IN THE SUPREME COURT OF FLORIDA

PATRICK ANTHONY REYNOLDS,

PETITIONER,

-VS-

CASE NO. 75,680

STATE OF FLORIDA,

RESPONDENT.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Appellee is in substantial agreement with appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

The opinion of the First District Court of Appeal, which affirmed the trial court's exercise of discretion, should be approved by this court because it properly applied the legal reasoning provided by the opinions of this court.

In order to find a strong likelihood, petitioner must point to facts other than merely that an individual of petitioner's race has been peremptorily challenged. Petitioner offered no reasons to support the assertion that the strike was discriminatorily based. Further, the facts do not establish that the challenge was exercised in a discriminatory purpose. Moreover, the cases relied upon by petitioner to assert as a matter of law that the removal meets the standards are based on assumptions which have beem rejected by this Court.

Therefore, respondent asserts that this Court should approve the decision of the First District Court of Appeal and affirm petitioner's conviction.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT ERR WHEN IT DID NOT REQUIRE THE STATE TO PROVIDE REASONS FOR PEREMPTORILY STRIKING A JUROR.

The opinion of the First District Court of Appeal, which affirmed the trial court's exercise of discretion, should be approved by this court because it properly applied the legal reasoning provided by the opinions of this court.

The three decisions of this court whose holdings are critical to the resolution of this issue are **State** v. **Neil, 457** So.2d 481 (Fla.1984); **State** v. **Slappy,** 522 So.2d 18 (Fla.), ***cert.den.,*** 108 S.Ct 2873 (1988), and **Reed** v. **State, 560** So.2d **703** (Fla.1990).

In **Neil,** this Court stated that, when a party establishes that there is a "strong likelihood" that a juror has been challenged solely on the basis of race the court must conduct an inquiry. **Neil** changed the law of jury selection but did not abolish peremptory challenges.

In **State** v. **Slappy,** this Court expanded and clarified its holding in **Neil.** Although **Slappy** deals primarily with what happens after a **Neil** "strong likelihood" is shown, this Court discussed the strong likelihood standard and stated that it does

not lend itself to precise definition. Id. at 21. This Court also stated that in determining the existence of a strong likelihood numbers were not dispositive, and the fact that other minority jurors were seated was not dispositive either. The court concluded that creation of a bright line test would create more havoc than use of the Neil standard and declined to create such a rule.

In **Reed, supra,** this Court revisited the strong likelihood issue and clarified the applicable standards. The court held that the trial judge is vested with broad discretion in determining whether peremptory challenges are racially motivated. In **Reed,** the court quoted from **Kibler** v. **State,** 546 So.2d 710, 712 (Fla.1989), and said that "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."

This statement from **Kibler** is consistent with the court's application of the **Neil-Slappy** standards in other cases. In **Parker** v. **State,** 476 So.2d **134** (Fla.1985), the court found that even though several prospective black jurors had been struck the requisite likelihood had not been established. It is consistent with the statement in **Slappy** that numbers alone are not dispositive. Moreover, these holdings are consistent with the Sixth Amendment of the United States Constitution which requires that the petit jury will be selected from a pool of names

representing a cross-section of the community. **Taylor** v. **Louisiana,** 419 **U.S.** 522 (1975). However, this does not mean that a petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. **Taylor, supra.** Moreover, because it has been repeatedly stated that the exclusion of a minority juror by itself is insufficient to require an inquiry, **Thomas** v. **State, 502** So.2d **994** (Fla.4th DCA 1987); **Neil** at 487, and a defendant has no right to a jury composed in whole or in part of members of his own race **Strauder** v. West **Virginia, 100 U.S. 303,** 25 L.Ed. 664 (1880), petitioner has identified no error. For he received what he was entitled to, a process that is free from discrimination, **Batson** v. **Kentucky,** 476 **U.S.** 79, 90 L.Ed.2d 69, 90., and a way to challenge a process that isn't free from discrimination. The opinion of the First District Court is consistent with these decisions regulating the use of peremptory challenges and should be affirmed.

In Florida the initial presumption is that the challenge has been exercised in a nondiscriminatory way. **Neil.** Petitioner's argument would have this Court flip this presumption on its ear, this argument is not justified under the facts of this case.

In this case, neither the crime, possession of drugs, nor the facts of the crime created any heightened racial tensions. The facts of the case were plain vanilla, **a** routine traffic stop

for not having a tag, an arrest for driving on a revoked or suspended license, and the discovery of drugs during a search at the jail. The crime itself did not juxtapose a victim and a defendant of different races.

Further, the jury selection process was very routine. The state accepted the first six individuals, however the defense struck two. Out of the next group the state struck a white male and the defense struck two more. After the three replacements were added to the pool the state again accepted the jury and the defense used another peremptory. Ms. Dean was added to the pool and the state used its second peremptory challenge. The only basis the public defender offered for her claim of discrimination was that Ms. Dean was black. The public defender did state that because the lady had a relative who had overdosed on crack she felt that Ms. Dean would make a good state juror. It is interesting that petitioner could assert that a juror's relative's crack overdose is a sound basis for a defense lawyer to feel uneasy about a juror, and, not be sufficient for the state to feel unsure about the juror and strike her from the panel. Respondent asserts that the trial record supports the finding that no strong likelihood exists and that the opinion of the district court should be affirmed.[1]

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[1] Respondent acknowledges under other facts it may be possible to establish a strong likelihood based on the excusal of one juror. However, it was not done here.

Petitioner's reliance on **Parrish** v. **State,** 540 So.2d **870** (Fla.3rd DCA 1989), is misplaced. In **Parrish,** the district court relied on **Pearson** v. **State,** 514 So.2d 374 (Fla.2d DCA 1987), for the proposition that using a peremptory challenge to excuse the only representative of the defendant's race established a prima facie case. It then noted that the state volunteered a reason and determined that the reason was not valid. Recently, in **Adams** v. **State,** 559 So.2d 1293 (Fla.3rd DCA 1990), the court distinguished **Parrish** and stated that the trial judge is in the best position to determine whether there is a need for an explanation of peremptory challenges. In the instant case, the district court did just what this Court said was proper in **Reed** and did just what the district court in **Adams** did; it relied on the sound discretion of the trial judge who listened to the voir dire questions and answers. Petitioner has identified no error.

Further, respondent asserts that **Parrish's** reliance on **Pearson** is fatal to petitioner's claims. In **Pearson,** the district court held that the test found in **Batson** v. **Kentucky** had superceded the **Neil** test. Based on that determination, the court held that the removal of a single black juror met the **Batson** test and was reversible error. The holding of **Parrish** has been rejected by this Court which has repeatedly validated the **Neil** test for the determination of a prima facie case of discrimination. **Slappy, Reed.** Therefore, in order to adopt

petitioner's position that **Pearson** is controlling, this Court would have to overrule virtually every decision it has rendered on the use of peremptory challenges. This is totally unnecessary because the United States Supreme Court in **Batson** stated that individual states had leeway in implementing its decision, **Batson,** 90 L.Ed.2d 89, 90, and this Court has adopted a test that is more stringent than **Batson.** Therefore, as the cases cited for conflict rely on an incorrect legal premise, the opinion of the First District Court of Appeal should be affirmed.

Petitioner discusses in great detail the standard that the trial court used in making its decision. As noted by the district court, the fact that the trial court may have used the wrong standard does not impact the decision in this case. Petitioner has not established a "strong likelihood" existed. Therefore, cases such as **Blackshear** v. **State,** 521 So.2d 1083 (Fla.1983), where this Court required a new trial because a likelihood was established do not come into play. Neither do cases such as **Tillman** v. **State,** 522 So.2d 14 (Fla.1988), which require the trial court to fully evaluate reasons given by the prosecutor instead of speculating on its own. The trial court was right even if in the wrong reason, **Caso** v. **State,** 524 So.2d 422 (Fla.1988), and the district court's opinion should be affirmed.

CONCLUSION

Therefore, respondent asserts that this Court should approve the decision of the First District Court of Appeal and affirm petitioner's conviction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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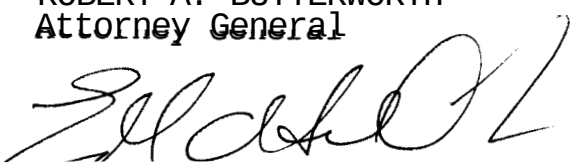

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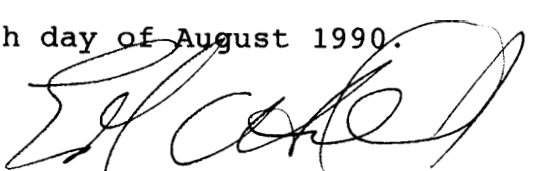
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded to Kathleen Stover, Assistant Public Defender, Fourth Floor North, Leon County Courthouse, **301** South Monroe Street, Tallahassee, FL **32301**, via U. **S.** Mail, this 27th day of August 1990.



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