IN THE SUPREME COURT OF FLORIDA

PATRICK ANTHONY REYNOLDS,

Petitioner,

vs. : CASE NO. 75,680

STATE OF FLORIDA, :

Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

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I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court below, Reynolds v. State, 555 So.2d 918 (15 FLW D184) (Fla. 1st DCA 1990), on a Neil issue.

Petitioner, appellant in the district court and defendant in the circuit court, will be referred to by name or as petitioner. Respondent, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

II STATEMENT OF THE CASE AND FACTS

Per the decision of the First District Court below:

> Reynolds appeals from his convictions of the offense of possession of cocaine, asserting reversible error in the jury selection process by reason of the state's excusing a black juror peremptorily. ...
>
> The trial court employed a jury selection method whereby 17 men and women were randomly called forward from a larger pool. Among the 17 was one black, Ms. Dean, who was the twelfth person called forward.

Reynolds v. State, 15 FLW at D184. While this fact is not contained in the opinion below, counsel feels compelled to add the fact, known to the district court, that petitioner is black (R-1).

The district court went through a detailed discussion of which side exercised peremptory challenges which led up to Ms. Dean, the twelfth prospective juror, being considered for the petit jury. Up to the point that Ms. Dean was added to the panel, the state had exercised one peremptory challenge and the defense, five.

When Ms. Dean was added to the panel under consideration, the state struck her peremptorily. Defense counsel requested the trial judge, Sharon Tanner, to instruct the prosecutor to give a reason for striking Ms. Dean, pointing out that she was the only black among the original 17 prospective jurors considered. The prosecutor objected to giving a reason because there had been no "systematic exclusion" of blacks by the state. The court agreed with the prosecutor and did not require the state to announce a reason for excusing Dean. In a footnote at this

point, the district court noted the one distinctive answer Ms. Dean gave, which was that her cousin had overdosed on cocaine. Id. at D185.

In deciding the case, the First District said:

> On appeal, appellant relies heavily upon the Supreme Court's expressions in State v. Slappy, 522 So.2d 18 (Fla. 1988), to the effect that the racially discriminatory excusal of even one prospective juror taints the jury selection process. Id. at 21.

Reynolds at D185.

The First District goes on to hold, however, that Slappy does not apply to the instant case because petitioner failed to satisfy the initial burden of demonstrating on the record a strong likelihood that the state struck Ms. Dean solely because of her race. The district court said:

> But the mere fact that Ms. Dean was the only black among the 17 called forward does not mean that excusal demonstrates "a strong likelihood" that she was excused "solely because of [her] race." Slappy at p. 21 (quoting Neil). Contra Parrish v. State and Pearson v. State [infra]. Thus the defendant failed to satisfy the third Neil criterion and the trial court did not err in failing to inquire into the state's motives for excusing Ms. Dean....

Id. As for the trial court's acceptance of the clearly erroneous "no systematic exclusion" argument, the district court said:

> And the fact the trial court may have erroneously stated that the defense was required to show a "systematic exclusion" of blacks will not cure the defendant's failure to meet his initial burden.

Id. In the last sentence of the opinion, the court expressly acknowledged conflict with Parrish v. State and Pearson v. State, infra.

The 2-1 decision of the district court was entered January 12, 1990, rehearing was denied February 8, and the notice to invoke was timely filed March 9, 1990.

III SUMMARY OF ARGUMENT

In Blackshear II, infra, in which the state exercised eight of nine peremptory challenges against blacks, this court said that where the state uses its peremptories to exclude all blacks from the jury, the burden shifted to the state to prove the challenges were not racially discriminatory. In Parrish and Pearson, infra, the Second and Third District Courts held that where the state used a peremptory challenge to exclude the only black prospective juror on the venire, this was sufficient to make a prima facie case of discrimination, and shift the burden of proof to the state. In the instant case, the First District Court held that the state's exclusion of the only black prospective juror on the venire was not sufficient to make a prima facie case. This opinion, therefore, expressly and directly conflicts with Parrish and Pearson, and the First District expressly acknowledged the conflict.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH PARRISH V. STATE, 540 SO.2D 870 (FLA. 3D DCA), REVIEW DEN. STATE V. PARRISH, 549 SO.2D 1014 (FLA. 1989) AND PEARSON V. STATE, 514 SO.2D 374 (FLA. 2D 1987), REVIEW DISM. 525 SO.2D 881 (FLA. 1988).

In the instant case, the state exercised a peremptory challenge against Carol Dean, the only black person on the 17-person venire. When the defense objected and moved for a Neil inquiry, the state argued it was not required to give a reason because there had been no showing of "systematic exclusion." Neil v. State, 457 So.2d 481 (Fla. 1984), clarified sub nom. State v. Castillo, 486 So.2d 565 (Fla. 1986). The trial court accepted this argument and did not require the state to give a reason for excluding Ms. Dean.

Petitioner appealed this Neil/Slappy violation to the First District Court of Appeal. State v. Slappy, 522 So.2d 18 (Fla.), cert. den. 487 U.S. ____, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). The First District ruled against petitioner, Reynolds v. State, 555 So.2d 918 (15 FLW D184) (Fla. 1st DCA 1990), holding that he had failed to prove a prima facie case. This is an appeal from that decision.

First, the "no systematic exclusion" standard, which the trial court accepted, is clearly wrong. Thompson v. State, 548 So.2d 198, 202 at n.4 (Fla. 1989); State v. Slappy, supra. This clearly erroneous ruling, which was the basis on which the

trial court cut off a Neil inquiry, did not settle the matter for the First District Court, however.

Rather, although the record shows that the state exercised a peremptory challenge to exclude the only black prospective juror, the First District held the defense had not made a prima facie showing that the challenge was exercised in a racially discriminatory manner. In Parrish, however, the Third District Court held that striking the only black member of the venire in itself "demonstrated a strong likelihood that the juror was rejected on racial grounds." Parrish v. State, 540 So.2d 870, 871 (Fla. 3d DCA), review den. State v. Parrish, 549 So.2d 1014 (Fla. 1989).

Similarly, in Pearson, the Second District court held:

> ...that the appellant established a prima facie case of racial discrimination violative of the fourteenth amendment based on the state's use of a peremptory challenge to strike the only representative of the appellant's race from the jury venire and that the burden shifted to the state to come forward with a neutral explanation for its challenge.

Pearson v. State, 514 So.2d 374, 375 (Fla.2d DCA 1987), review dism. 525 So.2d 881 (Fla. 1988).

This principle is also deducible from this court's opinion in Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988)(Blackshear 11), in which this court noted that at the time of the defense objection, "not a single black member remained on the prospective panel." The fact the prosecutor here could effect the very same complete and systematic exclusion of blacks from the jury by exercising only one peremptory, while the

prosecutor in Blackshear had to exercise eight peremptory challenges to accomplish the same disapproved goal does not vitiate the principle.

It should be noted that the same judge wrote the opinion in the instant case as wrote the First District opinion in Blackshear. Blackshear v. State, 504 So.2d 1339 (Fla. 1st DCA 1987) (Blackshear I). In both cases, the same judge wrote the opinion which held that the defendant had failed to make a prima facie showing of discrimination. The First District opinion in Blackshear I was overruled by this court, and the instant case merits the same treatment.

While it does not appear to be a proper subject for a jurisdictional brief, in case the state should raise it, one more point must be addressed. In Parrish and Blackshear 11, the courts noted there was no indication the challenged juror(s) would be unfair or partial. Here, while the district court did not expressly state a belief that Ms. Dean would be unfair or partial, it did note her one answer which distinguished her from other jurors, which was that she had a cousin who had overdosed on crack. The implication of including this statement is that the First District must believe Dean was excludable under Neil on the basis of this answer. The trial court of course never considered the issue because, having accepted the state's argument that there was no systematic exclusion, it did not require the state to give any reason for excluding Ms. Dean.

Fairness of a juror in this context means that she be not prejudiced against the prosecution. Contrary to the implication of the district court opinion, the relationship of one's having a relative overdose on crack to one's ability to be a fair and impartial juror is not self-evident. It provides a fact, but provides no illumination as to how that fact may have colored the views of a prospective juror. It is not in itself a fact which self-evidently and unambiguously would dispose a juror favorably towards a defendant charged with an offense involving crack, as was petitioner here.

By itself and without more inquiry, the fact a relative overdosed is at least as likely to be a pro-state quality as a pro-defense quality in a juror. There is no way to know, without asking her, whether Dean felt sympathy for the bonds of addiction which may afflict crack users, or whether she thought they were a blight on the land. Had the state been required to give a reason for excluding Dean, and given the cousin's overdose as its reason, without an inquiry into how that fact would affect Ms. Dean's impartiality, it would have violated Slappy's express disapproval of perfunctory examination.

In Blackshear 11, this court said that where the state uses its peremptories to exclude all blacks from the jury, the burden shifted to the state to prove the challenges were not racially discriminatory. In Parrish and Pearson, the Second and Third District Courts held that where the state used a peremptory challenge to exclude the only black prospective juror on the venire, this was sufficient to make a prima facie

case of discrimination, and shift the burden of proof to the state. In the instant case, the First District Court held that the state's exclusion of the only black prospective juror on the venire was not sufficient to make a prima facie case. This opinion, therefore, expressly and directly conflicts with Parrish and Pearson, and the First District expressly acknowledged the conflict.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court accept review of this case to resolve the conflict with Parrish and Pearson, supra.

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 Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Patrick Reynolds, **1329** Iouia Street, Jacksonville, Florida, **32206**, this 16 day of March, **1990**.

KATHLEEN STOVER