IN THE SUPREME COURT OF FLORIDA

WALTER BLACKSHEAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 70,513

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

NORMA J. MUNGENAST
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, hereinafter referred to as the State, accepts Petitioner's Preliminary Statement and will use the designations set out therein. 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 be by use of the symbol "A" followed by the appropriate page number in parentheses. Reference to Petitioner's Brief and/or Appendix will be by use of the symbol "PB" and/or "PA" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

As did Petitioner, the State relies on the facts contained in the opinion filed in this case by the lower tribunal, Blackshear v. State, 12 F.L.W. 806 (Fla. 1st DCA March 20, 1987). (A-1) On April 16, 1987, the State timely filed its reply to Petitioner's April 6, 1987 motion for rehearing or clarification (A-2-5) and the First District denied Petitioner's motion on April 27, 1987. (PA-11)

SUMMARY OF ARGUMENT

The State contends that this Court should not accept jurisdiction as Petitioner has failed to demonstrate an express and direct conflict with this Court's decisions or another district court's decisions on the same question of law.

ARGUMENT

ISSUE: (RESTATED) THIS COURT SHOULD NOT ACCEPT JURISDICTION TO REVIEW THE DECISION IN BLACKSHEAR V. STATE, 12 F.L.W. 806 (FLA. 1ST DCA MARCH 20, 1987) SINCE THAT CASE IS NOT IN EXPRESS AND DIRECT CONFLICT ON THE SAME QUESTION OF LAW WITH STATE V. JONES, 485 SO.2D 1283 (FLA. 1986) AND SLAPPY V. STATE, 12 F.L.W. 433 (FLA. 3D DCA 1987).

As Petitioner correctly notes on page four of his jurisdictional brief, under this Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984) there is a presumption that peremptory challenges have been exercised by the State in a nondiscriminatory manner, and a defendant seeking to challenge exercise of peremptories must initially demonstrate 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. The First District Court of Appeal issued an opinion in the above-styled cause denying Petitioner relief on the grounds that he never met his burden of demonstrating this latter element, i.e., that there was a strong likelihood that the eight black jurors who were peremptorily challenged by the State were challenged solely because of their race. Petitioner had contended that the number of blacks excluded by the State was a factor, in and of itself, which satisfied his burden of showing a strong likelihood that the challenges were exercised solely on account of race. According to Petitioner, the First District's refusal to accept his argument creates a conflict with this Court's decision in State v. Jones, supra and with the Third District's opinion in Slappy v. State, supra. Based on the following discussion, the State disagrees that the First

District's opinion is in express and direct conflict with any decision, and furthermore, contends the Blackshear, supra opinion is actually consistent with this Court's opinions in Neil, supra and Woods v. State, 490 So.2d 24 (Fla. 1986).

In Jones, supra, this Court approved the Third District's reversal of the defendant's grand theft conviction on the basis that the trial court had erred in not conducting a Neil inquiry. In that case the State used five of its six peremptory challenges to remove the five black prospective jurors questioned on voir dire. As this Court pointed out, "[e]ach of these had declared that he or she could be fair and impartial and demonstrated no reluctance to sit on the jury. No apparent reason, other than color, for their removal exists." Jones, supra at 1284. (emphasis added) Contrary to Petitioner's analysis of Jones, this Court did not hold a Neil inquiry should have been conducted due to the number of blacks excluded. It was the prospective black jurors' responses and attitudes at voir dire and the fact that no apparent reason for their removal existed on the record that caused this Court to conclude the defendant had met his initial burden of demonstrating a strong likelihood that the peremptory challenges were exercised solely on the basis of race and that therefore, a Neil inquiry should have been conducted.

The Blackshear opinion is not in express and direct conflict with this Court's decision in Jones. The First District held in Blackshear that the following objection made by Petitioner's counsel would not suffice to trigger a Neil inquiry: "Eight challenges have gone to exclude black potential jurors, and [the State] is obviously

making an attempt to provide a jury that is of a different race than the defendant." In order to compel the State to explain its reasons for excluding prospective black jurors, the Petitioner first had to show there was no other apparent reason for their removal other than their race. Petitioner never made this showing, as obviously the defendant did in Jones. Accordingly, the First District, relying on this Court's comments in Neil, supra at 487 n.10, held that "the mere exclusion of a number of blacks by itself is insufficient to entitle a party to an inquiry into the other party's use of peremptories." This statement of law does not expressly and directly conflict with this Court's decisions, but rather is consistent with this Court's prior opinions. See Neil, supra and Woods v. State, 490 So.2d 24 (Fla. 1986). In Woods, after the State had used ten peremptories, the defense objected contending six of those had been exercised against blacks and that the State had removed every black that was on the jury. The record actually showed that out of nine black prospective jurors, one was challenged for cause, five were excused by the State and the remaining two were excused by defense. Citing to Neil's holding that the exclusion of a significant number of black potential jurors is insufficient to require an inquiry, this Court held that Woods had failed to demonstrate a substantial likelihood that the State exercised its peremptory challenges solely on the basis of race. Woods, supra and Blackshear, supra are indistinguishable.

The State also contends Blackshear is not in express and direct conflict with the Third District's opinion in Slappy, supra. The

Slappy opinion has nothing to say with respect to a defendant's burden in demonstrating that there is a strong likelihood that the State's peremptory challenges are being exercised against black prospective jurors solely because of their race. Rather, the Slappy opinion discussed the State's burden in articulating "legitimate" neutral reasons for the exclusion of blacks after a prima facie case has been established. Consequently, nothing the First District wrote in the Blackshear opinion is in express and direct conflict with the Third District's pronouncements in Slappy.

In sum, nothing in the Blackshear case expressly and directly conflicts with this Court's resolution of the legal issues posed in Jones, supra or with the Third District's resolution of the legal issues in Slappy. Accordingly, the State respectfully requests this Court to reject Petitioner's argument and deny jurisdiction.

CONCLUSION

Based on the foregoing the State respectfully requests this Court to deny jurisdiction of this appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Norma J. Mungenast
NORMA J. MUNGENAST
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Carl S. McGinnes, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida, 32302 on this the 27th day of May, 1987.

Norma J. Mungenast
NORMA J. MUNGENAST
OF COUNSEL