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

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the District Court and the Defendant in the trial court. The parties will be referred to as they appear before this Court. Citations to the record will be referred to by the symbol "R" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case.

For the facts of this case, the Respondent refers this Court to the facts as set forth by the District Court in its opinion of December 9, 1987 wherein the court stated:

> This is an appeal by McCloud of the judgments and sentences imposed as a result of two separate trials. We affirm both convictions but remand for resentencing in one of the cases.
>
> McCloud was charged in case number 85-4591 with one count of burglary with intent to commit felony assault and one count of sexual battery while armed with a deadly weapon. In case number 85-4592 McCloud was charged with the same offenses involving a different victim. He entered pleas of not guilty in both cases, and the cases proceeded to jury trial on October 16, 1985 and September 9, 1985, respectively. In case number 85-4591 McCloud was found guilty as charged, and in case number 85-4592 he was found guilty of the lesser included offenses of trespass and sexual battery with slight force.
>
> In case number 84-4592, which was tried first, the state used eight of its ten peremptory challenges to strike eight of the nine black members of the venire. The remaining black venire member served as a juror. Pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984) the defendant moved to strike the venire and for a mistrial on the grounds that the prospective black jurors were challenged solely on the base of their race. The state volunteered non-racial reasons for five

of its eight challenges and the trial judge denied the defense motions, finding that the state had provided sufficient reasons for its challenges.

In case number 85-4591 the state challenged seven black members of the venire and one white member. The defense objected to the state's use of its peremptory challenges to strike black venire members and again asked the court to strike the venire and declare a mistrial. The state volunteered nonracial reasons for each strike, and the court denied the defense motions. No showing was made in this case as to the racial composition of the original twenty-one member venire or of the jury which was ultimately seated.

SUMMARY OF ARGUMENT

The Respondent will argue that this Court should not accept review of the District Court's decision since it is not in direct conflict with State v. Jones, 485 So.2d 1283 (Fla. 1986); Slappy v. State, 503 So.2d 350 (Fla. 3rd DCA 1987), and Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987).

In the instant case the District Court correctly held that the exclusion of a certain number of blacks is insufficient to satisfy the Defendant's initial burden under State v. Neil. The District Court correctly followed its decision in Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987). Review pending, F.S.C. Case No. 70,513. (Orally Argued November 3, 1987).

ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IS NOT IN EXPRESS OR DIRECT CONFLICT WITH A DECISION OF THE FLORIDA SUPREME COURT OR ANOTHER FLORIDA DISTRICT COURT OF APPEAL.

Pursuant to 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 denied Petitioner relief because of his failure to meet the burden of demonstrating that there was a strong likelihood that black jurors who were peremporily challenged by the State were challenged solely because of their race. In case number 85-4592 eight out of nine prospective black jurors were challenged and in case number 85-4591 eight out of eight prospective jurors were challenged. The Petitioner contends that the number of blacks excluded by the State should be a factor in and of itself which satisfies his burden of showing a strong likelihood that the challenges were exercised solely on account of race. Petitioner argues that the First District Court's decision creates a conflict with this

Court's decision in State v. Jones, 485 So.2d 1283 (Fla. 1986) and Slappy v. State, 503 So.2d 350 (Fla. 3rd DCA 1987).

The State, of course, disagrees that the First District's opinion is in express and direct conflict with any decision, and furthermore, contends that the Court's opinion is consistent with Blackshear v. State, 504 So.2d 330 (Fla. 1st DCA 1986) and with this Court's decision in State v. 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, "Each of these had declared that he or she could be fair or 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, his Court did not hold that 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 not 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.

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. Blackshear supra, is indistinguishable from Woods.

The Respondent also contends that the Court's opinion is not in conflict with Slappy v. State, supra. The Slappy opinion was silent 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 McCloud opinion is in express and direct conflict with the Third District's pronouncements in Slappy.

The Respondent also contends that the First District's opinion does not conflict with Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987). In Pearson, the Second District Court of Appeal dealt with the striking of one black member of venire. The District Court determined that the exclusion of one black juror required the State to explain its reasons for its peremptory challenge when the exclusion left the panel without blacks. As pointed out by the First District Court in case number 85-4592, the State used eight its peremptory challenges to strike eight of nine black members of the venire. The remaining black venire member served as a juror. The State volunteered nonracial reasons for five of its eight challenges. In case number 85-4591 seven of eight black members of the venire were challenged. The State volunteered nonracial reasons for each strike and the court denied the defense motions in both cases. Thus, there is no conflict between the decision in this case and the decision in Pearson v. State, supra.

The McCloud opinion is consistent with the First District Court's decision n Blackshear v. State, supra. The First District Court 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, Petitioner first had to show that there was no apparent reason for their removal other than their race. The Petitioner in the instant case never made this showing, as the defendant did in Jones. Accordingly, the First District was correct in relying upon its decision in Blackshear and this Court's comments in Neil, supra at 487, note 10, wherein this Court stated, "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."

In the instant case the District Court applied the correct law. The Petitioner's disagreement with the decision is actually based upon the Court's factual finding that the State articulated "legitimate" neutral reasons for the exclusion of the black members of the venire. Consequently, nothing in the McCloud case expressly and directly conflicts with this Court's resolution of the legal issues posed in Jones, or with the Second District's and Third District's resolution of the legal issues in Pearson and Slappy respectively. 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 9th day of March, 1988.

FOR

KURT L. BARCH
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