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Brief OK
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IN THE SUPREME COURT OF FLORIDA

TONY JEFFERSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,507

PETITIONER'S BRIEF IN ANSWER TO BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS AS AMICUS CURIAE

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

The symbol "AB" will denote Brief of Amicus Curiae.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on his Statement of the Case and Facts as found in his Brief on the Merits.

SUMMARY OF ARGUMENT

Amicus Curiae relies heavily on the concept of "juror rights" in articulating its position. According to Amicus Curiae the only viable remedy for a Neil violation is "to permit a juror who has been the victim of an attempted discriminatory strike to sit on the case." AB p.7. Petitioner totally disagrees with this proposition. The longstanding use of a six-person jury in Florida precludes use of this "remedy." It is unworkable and may even be unconstitutional. Rather the remedy articulated by this Honorable Court in Neil should be retained and applied in the instant case.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER-DEFENDANT'S REQUESTS TO STRIKE THE JURY POOL AND START VOIR DIRE OVER WITH A NEW JURY PANEL WHEN THE TRIAL COURT FOUND A NEIL VIOLATION

Article I, Section 16 of the Florida Constitution (1968) guarantees the right to an impartial jury. This was the foundation of this Honorable Court's decision in State v. Neil, 457 So.2d 481, 486 (Fla. 1984), clarified sub nom, State v. Castillo, 486 So.2d 565 (1986).

In State v. Slappy, 522 So.2d 18, 24 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988), this Court reaffirmed our State's "continuing commitment to a vigorously impartial system selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. See Article I, Section 16, Fla. Const.." Id. at 21. An impartial system for selection jurors must remain the paramount consideration in formulating any remedy for a Neil violation. Petitioner asks this Court to reject Amicus Curiae's attempt to ignore or minimize this core Florida constitutional right that is implicated at bar.

Amicus Curiae relies primarily on the concept of "juror rights." It has indicated to this Court "that jurors and jury panel members have no voice, other than this one." AB p4. However in Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), Justice Kennedy writing for the majority held that the criminal defendant has standing to raise the constitutional violation which occurs when the prosecutor wrongfully excludes a juror by a race-based peremptory challenge. The Court explained

this relationship between the litigant and the third party (prospective juror) as follows:

> Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights. Petitioner has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction. Thus, "'there seems little loss in terms of effective advocacy from allowing [the assertion of this claim] by' the present *jus tertii* champion.

Id. at 1372. [Emphasis added].

Thus Powers made clear that it is both "necessary and appropriate for the defendant to raise the rights of the juror." Therefore the attempted excluded juror, Mr. Gaskin, does have a voice, the criminal defendant here, Petitioner Mr. Jefferson who has an "interest in eliminating racial discrimination from the courtroom."

This Court to ensure that criminal defendants receive their Florida Constitutional guarantee to an impartial jury mandated a clear and unequivocal remedy to be afforded a defendant when the trial court finds a Neil violation: "If the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool." Id. at 487. It was the trial court's failure to apply this remedy requested by defense counsel in the lower

tribunal that resulted in reversible error.

Amicus Curiae argues that this remedy is improper or inappropriate. According to Amicus Curiae: "There is no other viable remedy for a violation of the basic right of jury service than to permit a juror who has been the victim of an attempted discriminatory strike to sit on the case." AB p.7. Petitioner totally disagrees with this assessment. It is both unworkable and unconstitutional.

In Neil, this Court held that a party must demonstrate that "the challenged persons are members of a distinct racial group." Id. at 486. As to race this case is quite simple because Petitioner is black and Mr. Gaskins, the juror, is black. However the concept of a distinct or cognizable "racial group" has been held to include Hispanics, Hernandez v. New York, __ U.S. __, 111 S.Ct. 1859 (1991); United States v. Chinchilla, 874 F.2d. 695, 698 (9th Cir. 1989), Native American Indians, United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987), Caucasians, People v. Davis, 142 Misc.2d 88, 537 NY2d 430 (1988), and Italian-Americans, United States v. Biaggi, 673 F.Supp. 96 (ED.NY 1987), aff'd, 853 F.2d 89 (2nd Cir. 1988). This Court of necessity will now need to decide how narrowly or broad is the phrase "distinct racial group." See Doyle, In Search of A Remedy for the Racially Discriminatory Use of Peremptory Challenges, 38 Okla.L.Rev. 385, 414-416, 423-424 (1985).

Following the logic of Amicus Curiae if three (3) blacks, (2) Hispanics and three (3) Caucasians are improperly subjected to

peremptory challenges by one/or both parties to a prosecution all eight (8) people need to be seated to "remedy" the injury to all the prospective jurors. The longstanding use of a six-person jury in Florida would preclude use of this "remedy" suggested by Amicus Curiae.

In addition, if we focus only on one race per prosecution the same problem develops. For example in Powers v. Ohio, supra, the State of Ohio used seven (7) of ten (10) preemptory challenges to exclude black venireperson from the jury. Each time the prosecution challenged a black prospective juror, Powers renewed his objections citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). His objections were overruled. In State v. Slappy, supra, the prosecutor used six (6) peremptory challenges to strike four (4) blacks from the jury. In Blackshear v. State, 521 So.2d 1083 (Fla. 1988),the prosecutor used eight (8) of ten (10) peremptory challenges to exclude blacks from the jury resulting in an all white jury with one black alternate. In Thompson v. State, 548 So.2d 198 (Fla.1989), the prosecutor used his peremptory challenges to excuse all eight (8) blacks sitting on the initial venire. It becomes increasingly apparent that even in dealing with one race the numbers involved are such that seating the prospective jurors as "the only viable remedy" is unworkable.

Amicus Curie in advocating the "seating remedy" overlooks the fact that Article I, Section 16 of our constitution guarantees the right to an impartial jury. As this Court in Neil explained:

> The right to peremptory challenges is not of constitutional dimension. The primary purpose of

> peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.
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> Id. at 486 [Emphasis added].

Amicus Curie utterly fails to articulate exactly how its proposed remedy assures jury impartiality as compared to the remedy devised by this Court in Neil.

With the multitude of "distinct racial groups" in our pluralistic society, the ultimate result of this "seating remedy" if it is the sole remedy will surely end peremptory jury challenges as we know it.[1] The use of the peremptory challenge is well rooted in Florida jurisprudence. Mann v. State, 3 So. 207 (Fla. 1887). In Neil, this Court emphasized that "[t]he primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." Neil, 457 So.2d at 486. Any system that nullifies peremptory challenge should be avoided.

And finally the "seating remedy" once set in motion could very well lead to quota juries or affirmative action petit juries. See Jorgenson, Back to the Laboratory With Peremptory Challenges: A Florida Response, 12 Fla. St.U.L.Rev. 559, 577-578 (1984) ("The alternative of an affirmative action program for juries destroys randomness and, in any event, is unconstitutional.")

The "seating remedy" has too many inherent flaws to supplant the remedy of striking the panel and beginning voir dire anew. This

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[1] See generally Doyle, supra at 437-438.

Neil remedy is the best way to attain a representative cross-section of the community. Because "the complaining party is entitled to a random draw from an entire venire-not one that has been partially or totally striped of members of a cognizable group by the improper use of peremptory challenges." People v. Wheeler, 22 Cal.3d 358, 148 Cal.Reptr. 890, 583 P.2d 748, 765 (1978). Amicus Curiae has failed to justify its request to this Court to abandon the Neil remedy for the one it has proposed. Hence this Court should flatly reject the suggestions of Amicus Curiae.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carol Cobourn Asbury, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier and by mail to Barbara Green, Freidin, Hirsh, Green & Gerrard, P.A., Suite 2500 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 and to Roy D. Wasson, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130, this 31st day of October, 1991.

Of Counsel