3-14

IN THE SUPREME COURT OF FLORIDA

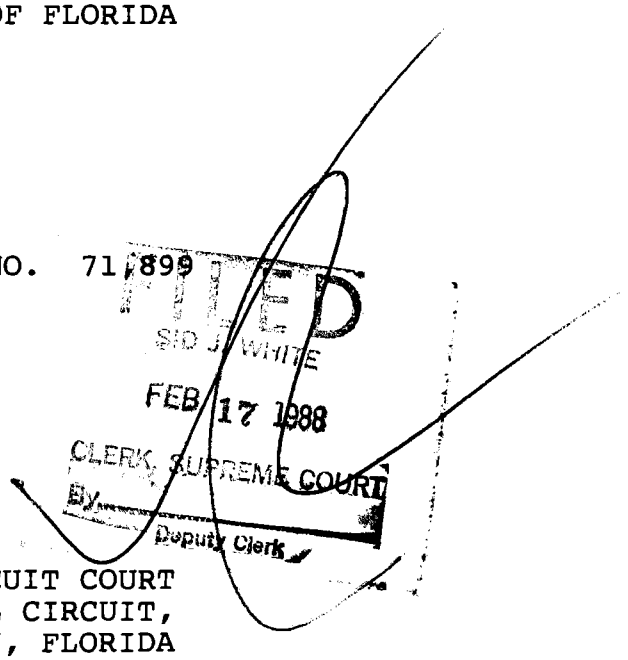
GERALD DOBLY MCCLOUD,

Petitioner,

v. CASE NO. 71,899

STATE OF FLORIDA,

Respondent.



ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

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GERALD DOBLY MCCLOUD,	:	
Petitioner,	:	
v.	:	CASE NO. 71,899
STATE OF FLORIDA,	:	
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	:	

PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Gerald Dobly McCloud was the defendant in the trial court in Case Nos. 85-4591 and 85-4592 and the appellant before the District Court of Appeal, First District of Florida. He will be referred to in this brief as petitioner. The State of Florida was the prosecution and appellee in the courts below.

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 parenthesis.

II STATEMENT OF THE CASE AND FACTS

In Case No. 85-4592, petitioner was charged with burglary with intent to commit assault and sexual battery while armed with a deadly weapon; he was tried on September 9, 1985, and found guilty of the lesser included offenses of trespass and sexual battery with slight force. Petitioner was charged with the same offenses involving a different victim in Case No. 85-4591 and, following a jury trial on October 16, 1985, was found guilty as charged. These cases were consolidated for purposes of appeal.

In Case No. 85-4592, the state exercised eight peremptory challenges to remove eight of the nine black prospective jurors on the venire. Petitioner moved to strike the venire and for a mistrial on the grounds that the black prospective jurors were challenged solely on the basis of their race. After the state provided reasons for only five of its challenges, petitioner's challenges to the venire were denied.

In Case No. 85-4591, the state exercised nine peremptory challenges, one against a white juror and eight against blacks. Petitioner again objected to the state's use of its peremptory challenges, and the court denied petitioner's motions after the state provided nonracial reasons for its removal of the black prospective jurors. No blacks were seated on the jury.

On direct appeal to the First District Court of Appeal, petitioner argued that the issue of racial discrimination in the jury selection was properly presented to the trial court and petitioner met his initial burden of showing a strong likelihood that the prospective jurors were challenged solely because of

their race. Petitioner further argued that the state failed to show that the questioned challenges were not exercised on the basis of race.

The District Court rejected these arguments, finding that although petitioner timely objected and demonstrated on the record that the challenged jurors were members of a distinct racial group, petitioner did not present any further evidence of a likelihood that the prospective jurors had been challenged because of their race. The Court relied on a footnote in State v. Neil, 457 So.2d 481, 487 n.10 (Fla. 1984), and its holding in Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987), to conclude that the mere demonstration of the exclusion of a number of blacks is not sufficient to entitle a party to an inquiry into the other party's use of peremptories (A 3-4).

On December 22, 1987, petitioner timely filed a motion for rehearing or certification (A 7-19), which was denied by order dated January 22, 1988 (A 20). Notice to invoke this Court's discretionary jurisdiction has been timely filed.

III SUMMARY OF ARGUMENT

The District Court of Appeal held that the mere exclusion of a certain number of blacks is not sufficient to satisfy a defendant's initial burden under State v. Neil, even though the same prosecutor in two separate proceedings against petitioner used eight out of eight peremptory challenges and eight out of nine peremptory challenges to exclude black prospective jurors.

This holding expressly and directly conflicts with the decisions in State v. Jones, 485 So.2d 1283 (Fla. 1986); Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), review granted, State v. Slappy, Case No. 70,331, and Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987). The court's holding is based in part on its prior decision in Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987), which decision is pending review by this Court. For these reasons, petitioner urges this Court to accept jurisdiction in the instant case.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, EXPRESSLY AND DIRECTLY CONFLICTS ON THE SAME QUESTION OF LAW WITH STATE V. JONES, 485 So.2d 1283 (FLA. 1986); SLAPPY V. STATE, 503 So.2d 350 (FLA. 3d DCA 1987), AND PEARSON V. STATE, 514 So.2d 374 (FLA. 2d DCA 1987).

In its opinion, the District Court of Appeal held that the state's use of peremptory challenges to exclude eight out of nine black prospective jurors in Case No. 85-4592 and eight out of eight black prospective jurors in Case No. 85-4591 did not sustain petitioner's initial burden under State v. Neil, 457 So.2d 481 (Fla. 1984), to demonstrate a strong likelihood that race was a factor in the state's exercise of its peremptory challenges. The Court based its holding on a footnote in Neil, which states that "the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories." 457 So.2d at 487, n.10. The Court further relied on its prior decision in Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1986), review pending, Case No. 70,513, wherein it held that the use of eight out of nine peremptory challenges to exclude black jurors did not satisfy the defendant's initial burden under Neil.

This Court accepted jurisdiction in Blackshear v. State, supra, based on conflict with State v. Jones, 485 So.2d 1283 (Fla. 1986) and Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), pending review, State v. Slappy, Case No. 70,331. Petitioner avers this Court should likewise accept jurisdiction

in the instant case. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

In State v. Jones, supra, the defense interposed a Neil objection on the fact that the state used five of its six peremptory challenges to remove all five black prospective jurors from the venire. According to the district court's opinion in Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), the trial court refused to require the state to justify its challenges. In affirming the district court's reversal of Jones' conviction, this Court held that the ". . . defendant adequately fulfilled his part of the required procedure in Neil." 485 So.2d at 1284.

In Slappy v. State, supra, the state used all six of its peremptory challenges, four of them against potential black jurors. The trial court required the state to justify its challenges and the district court was satisfied that a prima facie showing of racial discrimination had been made.

In Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987), the state used one of its peremptory challenges to exclude the only black member of the venire. The trial court did not inquire into the basis for the state's peremptory challenge of the only black prospective juror, and the district court remanded for an inquiry, stating:

> We see no difference, in terms of the equal protection clause, between the striking of the only one black juror and the striking of the only two black jurors--or the striking of the only three black jurors, or more. As observed by the court in the only case we have found dealing with the striking of the only member of the defendant's race from the

> jury, the result is the same regardless of number--no members of the defendant's race left on the jury, and the prosecution should be required to explain the reasons for its peremptory challenge when that result occurs.

514 So.2d at 376. The court noted that its opinion conflicted with the First District's holding in Blackshear v. State, but stated that its decision was mandated by the dictates of the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79 (1986) and Griffith v. Kentucky, ___ U.S. ___, 93 L.Ed.2d 649 (1987).

The numbers of excluded black jurors here (89% and 100%) are far more compelling than those in Jones, where 83% of the state's challenges were used on blacks, or in Slappy, where 67% of the state's challenges were used to exclude blacks, or in Pearson, where only one black was challenged by the state, yet the District Court below held that petitioner failed to meet his initial burden. The Court's opinion expressly and directly conflicts with the aforementioned decisions. Indeed, conflict was noted by the Second District Court of Appeal in Pearson.

State v. Neil does not require a defendant to prove discrimination in fact, but only a likelihood of discrimination in the use of peremptory challenges. Petitioner met that burden.

Petitioner requests this Court accept jurisdiction of the instant cause and reverse the decision of the District Court of Appeal.

V CONCLUSION

Based upon the foregoing reasoning and authorities, petitioner contends he has demonstrated conflict between the decision of the district court below and Jones v. State, Slappy v. State, and Pearson v. State on the same question of law. Petitioner accordingly requests this Court accept jurisdiction and require the filing of briefs on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Kurt L. Barch, Assistant Attorney General, The Capitol, Tallahassee, Florida, on this 17th day of February, 1988.

Paula S. Saunders

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FLA. BAR NUMBER 308846