IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v. CASE NO. 79,046

WARREN A. JOHANS,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

On August 28, 1989, the State Attorney for the Fifth Judicial Circuit filed an information charging the Respondent, Warren Johans, with burglary with a battery[1] and with attempted sexual battery while armed[2] in case no. 89-1868 (Marion County). A jury was selected in that case on February 8, 1990. During jury selection, defense counsel objected to the state's peremptory strike of venire member Veronica Butler. (A-111)[3] Defense counsel stated on the record that both Mr. Johans and Ms. Butler are black, and that the victim in this case is white. (A 111, 113-4) The assistant state attorney responded by pointing out that Ms. Butler was the fourth venire member he had struck peremptorily, and that the first three he had struck had been white. (A 112) Defense counsel pointed out further that of the fourteen venire members voir dired by the parties, only Ms. Butler was black. (A 111, 112, 25-6) The trial court noted that the fourteen people already voir dired by the parties were not the only people available for jury service that day, and that several additional jury pool members then sitting in the courtroom were black. (A 112-3) The court then ruled

> [a]t this point I'll let [the state] go ahead and do it, but if it' appears later on that's what the

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[1] In violation of Section 810.02(2)(a), Fla.Stat. (1987).

[2] In violation of Sections 794.011(3) and 777.04, Florida Statutes (1987).

[3] The designations "A-[page number]" and "B-[page number]" refer to the appendix to this brief.

state is trying to do, then we'll stop it.

(A 113)

Nine additional venire members were voir dired; the state used one additional peremptory strike without objection. (A 116, 152) After the jury was sworn, the assistant state attorney noted for the record that Bennie Blunt, one of the second group of jurors voir dired, is black, and had been seated without the state's having exercised a peremptory strike against her. (A 155-6) The record does not reflect the race of any of the other eight members of the second group to be voir dired.

Mr. Johans was found guilty as charged on both counts against him, and convicted of both offenses accordingly. On direct appeal to the district court of appeal for the Fifth District, his conviction was reversed. (B 1-2) In its opinion, the district court noted a conflict among decisions of the district courts of appeal as to the remedy to be afforded in cases like the present case. The state filed a timely motion for rehearing on October 7, 1991; that motion was denied November 8, 1991, The state filed a timely notice to invoke the discretionary jurisdiction of this court on November 27, 1991.

SUMMARY OF ARGUMENT

Point One: The appropriate remedy in cases reversed on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984), rather than reversal of the defendant's conviction, is a remand for a hearing to determine if peremptory strikes were improperly exercised. The state does not challenge this court's previous holding that a post-trial hearing is too late when a juror's demeanor is the reason given for a peremptory strike. However, in many cases the reasons given by the challenged party will be verifiable from written or transcribed records of voir dire. In those cases, neither the complaining party's individual rights nor the integrity of the justice system demand a second trial.

Point Two: The district court improperly applied this court's recent decison in Reynolds v. State, 576 So.2d 1300 (Fla. 1991), in this case. In Reynolds, seventeen potential jurors participated in voir dire; the state struck the sole black person among the seventeen; this court held that that single strike shifted the burden to the state to announce a race-neutral reason for the strike. The rule of Reynolds was born of necessity, as no pattern of apparently race-based strikes can form when only one juror of the relevant race is available for jury service. The present case is distinguishable from Reynolds: here fourteen potential jurors, one of them black, were first called forward for voir dire. The defense noted for the record that one of them was black, and based his Neil objection on that one juror's being struck. The trial court denied the objection as premature. Nine additional potential jurors were voir dired; at least one was

black, and was seated without challenge by the state. The record does not show the race *of* the other eight jurors who were voir dired in the second group. On those facts, the defense did not show a pattern of discrimination. The district court's decision finding error on this point should be quashed.

ARGUMENT

POINT ONE

THE APPROPRIATE REMEDY IN CASES LIKE THE PRESENT CASE IS A REMAND FOR A DETERMINATION WHETHER PEREMPTORY STRIKES WERE EXERCISED IMPROPERLY.

In its opinion in this case, the district court noted a conflict in the form of relief granted by the respective district courts in Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987) and in Parrish v. State, 540 So.2d 870 (Fla. 3rd DCA 1989). See Johans v. State, 16 FLW 2520, 2521 (Fla. 5th DCA September 26, 1991). The district court further "certif[ied] this matter because of the supreme court's approval in Reynolds [v. State, 576 So.2d 1300 (Fla. 1991)] of both Parrish and Pearson." Id. The state submits that the quoted language from the district court's opinion, although it does not set off a question in upper-case letters in the customary fashion, must in fairness be read to certify the question of what remedy is appropriate in cases like the present case as a question of great public importance. The state accordingly urges this court to take jurisdiction of this matter to resolve that question pursuant to Article V, Section 3(b)(4), Fla. Const.

Moreover, the state submits that the district court's opinion establishes direct and express conflict between district court decisions on the same issue. In both Parrish, supra, and Pearson, supra, the district court found error in the trial court's refusal to require the state to explain its peremptory strikes when challenged to do so by defense counsel. In Parrish,

like in the present case, the district court reversed the defendant's conviction and remanded for a new trial. 540 So.2d at 872. In Pearson, the district court remanded "for the holding of a Batson[4] hearing with instructions that if the trial court finds that the state has not met its burden of providing a racially neutral explanation for the exercise of its challenge in this case, the trial court should set aside the appellant's convictions." 514 So.2d at 376. As the district court noted in this case, this court has approved the result in Pearson as well as the opinion in Parrish. 16 FLW at 2521. The district court's decision in this case is in conflict with the decision in Pearson to the extent it orders reversal of Mr. Johans' conviction rather than a limited remand. The state accordingly urges this court to take jurisdiction of this matter on that basis. See Article V, Sections 3(b)(3), (4), Fla. Const.

The state acknowledges this court's determination in Blackshear v. State, 521 So.2d 1083 (Fla. 1988), that a Neil[5] hearing held after trial is untimely since the trial court must "have the ability to observe and place on the record relevant matters about juror responses or behavior." Id. at 1084. Howewver, the remedy provided for in Pearson, supra, need not compromise the concerns expressed by this court in Blackshear. As the federal Second Circuit Court of Appeals has noted,

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[4] Batson v. Kentucky, 476 U.S. 79 (1986).

[5] State v. Neil, 457 So.2d 481 (Fla. 1984).

> [W]e appreciate that the [trial judge] might encounter some difficulty recalling the circumstances of the jury selection and might conclude that examination of the record, supplemented by such further hearing on remand as he deems appropriate, may not yield a satisfactory basis for determining the prosecution's state of mind when the jury was selected. If he concludes that the passage of time has unduly impaired his ability to make a fair determination of the prosecution's intent, he may so state, in which event the [trial court] shall order a new trial. But if appropriate findings may conveniently be made, this should be done, with the [trial court] authorized then either to reinstate the judgment of conviction or order a new trial.

United States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991). Accord Chew v. State, 317 Md. 233, 562 A.2d 1270, 1273 (Md. 1989).

The state submits that similar trust may be reposed in Florida's trial judges, and that the expense of a second trial may appropriately be avoided in some cases. It is true that, as emphasized in Blackshear, in many cases the nature of the reasons given for challenged peremptory strikes will call for the trial court to recall and analyze the demeanor of a particular venire member or members. However, in other cases race-neutral reasons may be given which can be verified with recourse to a transcript of voir dire, to juror questionnaires, or to some other matter of record. See, e.g., Johnson v. State, 731 P.2d 993, 999 n.3 (Okla. Crim. App. 1987). In such cases, where the trial court is satisfied with the reasons given by the

challenged party, neither the complaining party's individual rights nor the integrity of the justice system are diminished by an order reaffirming the original judgment. See Batson v. Kentucky, 476 U.S. 79, 100 (1986) (remanding for hearing permitting state to came forward with neutral explanation for strikes). There is, in particular, no threat to the integrity of the justice system where, as here, the trial court complies with existing law at the time it rules that the challenged strikes need not be justified: Reynolds v. State, supra, on which the district court relied to reverse Mr. Johans's conviction, was decided after the trial in this case concluded. See United States v. David, 803 F.2d 1567 (11th Cir. 1986)(remanding for consideration of new rule of Batson); Williams v. State, 507 So.2d 50, 53 (Miss. 1987) (same); Harrell v. State, 555 So.2d 263, 258 (Ala. 1989) (modifying Alabama law to require Batson showing on demand; remanding in light of new rule); State v. Jones, 358 S.E.2d 701 (S.C. 1987) (same).

This court, in Fowler v. State, 255 So.2d 513 (Fla. 1971), reversed the trial court's ruling denying the defendant's requested hearing on the issue of his competency to stand trial, but held that that ruling did not require vacation of the judgment entered against him and remanded for a hearing solely on the competency issue. Id. at 515. Accord Knight v. State, 164 So.2d 229 (Fla. 3rd DCA 1964); see also Seay v. State, 286 So.2d 532, 544 (Ervin, J., dissenting) (appellate court's ruling that trial court erred in denying requested hearing on whether grand jury was properly constituted called for remand on single issue,

rather than vacation of conviction). This court distinguished Fowler in Smith v. State, 372 So.2d 86 (Fla. 1979) and in Land v. State, 293 So.2d 704 (Fla. 1974). Smith stands for the rule that failure to hold a requested Richardson[6] hearing is per se reversible, as "the illusive search for past prejudice" entails the near-impossible inquiry whether a known guilty verdict would have been affected by the complaining party's having had more information when preparing for trial. Smith at 88; accord Wilcox v. State 367 So.2d 1020, 1024 n.4 (Fla. 1979). In Land, this court held that a post-trial hearing to determine voluntariness of a confession cannot cure the trial court's refusal to hold such a hearing before trial, since a confession, once introduced, "dictates, to a considerable extent, the trial strategy to be utilized by defense counsel.'' Land at 708. Accord Greene v. State, 351 So.2d 941 (Fla. 1977).

The state submits that the rule of Fowler should be applied in cases like the present case. The outcome of a **Neil** challenge does not, or at any rate should not, affect trial strategy or the jury's verdict. Cf. Smith, supra; Land, supra. The issue is one that can be determined in isolation. In those cases in which the passage of time makes post-trial resolution of the issue impracticable, the trial court should vacate the judgment entered against the appellant. Alvarado, supra, 923 F.2d at 256; Chew, supra, 562 A.2d at 1273. In all other cases a Neil hearing should be held on remand. See Batson, supra, 476 U.S. at 100; Harrell, supra, 555 So.2d at 268; Jones, supra, 358 S.E.2d at

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[6] Richardson v. State, 246 So.2d 771 (Fla. 1979).

703; Johnson, supra, 731 P.2d at 999. See also State v. Span, 819 P.2d 329, 342-3 (Utah 1991) (remanding for state to amplify reason for strike; race-neutrality of reason to be weighed by criteria set out in State v. Slappy[7]); Congdon v. State, 261 Ga. 398, 405 S.E.2d 677 (Ga. 1991) (remanding for state to provide reasons for strikes); Hawkins v. State, 783 S.W.2d 288, 292 (Tex. Ct. App. 1989) (same); People v. Freeman, 162 Ill. App. 3d 1080, 516 N.E.2d 440, 449 (Ill. App. Ct. 1987) (same); State v. Mims, 505 So.2d 747, 751 (La. Ct. App. 1987) (same). Compare People v. Scott, 70 N.Y.2d 420, 516 N.E.2d 1208, 522 N.Y.S.2d 94 (N.Y. 1987) (no point in remand where voir dire not transcribed, trial judge no longer on bench, and four years had elapsed since trial) with People v. Brown, 566 N.Y.S.2d 422 (N.Y. App. Div. 1991) (remanding where state not given reasonable opportunity to offer race-neutral explanations). See generally State v. Moore, 109 N.M. 119, 782 P.2d 91, 98 (N.M. Ct. App. 1989) (remand for Batson hearing appropriate); Love v. State, 519 N.E.2d 563, 566 (Tnd. 1988) (same); Commonwealth v. Wilson, 537 A.2d 370, 373 (Pa. Super. Ct. 1988) (same); State v. Carter, 756 S.W.2d 171, 176 (Mo. Ct. App. 1987) (same); State v. Hood 242 Kan. 115, 744 P.2d 816, 822 (Kan. 1987) (same); People v. Hart, 161 Mich. App. 630, 411 N.W.2d 803, 808 (Mich. Ct. App. 1987) (same); Williams v. State 507 So.2d 50, 53 (Miss. 1987) (same); Saadiq v. State, 387 N.W.2d 315, 329 (Iowa 1986) (same).

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[7] 522 So.2d 18 (Fla. 1988).

POINT TWO

THIS DISTRICT COURT IMPROPERLY APPLIED THIS COURT'S DECISION IN REYNOLDS *V. STATE* IN THIS CASE.

In Reynolds v. State, 576 So.2d 1300 (Fla. 1991), this court held that where only one person available for jury service in a specific case belongs to a distinct racial group, a peremptory strike of that person *ipso facto* shifts the burden to the party that exercised the strike to announce a race-neutral reason for having done *so.* The district court based its reversal of Mr. Johans' conviction on the rule established in Reynolds. Johans, 16 FLW at 2520. The state submits that Reynolds should not be applied in this case, and that the district court's decision should be reversed.

In Reynolds, seventeen venire members were randomly called from a larger pool and questioned by the parties' attorneys; jury selection then proceeded as to those seventeen. Reynolds v. State, 555 So.2d 918 (Fla. 1st DCA 1990), rev'd 576 So.2d 1300 (Fla. 1991). A similar procedure was used in Mr. Johans' case, with fourteen venire members questioned and challenged. The process was then repeated in this case with nine additional venire members. (A 25-6, 110-16, 152-6) In Reynolds, only one of the seventeen venire members that participated in voir dire was black. Reynolds, 576 So.2d at 1300. In this case, while only one of the first group of fourteen venire members to participate in voir dire, Veronica Butler, was black, the record shows that at least one of the second group of nine venire members to be voir dired was also black. (A 111, 155-6) The defense voiced its

objection to the state's strike of Ms. Butler before the second group was called. The trial court ruled that no prima facie case of discrimination had been shown, and the second group of venire members was called and voir dired. (A 112-16) Ms. Blunt, who was in that second group and who was eventually seated without challenge by the state, is black. (A 155-6) The defense did not renew its objection; the record does not reflect the race of any of the other eight jurors in the second group to be voir dired. (A 152-6)

The state submits that the trial court correctly ruled that the defendant's objection was premature, since it was based solely on the composition of the first panel randomly called into the jury box, and since some of the venire members still potentially available for jury service in Mr. Johans' case were members of the same minority as Ms. Butler. (A 112-3) The district court's decision misapplies the rule of Reynolds by holding that striking the single minority member *of the first panel called into the jury box* for voir dire raises a presumption of discriminatory intent. The rule of Reynolds was born of necessity: as this court cogently stated in that case,

> when a peremptory strike eliminates the only minority venire member' available for jury service[, n]o pattern can be shown because there was no possibility of a pattern ever occurring.

576 So.2d at 1301. In the present case, at the time the defense objected, there remained a possibility that a pattern of improperly race-based strikes might--or then again might not--

emerge. As it happened, the record of this case shows that *no more than* 50% of the black venire members that were voir dired were struck by the state. On the record before the district court, which did not establish how many of the second group voir dired were members of the same minority as Ms. Butler, the defense could not establish a pattern indicating discrimination, Compare Blackshear v. State, 521 So.2d 1083 (Fla. 1988) (eight of ten peremptories used to strike all potential black jurors; pattern shown) and State v. Jones, 485 So.2d 1283 (Fla. 1986) (five of six peremptories used to strike all black potential jurors; pattern shown) with Taylor v. State, 583 So.2d 323 (Fla. 1991) (peremptory strike of one black potential juror insufficient to shift burden where more black potential jurors in venire) and Woods v. State, 490 So.2d 24 (Fla. 1986) (five of ten peremptories against potential black jurors, two of which were patently race-neutral, insufficient to shift burden). The district court accordingly erred by reversing Mr. Johans' conviction. The district court's decision should be quashed and the trial court's judgment reinstated. In the alternative, this case should be remanded to the trial court for a hearing, to establish whether the defense can show a prima **facie** case of discrimination and whether the state can refute that prima facie case. See Point I supra.

CONCLUSION

The petitioner requests this court to quash the district court's decision and reinstate the trial court's judgment and sentence. In the alternative, the petitioner requests this court to remand this case to the trial court for a hearing on the Neil issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief has been furnished by hand delivery to M.A. Lucas, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 8th day of January, 1992.

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