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IN THE SUPREME COURT OF FLORIDA

ANTHONY L. WRIGHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 67,445
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
112 Orange Ave., Suite A
Daytona Beach, FL 32014
(904) 252-3367

ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the District Court of Appeal, Fifth District of the State of Florida. Respondent was the Appellee and will be referred to as "the State" in this Merit Brief. Petitioner will be referred to as he appears before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with sale and possession of cannabis. (R 264) He was tried by a jury on May 15, 1984, and found guilty as charged. (R 236-237, 240) He was sentenced on June 27, 1984, to spend thirty months in prison for sale of cannabis; no sentence was imposed for possession of cannabis. (R 289-290) He timely appealed to the Fifth District Court of Appeal, and his convictions were affirmed May 30, 1985. (Appendix 1) A motion for rehearing was denied on July 3, 1985, and a notice to invoke the Supreme Court's discretionary jurisdiction was timely filed in the District Court on August 2, 1985.

SUMMARY OF ISSUE PRESENTED

The District Court incorrectly held that reversal of Petitioner's convictions on the basis of the trial court's overruling of his objections to the State's exclusion of all blacks from his jury would be a retroactive application of this Honorable Court's holding in State v. Neil, 457 So. 2d 481 (Fla. 1984). The pronouncement that Neil was not retroactive made it clear that the restriction applied to collateral or postconviction proceedings, not to cases pending direct appeal where the issue had been properly preserved for direct appellate review, as evidenced by the reversals on the basis of Neil in Jones v. State, 464 So. 2d 547 (Fla. 1985), and Andrews v. State, 459 So. 2d 1018 (Fla. 1984). Because the trial court improperly required defense counsel to present "documented proof" that the prosecutor had excluded blacks from jury venires "over a period of time," instead of making the proper determination and inquiry required by Neil, Petitioner is entitled to a new trial.

ISSUE PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL ERRED BY AFFIRMING PETITONER'S CONVICTIONS WHERE ALL POTENTIAL BLACK JURORS WERE PEREMPTORILY EXCUSED BY THE STATE OVER PETITONER'S OBJECTION.

Petitioner was tried by a jury on May 15, 1984. During jury selection defense counsel objected to the prosecutor's exercise of peremptory challenges against the only two members of the venire who were black, and claimed that the prosecutor was systematically excluding blacks from serving as jurors. (R 80-81) The prosecutor responded:

> I would like to note for the record, that I exercised four challenges, only two of whom happen to be black. There are only two black people on the jury, one of whom stated she has problems with allergies and drowsiness and appeared to me when questioned to be somewhat drowsy, and I would also like to state for the record, that I frequently do have blacks on my juries.

(R 80-81) Later, defense counsel renewed his objection and asked the trial court for a ruling. (R 90) The following took place:

> THE COURT: Well, do you have any evidence to support your naked statement that the state engaged in systematic exclusion of black members?
>
> MR. MEEHAN [Defense counsel]: Yes, Your Honor, in that going down there were two black members on the jury out of the panel of 18, and they were both just summarily excluded.

THE COURT: Do you have any evidence of Mr. Lerner's proclivity to do that in other cases?

How do you characterize this as systematic? Is this a new word that you learned at a seminar or found in the dictionary? What makes it systematic?

MR. MEEHAN: No. I believe I knew that word previous to that, Your Honor.

THE COURT: Well, I am waiting to have some evidence of Mr. Lerner's proclivity to systematically strike members of the black minority.

MR. MEEHAN: I am saying in this particular case from the jury panel, as already stated, and that would be my evidence, that he struck both female members of the black race, and Mr. Wright [Petitioner] is black, and that is my statement and that is my objection, Your Honor.

THE COURT: As I recall you used four peremptory challenges, and the state didn't ask why you had struck those four, and I don't believe the current law of the state is that either side has to state why they peremptorily challenged any juror, and I don't believe that the Court has the authority to investigate that aspect, and so I am still trying to find where you can give me documented proof that Mr. Lerner has systematically strickened [sic] black jurors over a period of time in this courtroom or other courtrooms, in order to establish your allegations that he systematically struck two members of the black minority in this jury venire.

MR. MEEHAN: Your Honor, that is the statement that I make for this particular trial, and I would perhaps have to do further research to substantiate what the Court is questioning me on at the present time.

> MR. LERNER [Prosecutor]: For the record, Your Honor, I can think of at least three cases just off the top of my head in which I have had black people serving on the jury, the Alton Johnson case, where I had two black women serve on the jury, and the Marvin Sterling case, where I had a black woman serve on the jury. I remember that because she hung the jury in favor of conviction, where everyone else wanted to acquit, and I believe within the last couple of months we had a young black gentleman on one of my juries.
>
> I think this is an utterly specious argument and I would be quite happy to submit my past venires and the juries I have picked, because I think it would utterly refute any allegation that I have ever engaged in blanket racial exclusion in any of my juries.
>
> THE COURT: The motion will be denied.

(R 90-92) (Emphasis added.)

In State v. Neil, 457 So. 2d 481 (Fla. 1984), this Honorable Court departed from Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and held that the following test should be utilized by a trial court when discriminatory use of peremptory challenges has been alleged:

> . . . The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and 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. If a party accomplishes this, then the trial court must decide if there is a substanatial likelihood that the peremptory challenges are being exercised solely on the basis of race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremp-

> tory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characterisitcs of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Neil, supra, 457 So. 2d at 486-487.

The trial court in this case apparently relied on the law of Swain, supra, and overruled the objections because the court did not "believe that the current law of the state is that either side has to state why they peremptorily challenged any juror, and I don't believe that the Court has the authority to investigate that aspect . . . " (R 91) The trial court called upon defense counsel for "documented proof" that the prosecutor had systematically excluded black jurors "over a period of time in this courtroom or other courtrooms." (R 91) As this Honorable Court observed in Neil, the Swain test has seldom if ever been met. Neil, supra, 457 So. 2d at 483. Recognizing that the right to peremptory challenges is not of constitutional dimension, this Honorable Court fashioned the test in Neil in order to ensure that such challenges could not be used to thwart the constitutional guarantee to an impartial jury for the trial of someone accused of a crime in Florida. Art. I §16, Fla. Const.

Petitioner asserts that his objection at trial raised the threshold question of whether the prosecutor's challenge to the only two black members of the venire constituted an impingement of Petitioner's right to a trial by an impartial jury. Clearly, the two black women who were peremptorily excused by the prosecutor in this case were members of a distinct racial group, the same as Petitioner's. It was then the trial court's duty, according to Neil, to decide whether there was a substantial likelihood that the peremptory challenges were being exercised solely on the basis of race. Rather, in this case, the trial court refused to make any findings about the propriety of the State's challenges, announcing that neither side could be required to state its reasons for a peremptory challenge and that the court did not have the authority to make such an inquiry, instead requiring the defense to present "documented" proof of impropriety of this nature by the prosecutor over a period of time. (R 91) This is the same judicial action which was disapproved in Neil, where the trial court held that the State did not have to explain its challenges. As in Neil, reviewing courts cannot tell, if the Neil test had been used in this case, whether or not the trial judge would have found that Petitioner had shown a sufficient likelihood of discrimination in order for the trial court to inquire into the State's motives, although Petitioner would point out that 100% of the black venire members had been excluded. In the identical circumstances of Neil, this Honorable Court held that Mr. Neil should be afforded a new trial; likewise Petitioner is entitled to a reversal of his convictions.

The District Court in this case did not reach the merits of Petitioner's complaint about the State's peremptory challenges, because it read the decision in Neil as further holding that the law announced therein was not retroactive. This Honorable Court stated:

> 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 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.2d 612 (1980).

Neil, supra, 457 So. 2d at 488.

Petitioner suggests that the holdings in Jones v. State, 466 So. 2d 301 (Fla. 3d DCA 1985); Franks v. State, 467 So. 2d 400 (Fla. 4th DCA 1985); and Finklea v. State, 470 So. 2d 90 (Fla. 1st DCA 1985), i. e., that application of Neil to cases on direct appeal, or in the "pipeline," at the time of the Neil decision (September 27, 1984) is not a retroactive application of the decision. In Neil, this Honorable Court cited Witt, supra, for its ruling that the Neil decision was not retroactive. Witt held that retroactive application of "evolutionary refinements in the criminal law" would not be allowed in postconviction proceedings, that only "fundamental" and constitutional law changes would afford relief in collateral proceedings. The situation in a case such as this, where an issue was preserved by objection and the issue presented on a direct appeal pending at the time of a Supreme Court pronouncement on the same issue, is clearly and markedly different from one in which a prisoner who has exhausted his appeals seeks a retroactive application of newly announced law. If the definition of "retroactive" were as broad as the District Court found it to be herein, then because of Judge Perry's reliance on Swain, supra,

at Jack Neil's trial, the holding in Neil could not be applied "retroactively" to Neil's case. This Honorable Court illustrated the distinction between applying Neil retroactively and affording its benefit to "pipeline" cases by its decision in Andrews v. State, 459 So. 2d 1018 (Fla. 1984), which reversed a conviction obtained before September 27, 1984, on the basis of Neil, and in Jones v. State, 464 So. 2d 547 (Fla. 1985), wherein the appeal had been lodged in the Supreme Court in 1982.

The trial court improperly overruled Petitioner's objection to the State's exclusion of 100% of the black members of the venire, without a determination of likelihood of racial discrimination or inquiry; the issue was properly presented to the District Court; and upholding Petitioner's right to a fair and impartial jury would not be a "retroactive" application of State v. Neil. Petitioner is entitled to a new trial.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court herein, and direct that this cause be remanded to the trial court for a new trial.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Brynn Newton

BRYNN NEWTON, ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32014-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by hand delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Anthony L. Wright, 4841 Cutler Street, Orlando, Flroida 32805, this 30th day of January, 1986.

Brynn Newton

ATTORNEY