IN THE SUPREME COURT OF FLORIDA

WALTER BLACKSHEAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,513

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

WALTER BLACKSHEAR,	:	
Petitioner,	:	
v.	:	CASE NO. BL-441
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Walter Blackshear was the defendant in the trial court and appellant before the District Court of Appeal, First District of Florida. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Filed simultaneously with this brief is an appendix containing a copy of the decision rendered below as well as other documents pertinent to this Court's jurisdiction. Reference to the appendix will I be by use of the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

As his statement of the case and facts petitioner relies upon the case and facts contained in the opinion filed in this case by the lower tribunal, Blackshear v. State, BL-441,(Fla. 1st DCA Mar. 20, 1987)(A-1-5). On April 6, 1987, petitioner timely filed a motion for rehearing or clarification (A-6-10), which was denied by order dated April 27, 1987 (A-11). Notice to invoke this Court's discretionary jurisdiction has been timely filed.

III SUMMARY OF ARGUMENT

Since the actual argument is within the page limitations for a summary of argument, to avoid needless repetition a formal summary of argument will be omitted here.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN PETITIONER'S CASE, BLACKSHEAR V. STATE, BL-441 (FLA. 1ST DCA MAR. 20, 1987), EXPRESSLY AND DIRECTLY CONFLICTS ON THE SAME QUESTION OF LAW WITH STATE V. JONES, 485 SO.2D 1283 (FLA. 1986) AND SLAPPY V. STATE, 12 FLW 433 (FLA. 3D DCA 1987).

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court sought to prohibit race as a factor in the exercise of peremptory challenges. Under Neil, there is a presumption that peremptory challenges have not been exercised in a discriminatory manner, and a party seeking to challenge the other party's exercise of peremptories must make a timely objection and has the initial burden of demonstrating 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 race. Once this initial burden is established, it is incumbent upon the trial court to require the state to supply racially neutral reasons for the challenges.

Here, it was shown that the state used nine of the ten peremptory challenges available to it. Of the nine challenges used, eight were exercised against black jurors, leaving an all white jury. These facts standing alone, reasoned the lower tribunal, did not sustain petitioner's initial burden to demonstrate a strong likelihood that race was a factor in the state's exercise of its challenges. This holding, petitioner contends, conflicts with Jones and Slappy.

In Jones, the defense based a Neil objection on the fact that the state used five of its six peremptory challenges to remove the five black prospective jurors questioned on voir dire. According to the lower tribunal's opinion in Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), the trial court then refused to require the state to justify its challenges. This Court held that the "...defendant adequately fulfilled his part of the required procedure in Neil." 485 So.2d at 1284.

In Slappy, the state used all six of its challenges, four of them against potential black jurors. The appellate court would have been required to affirm Mr.Slappy's convictions under the "right for any reason" rationale if the trial court had erred in requiring the state to justify its challenges. Instead, the appellate court remarked the trial judge "...was obviously satisfied that a prima facie showing was made that the State was excluding jurors based on race...." 11 FLW at 433.

In the instant case a higher percentage of the state's challenges (89%) were used on blacks than was the case in either Jones (83%) or Slappy (67%). Yet the holding in the instant case was that a prima facie showing was not made, whereas in both Jones and Slappy it was held that the initial showing was made. Conflict between petitioner's case and Jones and Slappy is clear.

Two final observations. The first concerns that portion of the opinion below hinting that petitioner's objection was not timely. Since the objection was made prior to the swearing of

the jury, it was timely. State v. Castillo, 486 So.2d 565 (Fla. 1986).

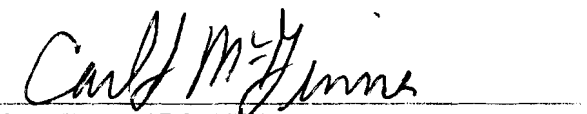
The second observation concerns the clear dicta in the opinion to the effect that the prosecutor's reasons were valid. Since it is dicta, the opinion does not go into detail on the reasons or the inquires asked the questioned jurors on voir dire. It should be noted that the erroneous exclusion of even one juror entitles petitioner to a new trial. Davis v. Georgia, 429 U.S. 122 (1976). More importantly, if dicta in an opinion cannot be a proper basis upon which to base conflict, Ciongoli v. State, 337 So.2d 780 (Fla. 1976), logical and legal consistency dictates that dicta cannot furnish a reason to explain away or harmonize conflict that otherwise exists.

V CONCLUSION

Based upon the foregoing reasoning and authorities petitioner contends he has demonstrated conflict between his case with Jones and Slappy. Petitioner accordingly requests this Court to enter an order ruling its has jurisdiction and requiring the filing of briefs on the merits.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on Jurisdiction has been furnished by hand delivery to Ms. Norma Mungenast, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Walter Blackshear, #042450, Post Office Box 221, Raiford, Florida, 32083, this 8th day of May, 1987.

Carl S. McGinnes

CARL S. MCGINNES