves somewhat

disparate treatment of defendants, the petitioner is perfectly willing to tolerate disparate treatment of defendants seeking direct review of their convictions and prisoners attacking their convictions in collateral proceedings.

> [I]t seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system. The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others; the Court's new approach equalizes nothing except the numbers of defendants within the disparately treated classes.

Shea v. Louisiana, ___U.S.___, 105 S.Ct. 1065, 1072 (1985), (White, J., dissenting).

When a conviction is overturned on direct appeal on the basis of a Neil violation, the remedy offered is a new trial before a new jury. Such a burdensome remedy is certainly no less burdensome or less costly when it is imposed on the state on direct review than when it is the result of a collateral attack. "The disruption attendant upon the remedy does not vary depending on whether it is imposed on direct review or habeas." Shea v. Louisiana, 105 S.Ct. at 1073. If it serves no worthwhile purpose to grant a new trial to a defendant whose conviction was final before Neil, it is nearly impossible to imagine why the remedy should be available on direct review. Because the court has already determined that the relevant considerations set forth in

Neil (the difficulty of trying to second-guess records that do not meet the standards and the extensive reliance on the previous standards) dictate nonretroactive application, the decision should not be applied retroactively to cases pending on direct review at the time of the decision in Neil.

In determining whether a decision warrants retroactive application, this court has, in the past, looked to decisions of the United States Supreme Court. See, State v. LeCroy, 461 So.2d 88 (Fla. 1984); Bundy v. State, 471 So.2d 9 (Fla. 1985). In Shea v. Louisiana, supra, the majority apparently adopted a rule endorsed in limited circumstances by the majority in United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982): namely, the rule that any new constitutional decision--except, perhaps, one that constitutes a "clear break with the past"--must be applied to all cases pending on direct appeal at the time it is handed down. The threshold test employed by the United States Supreme Court was fully explained in United States v. Johnson, 457 U.S. 537, 549, 102 S.Ct. 2579, 2586, 73 L.Ed.2d 202, 209 (1982):

> First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.
>
> Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," it almost invariably has gone on to find such a newly minted principle nonretroactive. In this second type of case, the traits of the particular constitutional

> rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course." Once the Court has found that the new rule was unanticipated, the second and third Stovall factors--reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule--have virtually compelled a finding of nonretroactivity. (Citations omitted).

It is clear that the Neil decision did not merely apply a settled precedent to a new and different factual situation, but constituted a "clear break with the past." The Neil decision held that the criteria established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) and heretofore relied upon by Florida courts, which required the defendant to show the prosecutor's systematic use of peremptory challenges against an identifiable racial group over a period of time is no longer to be used by Florida courts when confronted with the allegedly discriminatory use of peremptory challenges. The decision is a clear departure from Swain. Adopting the logic of the United States Supreme Court would result in a finding that such "newly minted principle is nonretroactive, as it "so changes the law that prospectivity is arguably the proper course."

A finding of nonretroactivity is also virtually compelled after an examination of the three-fold test of Stovall v. Denno, 388 U.S. 293, 297, 86 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). The pertinent considerations are: (1) the

process to be served by the new standard; 2) the extent of the reliance by law enforcement authorities on the old standards; and 3) the effect on the administration of justice of a retroactive application of the new standard. This court has relied on these essential considerations in prior decisions. See, e.g., Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); Bundy v. State, 471 So.2d 9 (Fla. 1985).

The purpose of the Neil decision is to deter attorneys from peremptorily challenging, with impunity, black jurors solely on the basis of race and to make attorneys accountable for such challenges. Retroactive application of the Neil rule to pipeline cases would not serve the purpose of deterring such conduct and the purpose of the rule does not warrant the reexamination of unknown numbers of jury verdicts. The judicial system's absolute reliance on the old standard is undisputedly pervasive. The apparent reliance of prosecutors on Swain also clearly weighs in favor of prospective application of the ruling, especially since prosecutors could not be faulted for failing to anticipate the Neil approach and distinct racial groups could still be included in a jury comprising a representative cross section of society, as black jurors as well as white will be eliminated on account of bias. This court in Neil acknowledged the extensive reliance on the previous standards. 457 So.2d at 488.

The effect of a retroactive application on the administration of justice would be substantial. Exposing to reversal every conviction prior to the time when the jury selection system

met all state constitutional requirements would be tantamount to directing a verdict of not guilty in a large number of cases. It is improbable that in crimes without any racial implications whatsoever, any petitioner in Wright's position could even hypothesize that he would not be in jail today, but for the discriminatory jury selection system. The reliability of the verdict in this case is not even seriously questioned. This court itself addressed the problem of "trying to second-guess records." Not to be forgotten among such obvious practical considerations is the taxing of the trial courts for a rule that has little to do with the truth-finding function. "Only where there is a denial of a basic right of constitutional magnitude that is correctable will retroactive application be applied." Bundy v. State, 471 So.2d 9, 18 (Fla. 1985). The decision in Neil further refines the system of jury selection under the Florida Constitution. But, this purpose does not mandate the retroactive application of the decision. Federal courts faced with a similar issue, i.e., the systematic exclusion of black persons from juries that convicted a white person, limited a Supreme Court decision prohibiting the same, to prospective application only. Watson v. United States, 484 F.2d 34 (5th Cir. 1973), cert. denied, 416 U.S. 940, 94 S.Ct. 1944, 40 L.Ed.2d 291 (1974); Campbell v. Wainwright, 738 F.2d 1573, 1577 (11th Cir. 1984). The reasoning in Neil, as well as the above reasons point to only the prospective application of Neil, with no reasons for distinguishing pipeline and collateral cases, and the language of Neil indicates the same and should be so interpreted.

In summary, the Neil decision does not mandate, and it should be so mandated that such decision is retroactive only to companion cases. There is, further, no viable reason for applying Neil to death cases. Although death is, indeed, different, neither the federal nor the state constitution requires a different basis for according relief in death penalty cases. See, Spenkelink v. State, 350 So.2d 85, 87 (Fla. 1977)(England, J. concurring). Similarly, when factors justly point to only the prospective application of a rule, the punishment should not be a factor.

The decision of the Fifth District Court of Appeal should be approved, even in the event Neil is held to have retroactive application. Pursuant to Neil, after objecting, a party must next "demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." 457 So.2d at 486. While the record reflects that the excused jurors were black, the petitioner never demonstrated a strong likelihood that they were challenged solely because of their race. The record reflects a basis for challenge on other grounds as to one of the jurors. That juror stated she has problems with allergies and drowsiness (R 80-81). The prosecutor stated that he does frequently have blacks on his jury and named specific cases (R 80-81;90-92). Although he did not explain the challenge to the black juror, based on his having black jurors serve in other cases, it must be assumed he was exercising his intuitive prerogative to eliminate those with whom he feels no

rapport. The petitioner failed to demonstrate these jurors were suitable to the state, but being stricken based on unknown motives, or failed to introduce evidence as to the prosecutor's bad motive. The petitioner simply did not make any showing whatsoever, as to trigger an inquiry of the prosecutor. The fact that blacks are excluded, without more, does not create a strong likelihood that they have been challenged solely because of their race. Even this court envisioned a situation in which "on the peculiar facts of a particular case, no member of some distinct group could be impartial." 457 So.2d at 487. See, Parker v. State, 476 So.2d 134 (Fla. 1985); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985). Moreover, even though the court did not require inquiry as to the prosecutor's motive, the prosecutor himself justified his reasons, and the petitioner did not claim they were insufficient or move to strike the pool. Such lack of action denotes waiver, or at least minimal satisfaction with the jury chosen.

CONCLUSION

Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is correct and should be approved by this court as the controlling law of this state and the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Brynn Newton, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the petitioner, this 19th day of February, 1986.

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