IN THE SUPREME COURT OF FLORIDA

DAVID WAYNE KIBLER,

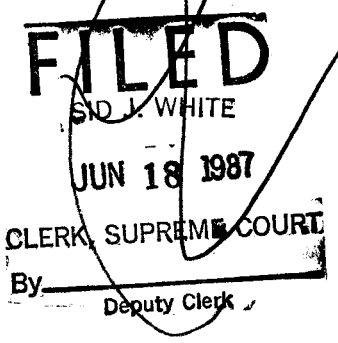
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,067



RESPONDENT'S BRIEF ON THE MERTIS

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TOPICAL INDEX

PAGES:

AUTHORITIES CITED

CASES: PAGES:

AUTHORITIES CITED CONTINUED

OTHER AUTHORITIES

STATEMENT OF THE FACTS

The record reveals that the prosecutor challenged three blacks on the venire. Petitioner does not question the prosecutor's reason for using a peremptory challenge against Ms. D[redacted] (See, Petitioner's brief on the merits p. 17) The first black that was challenged by the assistant state attorney was a Mr. W[redacted] W[redacted]. He revealed that he was a defense witness in an armed robbery trial about six years from the date of the present trial. He was an alibi witness for that defendant. (R 52) He also revealed that he was the former president of the Orange County NAACP. In that capacity he had discussed cases with criminal lawyers. Specifically he had discussed rape cases with the lawyers and was involved with several of those cases. (R 55-56) Mr. W[redacted] noted that he had served as a juror in a D.W.I. case. In fact, the present prosecutor also was the assistant state attorney that prosecuted that particular traffic offense. (R 4, 30-31, 99)

The second black that was dismissed by the prosecutor was a Mr. J[redacted] Mr. J[redacted] acknowledged that he knew Mr. W[redacted]. The prosecutor asked Mr. J[redacted] if these two might influence each other's decision if they were both serving on the same jury. The prosecutor, according to the record, received no response to this question. (R 94)

SUMMARY OF ARGUMENT

Point I - Standing

Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), conclusively establishes that the defendant must initially show that he is a member of a racial group capable of being singled out for differential treatment. Petitioner's premise that the latter decision conflicts with other federal decisions is unavailing, in light of the fact that those other decisions are not concerned with the actual selection of the jury but rather the composition of the venire. Furthermore, under both state and federal law, a defendant is not entitled to have the makeup of the petit jury mirror the community or have an exact proportion of minorities that reflects the ratio of the jurisdiction where the case is tried.

State v. Neil, 457 So.2d 481 (Fla. 1984), does not hold explicitly or implicitly that petitioner has standing to raise the issue of challenging the use of the prosecutor's peremptory dismissals. **Neil**, explicitly held that the party making such a challenge must do so based upon a particular trial and based upon the parties. Furthermore, none of the cases cited in **Neil**, would support petitioner's premise.

Point II - Merits (Assuming for the Sake of Argument that the Petitioner has Standing)

Inasmuch as petitioner has conceeded that one of the three blacks was properly dismissed, respondent submits that the dimissal of the two other blacks did not demonstrate a systematic

exclusion, even if it is assumed for the sake of argument that the prosecutor did not give sufficient reasons for their dismissal and the record does not support any valid reasons. Respondents further submit that this court should look to the record and not to the reasons of the prosecutor to sustain the trial court's ultimate finding that the peremptories were not used solely to discriminate against a racial group. When one examines the record, it is clear beyond any doubt that the prosecutor had ample grounds to dismiss the two blacks for reasons other than on account of their race.

ARGUMENT

POINT I

PETITIONER HAS NO STANDING UNDER THE CIRCUMSTANCES OF THIS PARTICULAR CASE TO CONTEST THE PEREMPTORY CHALLENGES USED BY THE PROSECUTOR AGAINST TWO BLACKS.

Initially appellant argues that he has standing, as a white defendant, to contest the peremptory challenges used by the prosecutor against blacks. Petitioner maintains that **Batson v. Kentucky**, 476 U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), does not preclude a white defendant from asserting this issue, notwithstanding the following language in that decision: "The defendant must initially show that he is a member of a racial group capable of being singled out for differential treatment." 106 S.Ct. at 1722. **Batson**, later on explains that discrimination within the judicial system is most pernicious because it is ..."a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure all others." 106 S.Ct. at 1718. Later on the decision explains:

> ...The equal protection clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant.

(106 S.Ct. at 1721, emphasis applied)

The language and holding are unequivocal that in order for defendant to avail himself of this decision, he must prove that

he is a member of the racial group which is being singled out for differential treatment by the use of arbitrary peremptory challenges. Petitioner's characterization of the latter holding as "dicta" is untenable, to say the least. Petitioner's argument is further refutted in the recent holding of **Allen v. Hardy**, 477 U.S. ____, 106 S.Ct. 2878, 90 L.Ed.2d ____ (1986). There, the Supreme Court held that a black defendant would not be able to take advantage of **Batson**, supra, pursuant to post-conviction relief. In making this holding, the Court explained: "Our holding insures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race..." S.Ct. at 2880. As such, this argument made by petitioner should be rejected.

Petitioner maintains that **Batson**, "conflicts" with the previous holding of the Supreme Court in **Peters v. Kiff**, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). The latter decision, however, applies only to the overall exclusion of a particular race to a venire or a grand jury. Had the United States Supreme Court wanted to extend the holding of **Peters**, to the final selection of petit juries, it certainly would have done so in **Batson**, supra; the Court did otherwise. Petitioner cites **Castillo v. State**, 466 So.2d 7 (Fla. 3d DCA 1985), in support of this argument, where the district court, in a footnote, explained that a white could protest the systematic exclusion of another racial group based on the authority of **Peters**, supra. As explained above, the district's alliance on **Peters**, is erroneous. Furthermore, this court in **State v. Castillo**, 486

So.2d 565 (Fla. 1986), quashed the district court's decision based upon the **State v. Neil**, 457 So.2d 481 (Fla. 1984), issue albeit on different grounds. Nevertheless, because the reasoning of the district court was misapplied and because this court has quashed that decision, petitioner should take no comfort from that opinion.[1] Petitioner also maintains that **Taylor v. Louisiana**, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), militates against the Supreme Court's decision in **Batson**. Again, this case is distinguishable because the **Taylor**, decision dealt exclusively with jury pools and panels; not with the ultimate selection of the petit jury itself. **Taylor**, explained this limitation as follows:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries adequately chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition,...(citations ommitted).

95 S.Ct. at 702.

Certainly, the Supreme Court could have extended the **Taylor**, decision to the distinct factual situation presented in **Batson**, supra, but it chose not to do so.[2] See also, **Koenig v. State**,

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[1] Both **Peters**, and **Batson**, supra, S.Ct. at 1717, were decided under the equal protection clause of the United States Constitution.

[2] Another distinction between **Batson**, and **Taylor**, supra, is the fact that the former was predicated upon the Sixth Amendment, while the latter opinion was based upon equal protection grounds.

497 So.2d 875, 879-880 (Fla. 3d DCA 1986), which also explained the latter principle announced in **Taylor**. The Eleventh Circuit in **Willis v. Zant**, 720 F.2d 1212, 1219 n. 14 (11th Cir. 1983), recognized that the **Taylor** decision was limited to venires and that the Sixth Amendment did not extend to the actual selection of the petit juror itself.

Petitioner's interpretation of the federal constitution is unwarranted and would invite conflict between this state's interpretation of the federal constitution and those Supreme Court decisions, if this court were to accept petitioner's premise. There is no conflict between **Batson** and the cases that petitioner cites from the United States Supreme Court.

Batson, limited a challenge to the use of a prosecutor's peremptories to those defendant's of a distinguishable racial minority because the Supreme Court was unwilling to define an "impartial jury" as one that actually mirrored or reflected the proportion of a particular minority in the actual population. Respondents submits this court should adopt the policy and the holding of **Batson**, and incorporate it into **Neil**, supra.

Petitioner notes the three state supreme court cases cited in **Neil**, supra and maintains that two of those cases support his position. The third case discussed by this court in **Neil**, was **People v. Thompson**, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). Petitioner maintains that this latter case did not decide the standing issue. Yet the following comment in that case belies such an assertion: "Applying these principles to the case at bar, we conclude that, from all the circumstances, including the

prosecutor's use against all his many peremptory challenges, the defendant's race,..." 45 N.Y.S.2d at 755. The latter quote indicates that had the defendant been a white, the holding could well have been different. The court no doubt took account of the defendant's race in reaching its conclusion. Moreover, this court in **Neil**, supra, reached the same conclusion as noted by the following: "If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end..." Id. at 487 (emphasis applied). No doubt the fact that Neil was a black was a significant factor in this court's holding. Moreover, this court in **Neil**, stated its preference for the the New York case over the other two state cases because the former case charted a more even course. Id. at 485. In any event, petitioner is arguing that standing is never a factor. No matter who is on trial or what the issues, petitioner would argue that **Neil**, always applies. Yet the latter quote from **Neil**, as well as **Thompson**, supra, clearly belie such a position; it is absolutely necessary to account for the particular parties, i.e., the defendant.

Petitioner maintains that the other two cases cited in **Neil**, **People v. Wheeler**, 583 P.2d 748 (1978), and **Commonwealth v. Soares**, 387 N.E.2d 499 (Mass. 1979), stand for the proposition that the common group membership of the defendant is totally irrelevant.

Petitioner maintains that in **Commonwealth v. Soares**, 387 N.E.2d 499 (Mass. 1979), and **People v. Wheeler**, 583 P.2d 748

(Cal. 1978), the race of the defendant may be a factor in the determination of whether a party has in fact used its peremptory challenges in an intentionally discriminatory way. Cf., **People v. Motton**, 704 P.2d 176, 182 n. 2 (Cal. 1985), where it was held that **Wheeler** would not be applied retroactively and where the court noted that a **Wheeler**, claim would gain strength if the defendant was a member of a challenged group and the victim a member of the group to which the minority belongs. Perhaps petitioner's argument would have some merit if he could demonstrate that race was related to the case in other ways. For example, the defendant may be white but the defense witnesses may be black. Another example would be a white defendant where the parties anticipated that his participation in a civil rights group would be disclosed to the jury. As this court noted in **Neil**, supra, the party must show that the challenges were based on a particular case on trial, the parties or witnesses. Id. at 487. Petitioner has not demonstrated the latter and, as such, this petitioner has no standing.

It should also be noted that the Massachussets Supreme Court in **Reddick v. Commonwealth**, 409 N.E.2d 764 (Mass. 1980), qualified somewhat their decision in **Soares**, supra. **Reddick**, held that **Soares**, could not be applied retroactively on a motion for post-convcition relief. Specifically the court buttressed its holding by noting that in a particular case race was not a factor in the trial because both the defendant and the victim were black. 409 N.E.2d at 766 n. 1.

Petitioner highlights a quote from **Wheeler**, 583 P.2d at 761

n. 17, for the proposition that a defendant has absolute standing to raise this issue. This quote generally concludes that blacks would be inclined to acquit based on general sympathy for all criminal defendants and based on a general feeling that the criminal justice system was too harsh. Conversely, this quote speculates that whites would be more likely to convict, especially where the victim was white. **Neil**, was promulgated by this court to counteract such broad generalizations. The goal of **Neil** is to individualize the voir dire process and not to allow members of a distinct racial group to be dismissed merely because of their race and based on the superficial generalizations announced in this latter quote in **Wheeler**. Indeed, if a black person indicates that he has sympathy for the social circumstances of the defendant (where the defendant is white) or if he feels that the criminal justice system is too harsh, such reasons would support a peremptory challenge, if not a challenge for cause. **Neil**, is more realistic since it does not base its holding on the stereo-types but bases its holding on the particular issues or parties at trial. Respondent would emphasize the word "impartial" in the language of **Article I, Section 16 of the Florida Constitution.** In the case at bar, petitioner has not demonstrated that there is any possibility that the striking of these two blacks deprived him of an "impartial" jury, inasmuch as racial issues were not a consideration vis-a-vis the parties or the issues at trial. Given the latter factors, petitioner should not have standing to raise this issue.

POINT II

THE RECORD DEMONSTRATES THAT THE PROSECUTOR EXERCISED HIS PEREMPTORY CHALLENGES FOR VALID REASONS AND NOT BECAUSE THE VENIREMEN WERE BLACK.

Whether or not petitioner had standing, all three judges of the Fifth District Court of Appeal agreed that the prosecutor did not exercise the peremptory challenges in a racially discriminatory manner. **Kibler v. State**, 501 So.2d 76 (Fla. 5th DCA 1987). Of the three blacks that were dismissed, petitioner agrees that one of these persons was properly dismissed (Thelma Danvers).

Assuming for the sake of argument that the prosecutor did arbitrarily exclude two of the three blacks from serving on the jury, respondent submits that such actions do not constitute systematic exclusion. In **Woods v. State**, 490 So.2d 24 (Fla. 1986), this court explained that "exclusion of a significant number of black potential jurors... will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry." (citations omitted) Respondents submit that two out of three is not even a significant number of blacks. For example, in **United States v. Dennis**, 786 F.2d 1029, 1049 n. 24 (11th Cir. 1986), the appellate court noted that there was no per se violation of **Batson**, supra, when the prosecutor excluded three out of four blacks but two blacks were left on the jury. Respondent submits that excluding two out of three blacks wrongfully is simply not a per se violation of either **Batson**, or **Neil**, supra.

In any event, the record amply vindicates the prosecutor's use of the peremptory challenges for the remaining two blacks. Petitioner focuses on the comments of the prosecutor, while eschewing the record. Such an analysis exalts form over substance. Moreover, petitioner urges this court to reverse merely on the basis that the trial court did not make specific findings, i.e., did not utter the "magic words" by indicating whether he found the peremptory challenges were based on good cause or not. In **Hamilton v. State**, 487 So.2d 407 (Fla. 3d DCA 1986), it was held that there was not even a need for the trial court to hold a **Neil**, inquiry and it would be unnecessary to examine the state's reasons when the defense had not carried its burden of overcoming the initial presumption that the peremptory challenges were used properly. See also, **Parker v. State**, 476 So.2d 134 (Fla. 1985), were a **Neil** challenge was rejected and where the prosecutor volunteered reasons for excluding one black.

There is a great potential for miscarriage of justice if an appellate court were to look only at the explanations of the attorneys as opposed to the the record itself. Looking at this issue from the defense perspective, hypothetically, if a prosecutor gives very valid reasons for using peremptories against blacks but those same reasons were not used against whites, an appellate court would be obligated to not only look at the explanations but look at the record itself. E.g., **Taylor v. State**, 491 So.2d 1150, 1152-1153 n. 2 (Fla. 3d DCA 1986), which explained that the reasons given by a prosecutor to use the peremptories would not be supported if those reasons were not

likewise applied to whites. See also, **Thomas v. State**, 502 So.2d 994 (Fla. 4th DCA 1987), where the court rejected a **Neil** argument and examined the record to supports its finding.

Respondent will then examine the record to determine if the two black jurors were properly dismissed. The first black juror, Mr. W[redacted], revealed to the prosecutor that he was a defense witness in an armed robbery trial about six years from the date of the present trial. He was an alibi witness for the criminal defendant. (R 52) Mr. W[redacted] also revealed that, as the former president of the Orange County NAACP, he had discussed cases with criminal lawyers. Specifically, he had discussed rape cases with those lawyers and was, in fact, involved with several cases. (R 55-56) Although Mr. W[redacted]' participation in the NAACP may not in and of itself be a proper reason to dismiss him from the jury, the appellee is emphasizing the fact that he could have been very biased against rape victims due to his discussion with criminal attorneys and being involved with sexual battery cases. The latter reveals that the prosecutor had valid reasons to dismiss Mr. W[redacted] apart from the mere fact of his race; he could be unduly sympathetic towards the defense. Furthermore, the voir dire also revealed that Mr. W[redacted] served as a juror on a DWI case. In fact, the present prosecutor also was the assistant state attorney that prosecuted that offense. (R 4, 30-31, 99) Given the latter fact with the other factors already discussed, it is highly unlikely that he was excluded from the jury solely because of his race.

The next black juror that was dismissed was Mr. J[redacted]. The

voir dire examination revealed that he and Mr. W[redacted] knew each other. When the prosecutor asked Mr. J[redacted] if he or Mr. W[redacted] could influence each other if they both served as jurors together, he received no response. (R 94) Since the prosecutor was justifiably weary of Mr. W[redacted] his association with Mr. J[redacted] could potentially bias Mr. J[redacted] views as a juror. In addition, the prosecutor may have been forced to strike Mr. J[redacted] before he reached Mr. W[redacted]. He may have anticipated that he would run out of peremptories before reaching Mr. W[redacted] so that he would have to excercise a peremptory against Mr. J[redacted] to insure that these two would not be on the jury together. In any event, petitioner would have the burden to refute the latter scenario inasmuch as it is the petitioner's burden to affirmatively show error based on the record. **Wright v. Wright**, 431 So.2d 177 (Fla. 5th DCA 1983). In conclusion, there is ample support in the record to justify the use of both peremptory challenges.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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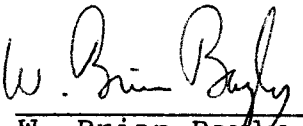
CERIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Answer Brief on the Merits has been furnished, by mail, to Daniel J. Schafer, Assistant Public Defender for petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 16th day of June, 1987.



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