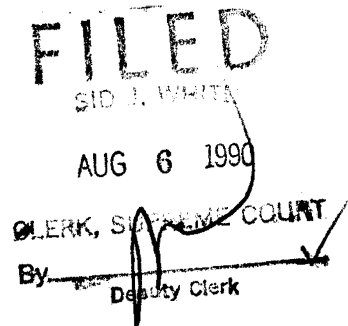
IN THE SUPREME COURT OF FLORIDA

PATRICK ANTHONY REYNOLDS,	:	
Petitioner,	:	
v.	:	CASE NO. 75,680
STATE OF FLORIDA,	:	
Respondent.	:	



BRIEF OF PETITIONER ON THE MERITS

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STATE OF FLORIDA, :

Respondent.

________________________________.

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

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

Petitioner, appellant in the district court and defendant in the Duval County Circuit Court, will be referred to by name and or as petitioner. He was tried before Judge Sharon Tanner. Respondent, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

The record on appeal will be referred to as "R" and the three-volume transcript as "T."

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, 555 So.2d at 918. While this fact is not contained in the opinion below, it was known to the district court - 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 court to instruct the prosecutor to give a reason for striking Ms. Dean, the only black among the 17 prospective jurors considered. The prosecutor argued no Neil inquiry was necessary because there had been no systematic exclusion of blacks. The trial court accepted the state's reasoning and did not require the state to announce a reason for excusing Dean. The district court noted in a footnote the one distinctive answer Ms. Dean gave, which was that her cousin had overdosed

on cocaine. 555 So.2d at 918. Ms. Dean's answers to other questions revealed that she was employed, was not married, had no children, and had never served on a jury (T-14,32).

The entire Neil colloquy consisted of the following:

> MS. MINTON (DEFENSE COUNSEL): Your honor, we would ask at this time for the Court to instruct State to give a reason for striking Ms. Dean. She was the only black empaneled on the entire jury out of our group of 17, our jurors.
> She would be nothing but impartial, from our questioning of her. She had someone who died, who overdosed.
>
> MR. BERRY (PROSECUTOR): Your Honor, Ms. Minton asked me to do the Neal challenge. What Ms. Minton is asking the Court to do is exercise the Neal challenge. The case law on Neal is very clear. There must be a showing by the State, there must be a systematic exclusion of the minorities of the defendant. There's been no systematic exclusion. The State has used its first preemptory [sic] on a white male...The only reason Ms. Dean was struck is because she was challenged [sic] by the Public Defender for preemptory. For that reason, I would assert there's no Neal challenge.
>
> MS. MINTON: The fact that Ms. Dean is the only black on the jury raises the questions as to why. With the facts I have just stated, she might even lean more towards the state in this case. She had a cousin who died. I think that would be sufficient to raise the Neal challenge.
>
> THE COURT: I agree with his statement of the law, as far as systematic exclusion. I don't think I can find one on the face of it at this point in the process.

(T-37-38).

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.

555 So.2d at 919.

The First District went on to hold, however, that Slappy did not apply to the instant case because petitioner failed to satisfy the initial burden of demonstrating 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 satisfyhe third Neil criterion and the trial court did not err in failing to inquire into the state's motives for excusing Ms. Dean....

Id. The court expressly acknowledged conflict with Parrish and Pearson.

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.

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

As for the facts of the charge, Officer Wright made a traffic stop of Reynolds for having no license tag. Reynolds was driving a van which had a piece of paper in back that said "lost tag" and had a tag number on it. When Wright asked for his driver's license, Reynolds said he did not have one, so Wright arrested him. Wright patted down Reynolds, but did not handcuff him, before placing him in the back of his police car. Wright did not find any contraband. Wright then took Reynolds to the Duval County Jail (T-62-66,70,74).

At the jail, Officer Wright left Reynolds in the shakedown room while he finished the paperwork on the arrest. The shakedown room is 4 or 5 feet by 5 feet in size. There was a newspaper in the room and some paper bags they use when an arrestee has a lot of personal property (T-80,89).

Officer Wildes searched Reynolds in the shakedown room before booking him and found a small packet of crack cocaine in a jacket Reynolds was not wearing (T-82-86).

IV SUMMARY OF ARGUMENT

The state peremptorily challenged the only black on the venire from which petitioner's petit jury was selected. When the defense asked for a Neil inquiry, the state argued no inquiry was necessary because there had been no systematic exclusion of black jurors. The trial court accepted the state's argument, and did not conduct a Neil inquiry. The district court held petitioner had not met his initial burden of making a prima facie showing of a likelihood that the juror was excluded solely on the basis of her race.

The district court below certified conflict with Parrish and Pearson, infra, on the issue whether excluding the sole black juror is sufficient to establish a prima facie case. The answer is yes, but the issue is not as simple as that. The district court's far more fundamental misapprehension was in its failure to discern the consequences of the trial court's erroneous ruling accepting the systematic exclusion standard.

The improper ruling cut off any further attempt by the defense to make a prima facie showing. Moreover, as the trial court did not reach the issue of whether a prima facie showing had been made, petitioner was in no position to know it would later be found deficient. Finally, as it conducted no Neil inquiry, the trial court never evaluated any reason for excluding the juror. In such a posture, the district court could not properly determine whether the juror was excludable under Neil on the basis of her one unique answer to a voir dire question.

V ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED REVERSIBLY IN PERMITTING THE EXCLUSION OF A BLACK JUROR ON THE STATE'S PEREMPTORY CHALLENGE OVER PETITIONER'S NEIL OBJECTION.

This case raises the issue of what is required to establish a prima facie case of racial discrimination against a juror sufficient to trigger a Neil inquiry, where the defendant is black, and the only black prospective juror is peremptorily challenged by the state.

The district court below certified conflict with Parrish and Pearson on the issue whether excluding the sole black juror is sufficient to establish a prima facie case of a likelihood of racial discrimination. Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987, review dism. 525 So.2d 881 (Fla. 1988); Parrish v. State, 540 So.2d 870 (Fla. 3d DCA), review den. State v. Parrish, 549 So.2d 1014 (Fla. 1989). The answer to this question is yes, but the issue is not as simple as that. The district court's far more fundamental misapprehension here was in its failure to discern the consequences of the trial court's erroneous ruling accepting the systematic exclusion standard.

In State v. Neil, 457 So.2d 481 (Fla 1984), clarified sub nom. State v. Castillo, 486 So.2d 565 (Fla. 1986), this court recognized that the need to protect against unconstitutional racial bias in the selection of jurors included examining the state's use of peremptory challenges. In Slappy, the court

said the Neil decision "preceded, foreshadowed and exceeds" the federal guarantees set out in Batson v. Kentucky. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Slappy, 522 So.2d 18, 20-21 (Fla.), cert. den. 487 U.S. ____, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988)(approving Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987)). The Slappy decision sets out the Neil test for bias in greater detail.

In Slappy, the supreme court said that the "ancient tradition" of peremptory challenges

> ... is to some degree inconsistent with the requirements of the Florida and federal constitutions. We thus cannot permit the peremptory's use when it results in the exclusion of persons from jury service due to constitutionally impermissible prejudice. To the extent of the inconsistency, the constitutional principles must prevail, notwithstanding the traditionally unlimited scope of the peremptory.

Id. at 20.

To trigger a Neil challenge, a party must make a timely objection to the questionable peremptory challenge and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood they have been challenged solely because of their race. Neil, 457 So.2d at 486. The district court below held there was no error in failing to conduct a Neil inquiry here because petitioner failed to make the prima facie showing there was a strong likelihood the sole black prospective juror was excused solely because of her race. Petitioner disagrees with the

district court's analysis and submits that he did make a prima facie case of discrimination.

While petitioner is black (R-1), only one black person, Ms. Dean, was among the 17 veniremen from whom was selected the jury which tried him. The state used a peremptory challenge to exclude Ms. Dean. When petitioner asked the court to require the state to give reasons for excluding her, the state argued no Neil inquiry was necessary because there had been no systematic exclusion of minorities. The trial court agreed with the necessity of showing systematic exclusion and did not require the prosecutor to state reasons for excluding Ms. Dean (T-37-38). The court erred reversibly in failing to make the appropriate inquiry.

In Parrish and Pearson, supra, the Second and Third District Courts of Appeal held that where the sole black juror was excused peremptorily from the trial of a black defendant, the defendants had made a prima facie showing of racial discrimination sufficient to trigger a Neil inquiry. In Parrish, the Third District 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, 540 So.2d at 871. 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.

514 So.2d at 375. The Pearson court added:

> As observed by the court in the only case we have found dealing with the striking of the only member of of the defendant's race from the jury, the result is the same regardless of number - no members of the defendant's race are left on the jury, and the prosecution should be required to explain the reasons for its peremptory challenge when that result occurs. (emphasis added)

Id. at 376, citing United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987). The Parrish court had also noted that "[t]here was no indication that the challenged juror would be partial or unfair." 540 So.2d at 871.

This principle is also deducible from this court's opinion in Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988), 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.

Moreover, in holding that a white defendant had standing to challenge the improper exclusion of black jurors, this court said in Kibler v. State, 546 So.2d 710, 712 (Fla. 1989):

> We hold that under article I, section 16 of the Florida Constitution it is unnecessary that the defendant who objects to peremptory challenges directed to members of a cognizable racial group be of the same race as the jurors who are being challenged.

> This does not mean, however, that the respective race of the challenged jurors and of the person who objects to the challenges may not be relevant in the determination of whether t'e challenges are being unconstitutionally exercised because of group bias. Under the procedure prescribed by Neil, the objecting party must ordinarily do more than simply show that several members of a cognizable racial group have been challenged in order to meet his initial burden. Thus, a defendant of a different race than the jurors being challenged may have more difficulty convincing the trial court that "there is a substantial likelihood that they have been challenged only because of their race." Moreover, in those cases in which the inquiry has been directed to the challenging party, the respective races of the challenged jurors and the defendant may also be relevant in the determination of whether the challenging party has met the burden of showing that the challenges were made for reasons not solely related to race. (citation omitted)

The corollary to the principle that the defendant has a heavier burden when he and the jurors are of different races is that the defendant's burden must be somewhat lighter when he is, as was Reynolds here, the same race as the challenged juror. Further, this court has also held that any doubt as to whether the moving party has met the burden should be resolved in that party's favor. Slappy; see also Parrish; Johnson v. State, **537** So.2d 117 (Fla. 1st DCA 1988). If there were any doubt here that petitioner had made the prima facie showing, that doubt was to be resolved in his favor.

It would take only a slight extension of Blackshear to find that where not only all black prospective jurors, but the only black prospective juror, has been peremptorily challenged by the state in the criminal trial of a black defendant, and

where the record contains no obvious reason for disqualification, that the defendant has made the prima facie showing which triggers the Neil inquiry. The issue is not, however, as simple as that. The district court's far more fundamental misapprehension here was in its failure to discern the consequences of the trial court's erroneous ruling accepting the systematic exclusion standard.

The trial court accepted the state's argument that no Neil inquiry was necessary because there had been no "systematic exclusion" of blacks from the jury. This was, of course, erroneous. There is no requirement that systematic exclusion be shown. Rather, the mere number of excusals is not dispositive of the issue, and the record here *is* quite sufficient to demonstrate reversible error. In Slappy, this court recognized that:

> ... number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate.

522 So.2d at 21, citing United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987), vacated in part on other grounds on rehearing 83[illegible] F.2d 1312 (11th Cir.), cert. dism. 487 U.S. 1265, 109 S.Ct. 28, 101 L.Ed.2d 979 (1988); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478 (11th Cir.), cert. den. 475 U.S. 1058, 106 S.Ct. 1295, 89 L.Ed.2d 593 (1986); Neil; Pearson; Floyd v. State, 511 So.2d 752 (Fla. 3d DCA 1987), review den. 545 So.2d 1369 (Fla. 1989). See also Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50

L.Ed.2d 339 (1976) (improper exclusion of a single prospective juror with only a general objection to the death penalty tainted death sentence and constituted reversible error).

The improper exclusion of even a single black prospective juror triggers the inquiry requirement, and the court's failure to conduct an inquiry constitutes reversible error. In United States v. Horsley, 864 F.2d 1543 (11th Cir. 1989), the government peremptorily challenged the only black on a 32-person venire. Asked the reason for the challenge, the prosecutor said he did not have any particular reason, but had a feeling about him as he had about Mr. Gonzalez and several others. The prosecutor did not question the black venireman, who had not given answers different from others on the venire panel. The appellate court pointed out that, by comparison with the black venireman's neutral answers, Mr. Gonzalez testified, inter alia, he had once been a witness at trial, had once been subject to a criminal charge, and had a family member who had been convicted of a crime and served time in prison.

Nevertheless, the federal district court interpreted Batson as requiring a showing of a pattern of discriminatory peremptory challenges, and as the single challenge did not constitute such a pattern, ruled that the prosecutor's use of peremptories did not rise to the stature of a constitutional violation. The appellate court said that while Batson had noted that a pattern of strikes against black jurors might be a relevant circumstance to consider, that example was "merely illustrative,'' and held, once again, that number alone was not

dispositive of a challenge to the discriminatory use of peremptory challenges.

This court has said the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is so because,

> the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

Slappy, 522 So.2d at 21, quoting Gordon, **817** F.2d at **1541.** Accord, David; Fleming; Pearson; Floyd.

The failure of a trial court to conduct a Neil inquiry when the exclusion of even a single black prospective juror has been challenged is reversible error. For example, in Sampson v. State, 542 So.2d 434 (Fla. 4th DCA **1989),** one black juror was excused for arguably race-neutral reasons. No such reasons appear in the record to support the exclusion of a second black juror. The defendant challenged the exclusion of the second black prospective juror. The district court said the judge "should have conducted an inquiry into the state's basis for excusing her." As no inquiry was conducted,

> the state never met its burden of rebutting the inference that Ms. Francis was peremptorily challenged for constitutionally impermissible reasons. We reverse and remand for a new trial.

Id.

In Stubbs v. State, 540 So.2d 255 (Fla. 2d DCA **1989),** the defense challenged the exclusion of Mr. Chambers, a black

prospective juror. An elderly black venireman, Mr. Lawton, was later seated on the jury. Defense counsel argued the state excluded Mr. Chambers because he was a black man about the same age as the defendant. The trial judge interrupted defense counsel's argument and refused to conduct any further inquiry, stating that there was a black person on the jury and "no showing of systematic exclusion" of black men. The district court held,

> ... the trial judge misapprehended the law. She mistakenly believed that no discrimination could be shown, because there was a black man on the jury. Batson, however, recognized that the state is prohibited from exercising a peremptory challenge "to strike any black juror because of his race."

Id. at 820. The cause was reversed and remanded for new trial.

In Pickett v. State, 537 So.2d 115 (Fla. 1st DCA 1988), there were five black prospective jurors in the venire, of whom two had been struck for cause, three peremptorily excused by the state, and one remained on the jury. The trial court concluded that:

> ... because the alternate juror was black, the defense's objection did not meet "the necessary prerequisite for a showing that they (the state) have utilized peremptories solely for the purpose of excluding black jurors..." No hearing was conducted nor were any inquiries directed to the state for the purpose of determining whether its challenges were motivated by impermissible reasons.

Id. at 116. The district court held that "the trial court erred in failing to conduct a timely inquiry that would require

the state to offer specific reasons for the use of its peremptory challenges," and reversed for a trial.

The trial court's application of the wrong standard here had the effect of cutting off petitioner's attempt to make a prima facie showing of a likelihood of racial discrimination in the state's use of peremptory challenges. Petitioner believes he succeeded in establishing a prima facie case, but even if this court disagreed, the trial court's erroneous ruling cut off any further attempt, and any deficiency in the prima facie showing cannot be held against him.

Systematic exclusion, if it were the correct standard, would require a preliminary showing of multiple excusals of black jurors before the court would ever need to address the reason why the jurors were excused. In other words, the defense would have to prove multiple exclusions of minority jurors before it ever got to the point of establishing that the jurors were excluded solely because of their race. The erroneous ruling here cuts off any further attempt to make the prima facie showing because the trial court has already ruled, in essence, that no showing of improper exclusion as to a single juror would be sufficient.

The district court's opinion significantly misapprehended the effect of this erroneous ruling. The district court said:

> And the fact that 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.

Reynolds, 555 So.2d at 919. The district court put the cart before the horse. If petitioner failed to make a prima facie showing, it was not only "cured by," it was caused by, the trial court's erroneous ruling on a preliminary matter, which cut off any further inquiry.

The district court would place an impossible burden on the defense, since the systematic (or multiple) exclusion question is preliminary to the issue whether the state had permissible grounds for exclusion. The district court found the prima facie showing deficient where the trial court never addressed its sufficiency. When the trial court never addresses the issue, how is a defendant to predict it is he, and not the trial court, which will be found wanting? The district court would require the defendant to continue to make a prima facie case even after the court has ruled that the attempt is hopeless as to a single juror because there was no systematic exclusion. This is an impossible standard and contrary to the principle of Neil and Slappy. If there was a deficiency in the prima facie showing here, though petitioner believes there was not, it was due to the trial court's erroneous ruling, not to any failure on the part of petitioner.

Parrish is similar to the instant case in this respect. When Parrish asked for a Neil inquiry, the trial judge said: "I don't think it reaches the level of a Neil inquiry of striking a singular black juror." 540 So.2d at 871. He then permitted the state to strike the sole prospective black juror. The district court did not discuss the trial court's application of

the erroneous systematic exclusion standard, but held that where the sole prospective black juror was excused, and there "was no indication that the challenged juror would. be partial or unfair," and because any doubt as to whether the burden had been met was to be resolved in the party's favor, the defense had met the burden of establishing a prima facie case, and the trial court erred in failing to conduct the Neil inquiry.

The district court distinguished the instant case from Jennings v. State, 545 So.2d 945 (Fla. 1st DCA 1989), but the claimed distinction is not apparent from that opinion. In Reynolds, the district court distinguished Jennings on the ground the trial court there "had found that the defendant had met his initial burden under Neil except for the fact the state had excused only one black prospective juror." 555 So.2d at 919. What the court said in Jennings, however, was:

> The trial court in this case concluded that, since the State had peremptorily challenged only one black juror, the defendant had not met its initial burden and, therefore, that no Neil inquiry was required.

545 So.2d at 946. The trial court's holding in Jennings Is virtually indistinguishable from the trial court's holding here.

Further, assuming arguendo that the trial court's ruling could be said to have been right for the wrong reason, that principle does not apply when the trial court misconceives the controlling principle of law, and the court's misconception can constitute grounds for reversal. Applegate v. Barnett Bank of

Tallahassee, 377 So.2d 1150 (Fla. 1979); Flagship National Bank v. Gray Distribution Systems, Inc., 485 So.2d 1336 (Fla. 3d DCA), review den. 497 So.2d 1217 (Fla. 1986); Delehant v. Delehant, 383 So.2d 231 (Fla. 4th DCA 1979). The trial court's erroneous ruling here on the need for systematic exclusion cut off further inquiry into whether petitioner had established a prima facie showing probable racial discrimination. This was reversible error.

When the defendant objects to the state's discriminatory use of peremptory challenges, the burden of proof shifts to the state to rebut the inference of racial bias with a "clear and reasonably specific" racially neutral explanation of legitimate reasons for the state's use of its peremptory challenges. Slappy, 522 So.2d at 22, citing Batson. The judge

> cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext.

The Florida Supreme Court approved the Third District's list of five factors,

> ... the presence of one or more [of which] will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext...

Slappy, 522 So.2d at 22. These factors are: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the

juror, (3) singling out the juror for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to jurors who were not challenged. Slappy v. State, 503 So.2d 350.

The state's exclusion of Ms. Dean from the jury falls far outside the guidelines for the prevention of racial bias set out in Batson, Slappy and Neil. The state engaged in only the most perfunctory questioning of Ms. Dean. All the state knew about Ms. Dean was that she was employed (as were most jurors), had not before served on a jury, was not married and had no children. As most jurors were married and had children, this made her somewhat different. Without some explanation from the state, however, as to how marriage and parenthood related to one's ability to sit as a juror, these are meaningless distinctions. Her one distinctive answer was that she had a cousin who OD'd on crack. This is not, however, a factor which self-evidently would tend to make a juror partial on the side of a defendant charged with an offense involving crack.

In Parrish and Blackshear, 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 answer concerning her cousin. The implication of mentioning this answer is that the First District must believe Dean was excludable under Neil because of it. The trial court never

considered the issue because it failed to conduct a Neil inquiry.

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 should all be locked up. 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 accepting reasons at face value. Where the trial court did not address the issue and the basis for disqualification is not apparent on the face of the record, the district court could not properly determine whether the juror was excludable under Neil on the basis of her one unique answer to a voir dire question.

In the instant case, while defense counsel did not use the magic words "substantial likelihood excusal was due solely to race," she did explain in detail why there was no showing that Ms. Dean would not be an impartial juror. This was sufficient to establish the prima facie case sufficient to trigger a Neil inquiry.

While only one black prospective juror was improperly excluded, she was the only black person ever considered for a seat on the jury. The fact that a very small number of black veniremen are called, cannot be used to eviscerate the principles of Batson, Neil, and Slappy.

If this court were to limit relief to those cases in which the state exercised a large number of peremptory challenges against blacks, it would effectively deny relief in the vast majority of cases where the number of black prospective jurors ever considered is itself quite small. If anything, where the number of black prospective jurors is small, this court should review the record with even more care. If the state is permitted one or two "free strikes'' of black jurors, and only one or two black jurors are called, the state may engage in wholesale discrimination with impunity unless this court will reach those cases involving small numbers of prospective black jurors. In the instant case, the state did not, as in Blackshear, exercise eight peremptories against blacks, because there were not eight blacks called. Blackshear v. State, 521 So.2d 1083 (Fla. 1988).

The exclusion of Ms. Dean from the jury without inquiry blatantly violated the requirements of *Neil* and *Slappy*. Petitioner believes he did establish a prima facie case of a discriminatory use of a peremptory challenge, but even if this court disagrees, the trial court's erroneous ruling on the systematic exclusion standard cut off any further attempt to make out a prima facie case. The only remedy which achieves the goal of nondiscrimination in jury selection is reversal for a new trial.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court quash the district court opinion, and reverse his conviction and remand for new trial.

Respectfully submitted,
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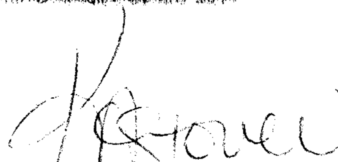
CERTIFICATE OF SERVICE

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 Anthony Reynolds, 1329 Iouia Street, Jacksonville, Florida 32206, this 6 day of August, 1990.



KATHLEEN STOVER