IN THE SUPREME COURT OF FLORIDA

GROVER REED,

Appellant,

v.

CASE NO. 70,069

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. MCLAIN #201170
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

GROVER REED,

Appellant,

vs. CASE NO. **70,069**

STATE OF FLORIDA,

Appellee.

SUPPLEMENT BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

During oral argument on June **22, 1988,** the State raised for the first time in this appeal the question of whether a white defendant has standing to object to the discriminatory use of peremptory challenges to excuse black jurors. This supplemental brief addresses that issue.

II STATEMENT OF THE CASE AND FACTS

The initial brief sets forth the facts pertinent to this appeal. However, the following additions are significant to the issue presented in this supplemental brief.

At the time Reed objected to the prosecutor's peremptory challenges, the State did not raise the standing question. The trial judge noted that Reed is white and stated, "The defendant is white. I don't question his standing to raise the question. There is standing to raise the question ..." (Tr 315) The prosecutor did not question the court's statement. (Tr 315)

III ARGUMENT

ISSUE PRESENTED

WHETHER A WHITE DEFENDANT HAS STANDING TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCUSE BLACKS FROM JURY SERVICE?

Both the United States and Florida Constitutions give white defendants the right to object to the discriminatory use of peremptory challenges to excuse black jurors. Although this Court has not yet spoken directly on the subject, the question is before this Court in Kibler v. State, Case No. 70,067, on discretionary review of the decision of the Fifth District. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987).

The Fifth District Court of Appeal held that a white defendant has no standing to object to a prosecutor's deliberate use of peremptory challenges to exclude blacks from his jury. Kibler v. State. The court wrote that the question had been settled -- as far as the federal constitution was concerned -- in Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Although this Court's decision in State v. Neil, 457 So.2d 481 was specifically based on the state constitution, the Fifth District Court majority reasoned that had Batson been available at the time Neil was decided, it would have provided the basis for the opinion. Judge Orfinger wrote in a concurring opinion that he would not have reached the standing question and was not confident that this Court would "embrace the more restricted test of Batson v. Kentucky". He acknowledged that in Castillo v. State, 466 So.2d 7 (Fla. 3d

DCA 1985), approved in part, quashed in part, 486 So.2d 565 (Fla. 1986), the court noted that the question of whether a defendant may protest the systematic exclusion of an identifiable group other than his own from the jury had been answered in the affirmative in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Kibler is incorrectly decided for two reasons. First, this Court would not necessarily have been swayed by Batson, had it been decided earlier, to base Neil on the federal constitution. This Court should not now bind itself to an interpretation of the federal constitution when answering a right clearly founded upon the Florida Constitution. Second, Kibler misinterpreted Batson as settling the standing issue under the federal constitution. When Batson is carefully read in light of related cases which directly address standing, it is apparent that the federal constitution also affords white defendants standing to complain.

This Court's decisions in Neil and State v. Slappy, No. 70,331 (Fla. March 10, 1988) evidence this Court's strong desire to eliminate discrimination in jury selection. The goal is broader than merely protecting the individual litigant. As stated in Slappy,

> One would think it unnecessary to point out again, as did the court in Batson v. Kentucky, 476 U.S. 79, 87-88 (1986) (citation omitted) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)), that "[d]iscrimination within the judicial system is [the] most pernicious." It would seem equally self-evident that the appearance of discrimination in court

> procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being--to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.
>
> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws.

Slappy, slip opinion at page 3.

This policy is protected by the tools given in Neil to both the defense and the prosecution. 457 So.2d at 486-487. Were the evil limited to the protection of the defendant and his racial group, alone, the prosecution would not need the authority to object. This Court correctly recognized the expanse of the discrimination problem and fashioned a remedy broad enough to cure the ill. Giving the same tools to any defendant, regardless of his race, will only further enhance the protection of the goal of eliminating prejudice from the judicial system. Moreover, every defendant, regardless of race, has a right to a jury fairly selected from a cross section of the community. Based on the Florida Constitution, this Court should hold that a white defendant has standing to object to discrimination in jury selection.

In State v. Neil, this Court cited three state court decisions that had dealt with the issue of peremptory

challenges and race. One of those decisions, People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (1981) did not decide the standing question presented here. The two others did and both allow a defendant of any race to raise the issue. In People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748, 764 (1978) the Court cited Peters v. Kiff and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), as resolving the standing question. Similarly in Commonwealth v. Soares, 387 N.Ed.2d 499, 517 (Mass. 1979), the court specifically held that common group membership of the defendant and those jurors excluded is not a prerequisite to assertion of the right.

The United States Constitution also gives a white defendant the right to object to discrimination against blacks in jury selection. Batson v. Kentucky, does state that in order to make a prima facie case of purposeful discrimination in jury selection, "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. However, the Batson court was not faced with a standing issue. The court's statement on standing is dicta because James Batson is black. There was no need to decide the issue, and the Court gave no explanation for the position stated.

In 1972 the U.S. Supreme Court was directly faced with a standing issue. Unlike Batson, the Court in Peters v. Kiff, 407 U.S. 493, decided a claim by a petitioner who was not black that blacks were excluded from his jury. After finding that the jury selection system was discriminatory, the Court held

that the defendant had standing regardless of his race. In reaching this conclusion, the Court said,

> If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
>
> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
>
> * * *
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

407 U.S. at **498-500.** (footnotes omitted)

Three years later, the Court faced a similar standing question in Taylor v. Louisiana, **419** U.S. 522. A male defendant argued that the systematic exclusion of women from the venire deprived him of his right to a fair trial by a jury of a representative segment of the community. Justice White, writing for seven members of the Court relied in part on Peters v. Kiff, to hold that a male defendant has standing to challenge the systematic exclusion of females from his jury.

Batson v. Kentucky, appears to contradict Peters and Taylor on the question of standing. However, a careful reading of the cases shows a consistency and a foundation for ruling

that a white defendant has standing. Recently, a Texas appellate court analyzed this facial contradiction and reached this result. Seubert v. State, Nos. 01-86-00057 & 01-86-00059 (Tex. Ct.App. 1st Dist. 1988). After discussing the federal authorities, the Texas court harmonized them upon recognizing that Batson was an equal protection case while Peters involved due process and Taylor the Sixth Amendment. The Seubert court stated:

> Swain v. Alabama, 380 U. S. 202 (1965), plainly recognized the right here in issue, but placed an impossible burden on defendants to prove a violation. "All Batson did was give defendants a means of enforcing this prohibition." Allen v. Hardy, 106 S.Ct. 2878, 2883 (1986) (Marshall, J., dissenting). Batson created a new remedy, not a new right. Batson requires the defendant to show that he belongs to the excluded class. This is a reasonable requirement for a defendant claiming denial of equal protection on the basis of race, and Batson was squarely grounded on the equal protection clause of the 14th Amendment. This was the narrowest basis on which to decide Batson because the defendant there was black. * * * *
>
> Appellant is white; therefore, he was not denied equal protection when [the black juror] was struck. He cannot meet that requirement of Batson, but he need not do so because he also asserted a denial of due process of law, see, Peters v. Kiff, and a Sixth Amendment violation, see, Taylor v. Louisiana, 419 U. S. 522, 538 (1975). Batson established a remedy for black defendants claiming denial of equal protection. To apply its "same race" or "membership" requirement to deny relief in this case would require us to ignore contrary holdings in Peters v. Kiff, Taylor v. Louisiana, Ballard v. United States [329 U. S. 187 (1946)], and Thiel v. Southern Pac. Co.[328 U. S. 217 (1946)]. We decline to do so.

Seubert, slip opinion at pages 6-7.

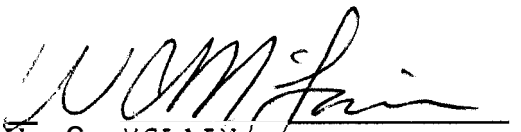
There is no legitimate policy goal served by limiting the application of the Neil decision to black defendants. In fact, allowing white defendants standing will enhance the policy goals of Neil, since discrimination in the judicial system is as much an evil as discrimination against a particular defendant. Moreover, all persons, even white defendants, are entitled to be tried by a fair and impartial jury selected from an cross section of the community.

IV CONCLUSION

For the reasons presented in the initial brief and in this supplemental brief, Grover Reed asks this Court to reverse his judgments and sentences.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



W. C. MCLAIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida **32302**
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 24 day of June, **1988**.

W. C. MCLAIN