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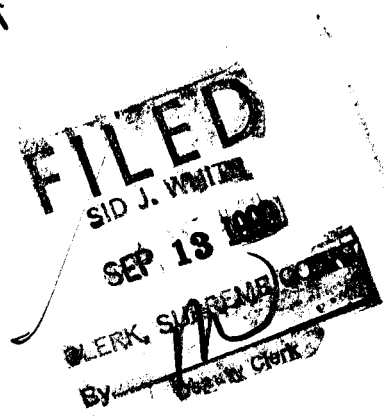

IN THE SUPREME COURT OF FLORIDA

PATRICK ANTHONY REYNOLDS :

Petitioner, :

VS. : CASE NO. 75,680

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I SUMMARY OF ARGUMENT

The protections afforded by the Florida Supreme Court in Neil exceed those afforded by the United States Supreme Court in Batson v. Kentucky. Contrary to the state's argument, Neil exceeds Batson; it is not more stringent than Batson.

Contrary to the state's argument, the trial court cannot soundly exercise its discretion when that exercise is premised on a misapprehension of the controlling principle of law. That is what happened here. The trial court accepted the state's argument that systematic exclusion was a required threshold to a Neil inquiry, although this was an invalid statement of the law. By accepting the invalid systematic exclusion argument, the trial court precluded any further attempt by the defense to make a prima facie showing of racial discrimination in jury selection. This cause must be reversed for new trial.

II 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.

In its answer brief, the state attacked petitioner's argument as dependent on Parrish and since, in the state's view, Parrish has been discredited, petitioner's argument must also fail. Parrish v. State, **540** So.2d **870** (Fla. 3d DCA), review den. State v. Parrish, **549** So.2d **1014** (Fla. **1989).**

The state's attack on Parrish is misconceived ab initio. The state's argument is that Parrish relied on Pearson, in which the district court held that Batson had superseded Neil. Batson v. Kentucky, **476** U.S. **79, 106** S.Ct. **1712, 90** L.Ed.2d **69 (1986);** State v. Neil, **457** So.2d **481** (Fla. **1984),** clarified sub nom. State v. Castillo, **486** So.2d **565** (Fla. **1986);** Pearson v. State, **514** So.2d **374** (Fla. 2d DCA 1987), review dism. **525** So.2d **881** (Fla. **1988).** The state argued:

> 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, [supra], and this Court has adopted a test that is more strinaent than Batson.

(State Brief (SB), pp. **7-8.**

Petitioner agrees completely that where they conflict, Neil controls over Batson in Florida. The holding of Parrish has not been rejected by this court, however, which rather, declined to review it. More importantly, neither Parrish nor Pearson is discredited by any reliance on Batson, because Neil is broader, not narrower, than Batson. The state's argument would make sense only if it were true, as the state argued, that this court had adopted a test that is more stringent than Batson. This is not true, however, and the state's argument is repudiated by this court's own words: In Slappy, this court said the Neil decision "preceded, foreshadowed and exceeds" (emphasis added) the federal guarantees set out in Batson. State v. Slappy, 522 So.2d 18, 20-21 (Fla.), cert. den. 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). Neil exceeds Batson; it is not "more stringent" than Batson.

The state threw in a red herring or two, such as its argument that this case did not "juxtapose a victim and a defendant of different races" (SB-6). While this is true, it is also irrelevant. Neil inquiries are not limited to crimes of personal violence, nor to cases in which the victim and defendant are of different races. Petitioner agrees with the state that the "facts of the case were plain vanilla" (SB-5), and that there was nothing particularly flagrant about the jury selection process, except for the prosecutor's obviously wrong systematic exclusion argument. Rather, the potential for racial discrimination here is quieter and more subtle, but no

less insidious, and no less the target of Neil and Slappy, than cases with more colorful facts.

While the state cited Reed, that case is not applicable to the issue here. Reed v. State, **560** So.2d 203 (Fla. 1990) (decision on rehearing), U.S. cert. pet. filed July 23, 1990, on other grounds. In Reed, a white defendant was convicted of murdering a white woman. Two black jurors were seated on the jury, while the state had used peremptory challenges against other black jurors. In holding that Reed had failed to make a prima facie showing of discrimination, the Florida Supreme Court gave great deference to the trial court's "broad discretion" in determining whether peremptory challenges are racially motivated. There are several reasons why Reed's applicability to the instant case is very limited. First, both Reed and his victim were white, and the challenged jurors were black. While white defendants have standing to challenge the discriminatory use of peremptory excusals against black prospective jurors, the respective races of the prospective jurors and the defendant may be relevant in determining both 1) whether the challenges were exercised in an unconstitutional manner because of group bias, and 2) whether the challenging party has met the burden of showing that the challenges were made for reasons not solely related to race. Kibler v. State, **546** So.2d 710, 712 (Fla. 1989).

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 where,

as here, he is the same race as the excluded juror. Also, any doubt as to whether the moving party has met its initial burden should be resolved in that party's favor. Slappy.

The second reason Reed is not applicable here has to do with the trial court's exercise of its discretion. Reed was premised on the trial court's broad discretion in deciding Neil issues. The state made its point here most succinctly in its summary:

> 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.

(SB-2).

Contrary to the state's argument, however, the trial court cannot soundly exercise its discretion when the exercise of its discretion is premised on a misapprehension of the controlling principle of law. That is what happened here. The trial court accepted the state's argument that systematic exclusion was a required threshold to a Neil inquiry, although this was an invalid statement of the law. By accepting the systematic exclusion argument, the trial court precluded any further attempt by the defense to make a prima facie argument.

This is also why Adams v. State, 559 So.2d 1293 (Fla. 3d DCA 1990) is inapposite to the problem here. The trial court in Adams did decide, presumably on a valid basis, whether the defendant had made the prima facie showing. The Adams court did not fail, as did the trial court here, to conduct an

inquiry because it accepted an erroneous systematic exclusion argument. As for another case cited by the state, in Parker v. State, 476 So.2d 134 (Fla. 1985), the trial court identified racially-neutral reasons why the jurors were excludable. In contrast, having accepted the invalid systematic exclusion argument, the trial court here never reached the issue of the racial neutrality of reasons for excluding the juror.

The state argued that the initial presumption is that peremptory challenges are exercised in a nondiscriminatory way, and that petitioner's argument "would have this court flip this presumption on its ear" (SB-5). While petitioner agrees the initial presumption is that a peremptory challenge is exercised in a nondiscriminatory way, it is not true that he wants to "flip" the presumption. Rather, his argument is that when the defendant is black and the state peremptorily excuses the only black prospective juror, and there is no apparent reason for the juror to be partial against the state, particularly where, as here, the state engaged in only perfunctory questioning of the juror, this combination of circumstances "flips" the initial presumption, and compels the state to give a racially-neutral reason for excluding the black juror.

Again, contrary to the state's exertions, without a specific inquiry into how that fact may affect her impartiality, Ms. Dean's comment about her cousin does not facially make her excludable by the state under Neil. Assumptions without record evidence about the effect of her cousin's situation on Dean's

impartiality amount to a pretext for excusing her, where the true reason for excluding her was her race.

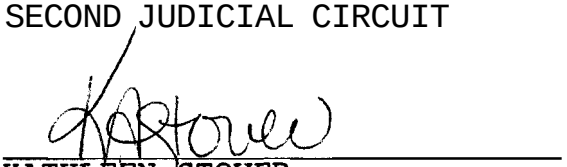
Defense counsel did not use the magic words that there was a "strong likelihood that the juror had been excused solely because of her race." In discussing the absence of any evidence of partiality on the part of the juror, however, defense counsel was implicitly arguing that if the juror were not partial to the detriment of the state, then her single distinguishing characteristic was her race, and that was the true reason the state excluded her. Petitioner made a prima facie showing of racial discrimination.

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.

III CONCLUSION

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

Respectfully submitted,
BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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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 13 day of September, 1990.

KATHLEEN STOVER