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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

WARREN A. JOHANS,

Respondent.

CASE NO. 79,046

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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RESPONDENT'S BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

POINT I: This Court has consistently held that when there is a failure to conduct a Neil inquiry, the proper remedy is to reverse the defendant's convictions and remand for a new trial. Thus, the Fifth District Court's decision in this case reversing Appellant's conviction and remanding for a new trial because of failure to conduct a Neil hearing must be affirmed.

POINT 11: The Fifth District Court of Appeal correctly applied this Court's decision in Reynolds **v.** State in this case. In the instant case, the state exercised a peremptory challenge and struck the sole black member of the initial fourteen prospective jurors. The state argues that because there were other black prospective jurors available in the jury pool that Reynolds does not apply. However, this narrow interpretation of Reynolds, is clearly wrong as this Court **has** held in Slappy, that "the striking of a single black juror violates the equal protection clause, even where other black jurors are seated, and

even when there are valid reasons for the striking of some black jurors".

ARGUMENT

POINT I

THE ONLY REMEDY TO BE CONSIDERED WHEN THERE IS A FAILURE TO CONDUCT A NEIL INQUIRY IS TO REVERSE THE CONVICTION(S) AND REMAND FOR A NEW TRIAL AS CORRECTLY ORDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE.

This Court has consistently held that when there is a failure to conduct a Neil[1] inquiry, the defendant's convictions should be reversed and remanded for a new trial. State v. Neil, 457 So.2d 481 (Fla. 1984); Blackshear v. State, 521 So.2d 1083 (Fla. 1988); State v. Slappy, 522 So.2d 18 (Fla. 1988). However, the state argues that this Court should change its position from one of providing a complete and full remedy of a new trial to a belated hearing which is clearly inadequate.

The state contends that this court should follow the decision in Pearson v. State, 514 So.2d 374 (Fla. 2d DCA 1987). In Pearson, the Second District Court of Appeal, after finding the trial court erred in failing to hold a Neil inquiry, simply remanded the case for a Batson[2] hearing. The state proposes that a Neil hearing held over a year after trial is an appropriate remedy because of this Court's approval of Pearson in Reynolds v. State, 576 So.2d 1300 (Fla. 1991). However, this Court in Remolds, stated that:

We quash the opinion below and remand for

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

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

> further proceedings consistent with the views expressed here. The opinion in Parrish is approved. We approve the result reached by Pearson but disagree with its tacit assumption that Neil provides less protection than the Federal law expounded in Batson. **See**, Slappy, 522 So.2d at 21. (Neil exceeds the current federal guarantees).

Id. at 1302-1303.

This Court clearly indicated that Florida law currently exceeds the federal guarantees as set forth in Batson. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court of the United States remanded the case for a hearing allowing the state the opportunity to come forward with a neutral explanation for its peremptory strikes. If the court found no neutral explanation then defendant's conviction must be reversed and a new trial ordered.

This Court in Blackshear v. State, 521 So.2d 1083 (Fla. 1988), stated:

> Moreover, we conclude that the hearing, conducted well after the trial had concluded, was untimely. When a Neil objection is **properly** raised, as it was in this instance, the time for the hearing has come. The requirements established by Slappy cannot possibly be met unless the hearing is conducted during the voir dire process. Only at this time does the court have the ability to observe and place on the record relevant matters about jurors responses or behavior that may be pertinent to a Neil inquiry.

Id. at 1084.

The state argues that in this type of case where there is a failure to conduct a Neil inquiry, the appropriate remedy is not a new trial but a hearing as this Court held in Fowler v.

State, 255 So.2d 513 (Fla. 1971). In Fowler, this Court reversed the trial court's ruling denying the defendant's requested hearing to determine his competency to stand trial. This Court held that this did not require a vacation of judgment entered against him and remanded for a hearing solely on the competency issue. Id. at 1515. The state attempts to argue that the rule as enunciated in Fowler which dealt with competency should be applied in Neil cases like the present. However, this Court in Hill v. State, 473 So.2d 1253 (Fla. 1985), stated that:

> As was determined Drope and Robinson, this type of competency hearing to determine whether Hill was competent at the time he was tried cannot be held retroactively because, as was stated in Drope, "a defendant's due process rights would not be adequately protected under that type of procedure". 420 U.S. at 183, 95 S.Ct. 909. Such a hearing should be conducted contemporaneously with the trial. Robinson, 383 U.S. at 387, 86 S.Ct. at 843.

Id. at 1215.

Respondent asserts that this Court clearly overruled Fowler, by holding that a competency hearing cannot be held retroactively. Thus, there must be a hearing on competency and if the defendant is determined competent to stand trial, a new trial must be held.

In Smith v. State, 372 So.2d 86 (Fla. 1979), this Court held that the failure to hold a requested Richardson hearing constituted reversible error which could not be remedied by an isolated post-trial evidentiary hearing. This Court gave several reasons why a post-trial hearing was not the appropriate remedy

for failure to conduct a Richardson inquiry:

> In the illusive search for past prejudice, the trial court is charged with the task of resurrecting the events and circumstances of a trial which may have taken place long ago. The reliability of findings of such a hearing must be suspect, for they are necessarily based on hearsay, conflicting recollections and summarized and paraphrased information. Instead of a vigorous investigation into the circumstances surrounding a discovery violation, a Richardson inquiry after remand from the appellate court is reduced to a mere guessing game.
>
> A post-trial Richardson inquiry is not only likely to be unreliable, it fosters piece-meal litigation as well. Where hearings come after trial, the possibility exists that judges, already concerned with congested court dockets, might become less sensitive to due process considerations. Land v. State, 293 So.2d at 708; accord, Greene v. State, 351 So.2d 941 (Fla. 1977).

Id. at 88.

Thus, because these same reasons apply where there has been a failure to conduct a Neil inquiry, the only remedy to be considered is to reverse Appellant's conviction and remand for a new trial.

POINT II

THE FIFTH DISTRICT COURT OF **APPEAL** CORRECTLY APPLIED THIS COURT'S DECISION IN REYNOLDS V. STATE IN THIS **CASE.**

In the instant case, Respondent, who is black, was charged and subsequently convicted of committing attempted sexual battery upon a white female. During voir dire, the state exercised a peremptory challenge and struck the **sole** black member of the initial fourteen prospective jurors, **who** had been called from a larger jury pool. Defense counsel made a timely objection and requested a Neil inquiry. (**R** 111) The trial court refused the defendant's request and no reasons were given by the state for the striking of this prospective black juror.

In Reynolds v. State, 576 So.2d 1300 (Fla. 1991), this Court held:

> The act of eliminating all minorities and there members, even if there number totals only one, shifts the burden to the state to justify the excusal upon a proper defense motion.

Id. at 1302.

In the present case, the Fifth District Court of Appeal held:

> **...**a doubt that the state excused a juror because of a race was created when the state peremptorily struck without explanation, the **sole** black venire member in the initial fourteen prospective jurors who were seated for voir dire. Thus, the trial court should have resolved all doubts in favor of Appellant and conducted a Neil inquiry to assure that the state **was** not striking this black juror for racial reasons and to protect the integrity of the jury selection process.

Reynolds, supra.

Johans v. State, 16 FLW 2520, 2521 (Fla. 5th DCA 1991).

The state argues that the Fifth District Court improperly applied Reynolds to the instant case. The state contends that Reynolds should be very narrowly interpreted. The state argues that Reynolds should only apply to situations where the entire jury venire has only one prospective black juror. This interpretation clearly does not comport to the present case law.

In State v. Slappy, 522 So.2d 18 (Fla. 1988). This Court stated that:

> Unfortunately, deciding what constitutes a "likelihood" under Neil does not lend itself to precise definition. . . We know, for example, that number alone is not dispositive, nor even the fact that a member of the minority has been seated as a juror or alternate. (citations omitted)
>
> Indeed the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is so because "the striking of a single black juror for racial reasons violates the equal protection clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." United States v. Gorden, 817 F.2d at 1541.

Slappy, at 21.

This Court in Slappy went on to state that:

> We hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

Id. at 22.

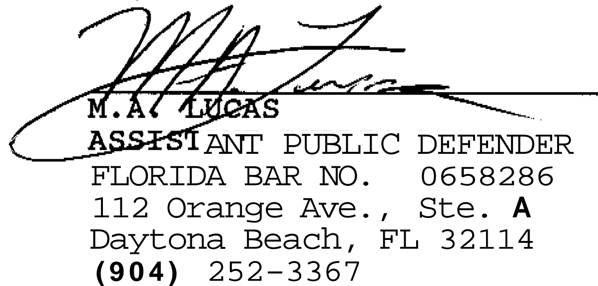
The District Court's Decision in this case should be affirmed and a new trial granted.

CONCLUSION

BASED UPON the foregoing reasons and authorities Respondent requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal and remand this **case** for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Warren A. Johans, 33123 Oil Well Road, Punta Gorda, FL 33955, this 28th day of January, 1992.

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