IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DARRIN O'NEILL MCCLAIN,

Respondent.

80,040

CASE NO. ~~79,734~~

RESPONDENT'S BRIEF ON JURISDICTION

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CITATIONS

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_____:

RESPONDENT'S BRIEF ON **JURISDICTION**

SUMMARY OF THE ARGUMENT

Petitioner asserts that the decision of the district court conflicts with this Court's decision in Neil because it relied on a different standard of proof. Petitioner incorrectly states the basis for the reversal in McClain. The District Court of Appeal reversed because "...the record reveal[ed] no apparent basis for the trial judge's sua sponte institution of the initial Neil inquiry...." Moreover, if the district court **did** rely on any standards of proof regarding Neil inquiries, it was the same standard espoused by Neil and therefore not in conflict.

Petitioner also asserts that the district court exceeded the proper scope of review. Respondent submits that the issue an which the district court based its ruling was subsumed within the issue which was expressly raised by Respondent, below. Hence this decision was not in conflict with any of this court's decisions regarding scope of review.

Finally, Petitioner asserts that McClain construes the Florida and Federal Constitutions. Respondent submits that the ruling below was determined by the factual basis, and not by some new standard of proof. It is simply more difficult to make a prima facie case of discriminatory peremptories where the challenged jurors are a different race than the defendant. This "increased burden" is merely a product of this particular factual scenario and does not represent a new standard of proof.

ARGUMENT

ISSUE I

THE DECISION OF THE LOWER COURT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT REGARDING THE INITIAL BURDEN OF PROOF REQUIRED PURSUANT TO A NEIL INQUIRY.

Petitioner has argued jurisdiction is based on the fact that the District Court of Appeal applied a standard created in Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991) which is inconsistent with State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Slappy, 522 So.2d 18 (Fla. 1988); and/or Kibler v. State, 546 So.2d 710 (Fla. 1989). Petitioner incorrectly states the basis for the reversal in McClain. The District Court of Appeal reversed because "...the record reveal[ed] no apparent basis for the trial judge's sua sponte institution of the initial Neil inquiry...." The court explained, in quoting Neil, that "the initial presumption is that peremptories will be exercised in a non-discriminatory manner." As such, the burden rests on the objecting party to establish 1) that the challenged jurors are members of a distinct racial group, and 2) that a strong likelihood exists that they have been challenged solely because of their race. By initiating the Neil inquiry himself, the trial judge in this case impermissibly shifted the burden to the party exercising the peremptories, in direct violation of Neil. Hence the district court's decision is not in conflict with any decision of this court.

Moreover, the district court did not "create" a new standard for challenges of majority race jurors, as suggested by Petitioner. See "Petitioner's Brief On Jurisdiction", p.5. Rather, this court plainly said:

> Under the procedure prescribed by Neil, the objecting party must ordinarily do more than simply show that several members of a cognizable racial group have been challenged in order to meet his initial burden. Thus, a defendant of a different race than the jurors being challenged may have more difficulty convincing the trial court that there is a strong likelihood that they have been challenged only because of their race.

Kibler, supra, at 712. Hence, the district court applied the standard evolving from Neil/Slappy/Kibler. The court merely observed that when the defendant is a different color than the jurors he or she strikes, the objecting party may have a more difficult task in making a prima facie case. This is because the factual basis makes it more difficult to demonstrate discrimination, not because a different standard is applied.

Hence, the district court's reliance on Elliott, if any, creates no conflict with any decision of this court.

Furthermore, this court has denied review of Elliott at ___ So.2d ___ (Fla. April 30, 1992).

ISSUE II

THE DECISION OF THE LOWER COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE PROPER SCOPE OF REVIEW.

Petitioner asserts that the district court decision is in conflict with previous decisions of this court holding that appellate courts should not address issues not raised by the parties. Respondent disagrees with the state's premise that the district court decision rests on an issue not raised.

The issue on which the district court relied for its holding was subsumed within the issue raised by Respondent, below. The issue argued in district court was whether:

> The trial court erred reversibly in forcing unwanted jurors onto the appellant's jury since Neil does not apply to white prospective jurors as it does to blacks.

The court ruled that the trial court did err in seating the jurors, not because they were white, but because no prima facie showing of a racial motive in the exercise of the peremptories had been made. Respondent argued that the jurors should not have been seated, and the court agreed. That it did so for reason's differing from those offered by respondent is of little significance in determining conflict jurisdiction.

Petitioner's cites Bowden v. State, 588 So.2d 225 (Fla. 1991) for the proposition that the Neil issue may be waived by failure to object to the purportedly race-neutral reasons given by the party exercising the peremptories, In this case, the trial judge, himself, objected to Defense Counsel's

race-neutral reasons. Moreover, Defense Counsel did object to the trial judge's restriction of his peremptories (R 23).

The remaining cases of Sparta State Bank v. Pape, 477 So.2d 3 (Fla. 5th DCA 1985), and State v. Barber, 301 So.2d (Fla. 1974) which were cited by Petitioner involved issues which were wholly distinct from any objection on the record.

Furthermore, Respondent rejects Petitioner's statement that the District Court of Appeals "...recognize[d] that the issue was not raised...." See "Petitioner's Brief on Jurisdiction", p.6. This assertion is not supported by the opinion in McClain, nor does Petitioner document the language to which he is referring.

ISSUE III

THE DECISION BELOW DOES NOT CONSTRUE EITHER THE FLORIDA OR FEDERAL CONSTITUTIONS.

Petitioner asserts that McClain has interpreted Amendment Fourteen of the U.S. Constitution in that it permitted "a freer exercise of peremptories against members of so-called 'majority races' than against members of so-called minorities" in violation of the majority race juror's right to equal protection under the law.

As argued under ISSUE I, neither McClain or Elliott relied on a new standard which required a heavier burden. Rather, under Neil, a prima facie case that peremptories are being used in a discriminatory manner is more difficult to establish when the challenged jurors are of a different race than the defendant. This is because the factual basis makes it more difficult to demonstrate discrimination, not because a different standard is being applied. In Kibler, supra, at 712 this court said:

> [A] defendant of a different race than the jurors being challenged may have more difficulty convincing the trial court that there is a strong likelihood that they have been challenged only because of their race.

The "increased burden" mentioned in Elliott is referring to the burden of production, not the burden of proof. Hence, any difference in the treatment of different race jurors is the result of well established rules governing the movant's burden of production and not because of a possibly unconstitutional standard of proof.

Alternatively, even if this court should decide that Elliott somehow construes the Florida or Federal constitutions, the district court's decision in this case, McClain, did not construe either because it did not rely on Elliott for its holding. Rather, the district court reversed because "...the record reveal[ed] no apparent basis for the trial judge's sua sponte institution of the initial Neal inquiry...."

Consequently, Respondent urges this court to find that McClain does not expressly construe either the Florida or Federal Constitutions and thereby deny jurisdiction.

CONCLUSION

Based on the foregoing citation and authority, Respondent urges this court to deny Petitioner's request for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, DARRIN O'NEILL MCCLAIN, #122709, Pensacola CCC, 3050 North "L" Street, Pensacola, Florida 32501, on this 24 day of July, 1992.

JAMIE SPIVEY