IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

CASE NO.: 80,040

DARRIN O'NEILL MCCLAIN,

Respondent.

PETITIONER'S BRIEF ON THE JURISDICTION

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_____/

PETITIONER'S BRIEF ON THE JURISDICTION

PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee below, will be referred to herein as either "Petitioner" or "the State," Respondent, Darrin O'Neill McClain, appellant below, will be referred herein as "Respondent." References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses. References to the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent appealed his conviction of two counts of robbery with a firearm. On appeal, he asserted that the reasons given by the prosecutor for excusing a black juror were improper. He also asserted that the trial court erred by forcing the defendant to accept certain juror's because Neil[1] does not apply to white jurors.

The lower tribunal rejected both claims raised by the defendant yet reversed the conviction based on its opinion in Elliott. In its decision, the lower tribunal recognized that the defendant did not raise this issue.

The petitioner's motion for rehearing or supplemental briefing was denied on May 19, 1992, and a notice to invoke was filed June 18, 1992.

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

SUMMARY OF ARGUMENT

In this brief, petitioner argues that there are three grounds upon which this court could grant discretionary review. First, the lower tribunal has created a new test to be applied to the exercise of peremptory challenges. This test directly conflicts with the test this Court has decided is appropriate.

Additionally, this decision of the lower tribunal directly conflicts with a long line of cases which hold that appellate courts decide issues which are presented by the parties and that issues which are not properly presented are waived.

Third, the district court's reliance on Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991), for the proposition that a party's right to strike members of a so-called "majority race" from the venire is constitutionally broader than the right to strike so-called minority venire members in a misconstruction of both the state and federal constitutions which warrants discretionary review,

This Court should accept jurisdiction in this case.

ARGUMENT

ISSUE I

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE STANDARDS APPLICABLE TO REVIEW THE USE OF PEREMPTORY CHALLENGES

The fundamental prerequisite for discretionary review, pursuant to Rule 9.030(a)(2), Fla.R.App.P., and Art. V, §3, Florida Constitution, is the existence of direct and express conflict between the decisions of district courts of appeal, or, between the decisions of the district court and the decisions of this Court on the same question of law. Reaves v. State, 485 So.2d 829 (Fla. 1986); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In Reaves, this court defined the type of conflict which must exist to accept a petition for discretionary review. It said:

> Conflict between decisions must be express and direct, id., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

This decision directly conflicts with established precedent from this court and requires review.

In a series of cases beginning with State v. Neil, 457 So.2d 481 (Fla. 1984), this court has significantly limited the use of peremptory challenges. This line of cases which includes State v.

Slappy, 522 So.2d 18 (Ela. 1988), holds that a peremptory challenge cannot be based on the race of the juror. This court has applied the same test regardless of the race of the defendant and without any requirement that the juror and party making the challenge be from the same racial group. Kibler v. State, 546 So.2d 710 (Fla. 1989).

In this case, the lower tribunal departed from test annunciated in Neil, Slappy, and Kibler, *supra* . It applied a standard it created in the case of Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991), which differs from the Neil/Slappy test articulated by this court. The lower tribunal's test directly conflicts with the substantial likelihood test created by this Court. By requiring the objecting party to meet a heavier burden when members of a "majority race" are at issue. This is a substantial deviation from this court's test which requires the objecting party to establish only a substantial likelihood of discrimination. By creating and applying a new test the decision of the lower tribunal expressly and directly conflicts with the Neil/Slappy/Kibler cases decided by this court.

Issue II

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SCOPE OF APPELLATE REVIEW.

There exists another significant conflict within the decision of the lower tribunal. The court decided the case on an issue not raised by the appellant and not briefed by the parties. In its opinion the lower tribunal stated:

> Appellant argues merely that the trial court erred in disallowing the defense's peremptory strikes because *Neil* does not apply to white prospective jurors as it does to blacks since whites are not members of a minority race.

The court rejected this argument made by the defendant and then decided the jury selection issue based on the assertion that the state has a heavy burden to establish invidious racial motivation. This standard first articulated in Elliott was not argued in the trial court and, as stated in the decision, was not raised or briefed by the parties. This procedure deciding a case on an issue not raised or briefed violates a basic tenet of appellate review and conflicts with numerous decisions of other courts.

In Anderson v. State, 215 So.2d 618 (Fla. 4th DCA 1968), the court held that professional advocacy requires the points on appeal to be stated and argued. In Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984), this Court said that when

issues are raised then the respondent party has the duty to respond so that the issues before the court are joined. These decisions emphasize the responsibility of the parties to present advocacy on the issues and implement this Courts Rule 9.210, Fla.R.App.P., setting out the manner in which issues are to be presented.

Just as the parties are to fully join the issues presented, the appellate court has responsibilities also. It has long been held that an appellate court cannot hear issues not presented to the trial judge. Sparta State Bank v. Pape, 477 So.2d 3 (Fla. 5th DCA 1985). In State v. Barber, 301 So.2d 7 (Fla. 1974), this Court held that an appellate court must confine itself to review only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. This rule applies ta the peremptory challenge issue. As this Court held in Bowden v. State, 588 So.2d 225 (Fla. 1991), the failure of defense counsel to abject to the reasons given waives the Neil issue. The decision of the lower tribunal recognizes that the issue was not raised yet used it as a basis for reversal. Thus, the decision directly and expressly conflicts with the precedents of this court on the same question of law. This Court should accept this case and resolve the conflict.

ISSUE III

THE DECISION BELOW CONSTRUES THE FLORIDA AND FEDERAL CONSTITUTIONS

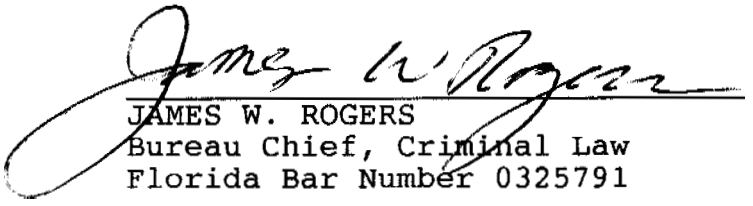
The district court below, relying on its Elliott decision, interpreted the Florida, and presumably the federal, constitutions as permitting a freer exercise of peremptories against members of so-called "majority races" than against members of so-called minorities. Whatever validity this highly questionable proposition may have when the analysis is based on **Art. I, §16 of** the Florida Constitution, it clearly has no validity when the analytical starting point is the venire members equal protection right not to be peremptorily challenged on the basis of race. **The** state recognizes that the district court did not have the benefit of the U.S. Supreme Court decisions in Georgia V. McCollum, case no. 91-372, opinion ***issued*** **June 18, 1992 (U.S.).**

CONCLUSION

Based on the above legal citation authorities, Appellee prays this Honorable Court accept this case for review in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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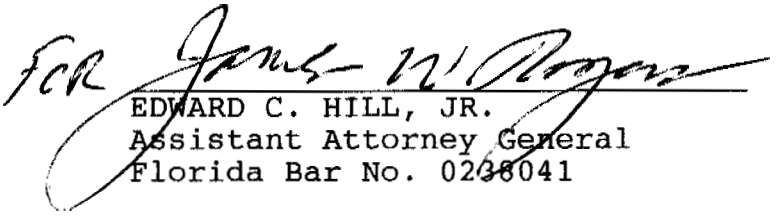

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to MS. NANCY A. DANIELS, Public Defender, and MR. STEVEN ROTHENBURG, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of June, 1992.

FOR James W Rogers
EDWARD C. HILL, JR.
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.:

DARRIN O'NEILL MCCLAIN,

Respondent.

APPENDIX TO
PETITIONER'S BRIEF ON THE JURISDICTION

Appendix A McClain v. State, (Fla. 1st DCA Apr. 8, 1992)

91-1111 05 TR

I

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DARRIN O'NEILL McCLAIN, *

Appellant, *

V. *

STATE OF FLORIDA, *

Appellee. *

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-1469

Opinion filed April 8, 1992.

An Appeal from the Circuit Court for Escambia County. Nickolas Geeker, Judge.

Nancy A. Daniels, Public Defender; Steven A. Rothenburg, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for appellee.

WIGGINTON, J.

Appellant appeals his conviction, after jury trial, of two counts of robbery with a weapon. We affirm in part, reverse in part and remand for a new trial.

Appellant first asserts that the trial court erred in accepting as race neutral the state's reasons for exercising one

of its peremptory challenges to strike a black juror, following defense counsel's objection to that strike under the authority of State v. Neil, 457 So.2d 481 (Fla. 1984). We affirm on that point, having concluded that appellant did not meet his burden of showing that the trial judge abused his broad discretion in this matter. See Files v. State, 586 So.2d 352 (Fla. 1st DCA 1991).

Appellant also challenges the trial court's denial of attempts by the defense to exercise peremptory challenges to strike white prospective jurors. During voir dire, after the trial judge had conducted the Neil inquiry into the state's striking of the black juror, the trial judge noted on the record that the defense had peremptorily stricken six white jurors. Thereupon, without further elaboration, sua sponte he called upon defense counsel to state his reasons for each of those strikes and ultimately disallowed four of the strikes on the ground that they were not race neutral. Comments made by the defense counsel indicate that only two non-whites were on the jury panel.

Appellant argues merely that the trial court erred in disallowing the defense's peremptory strikes because Neil does not apply to white prospective jurors as it does to blacks since whites are not members of a minority race. That argument has been rejected by this court in its recent decision in Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991).

However, we note that the "initial presumption is that peremptories will be exercised in a nondiscriminatory manner." Neil at 486. A Neil inquiry shall be instituted only upon a

demonstration on the record that the challenged jurors are members of a distinct racial group and that a strong likelihood exists that they have been challenged solely because of their race. In the absence of that demonstration and a corresponding finding by the trial judge of a substantial likelihood of racial discrimination, "no inquiry may be made of the person exercising the questioned peremptories." Id. Further, as recognized in Elliott, when peremptory challenges are being used to strike members of the majority race, a heavy burden to establish invidious racial motivation accompanies any attempt to deny, pursuant to Neil, the striking party's right to exercise its peremptory challenges.

In the instant case, our scrutiny of the record reveals no apparent basis for the trial judge's sua sponte institution of the initial Neil inquiry into the defense's exercise of the six peremptory challenges. Therefore, we must conclude that the defense was improperly denied, under the guise of Neil, its right to exercise peremptory challenges in a presumptively nondiscriminatory manner. Consequently, this cause is REVERSED and REMANDED for a new trial.

SMITH and MINER, JJ., CONCUR.