047

IN THE SUPREME COURT OF FLORIDA

TONY JEFFERSON, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 78,507

REPLY BRIEF OF PETITIONER ON THE MERITS

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AUTHORITIES CITED

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.

They symbol "RB" will denote Respondent's Brief.

STATEMENT OF THE CASE AND FACTS

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

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 flatly reject Respondent's attempts to ignore, obscure, or minimize this core Florida constitutional right that is implicated at bar.

Respondent cites Holland v. Illinois, 493 U.S. ___, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990), for the proposition "that the prosecutor's use of peremptory challenges to exclude members of a racial minority solely on the basis of their race is not prohibited by the Sixth Amendment." RBp.14. Respondent then concludes: "Thus, Petitioner's reliance on the Sixth Amendment right to be tried by a fair and impartial jury drawn from a representative cross-section of the county is misplaced." RBp.14. Notwithstanding

Respondent's view of Petitioner's Sixth Amendment rights, Petitioner clearly has an Article I, Section 16 Florida Constitution right to an impartial jury. See Neil. Also the equal protection clause guarantees Petitioner, a criminal defendant, that the State will not exclude members of his race from the jury venire on account of race, Batson v. Kentucky, 476 U.S. 79, 86 (1986), or "exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race." Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364, 1370 (1991). Thus Respondent's argument that Petitioner is limited merely to making an equal protection argument is misplaced. RBp.15-16.

Respondent cites decisions from a number of states for the proposition that disallowing improper peremptory challenges and reinstating improperly challenged jurors is an appropriate remedy. However this Court has carefully devised the appropriate remedy. Lower courts can not and must not ignore the clear dictates of this Honorable Court. This Court has already carefully weighed the balances, assessed the prejudices to the parties and calculated the appropriate response in devising the sole remedy for a Neil violation.

The remedy of merely seating the juror or jurors has too many inherent flaws and is unworkable in a six-person jury system. What if there are seven (7) or more black improperly struck from the venire? What if the State improperly attempts to peremptorily strike four (4) black jurors and the defense improperly attempts to strike five (5) Caucasian jurors? Also this type of concept if

set in motion could very well lead to quota juries or affirmative action petit juries. See Jorgenson, Back to Laboratory 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.")

With the multitude of "distinct racial groups" in our pluralistic society, the ultimate result of this "seating remedy" suggested by Respondent will be the end of peremptory challenge as we know it. 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 challenges should be avoided.

In February 1990, Petitioner's trial counsel was presented with a Neil violation in the trial court. The trial judge offered the remedy of seating the juror in question, Mr. Gaskins. R 53-54. However at that point, Petitioner's trial counsel flatly rejected this remedy as inadequate under all the circumstances in the case. She could have accepted this remedy but did not. Defense counsel sought the appropriate remedy of striking the entire venire. R 54. Petitioner was in the best position to determine what was the appropriate remedy for the violation of his constitutional rights. It seems unfair to second guess defense counsel years later as to the remedy.

Petitioner requests this Court to reverse his conviction under

Neil. If there is a decision to expand the potential remedies available to the trial court upon finding a Neil violation, this should be inapplicable at bar because of defense counsel's express reliance on Neil and the remedy specified therein. Based on the argument contained herein and those found in his Initial Brief on the merits, Petitioner requests this Court to reverse the decision of the Fourth District Court of Appeal and grant Petitioner a new trial.

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