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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 80,040

DARRIN O'NEILL McCLAIN,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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DARRIN O'NEILL McCLAIN,

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______________________________:

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the Appellant below, and will be referred to as Respondent in this brief, 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.

II STATEMENT OF THE CASE & FACTS

Respondent accepts Petitioner's Statement of the Case and Facts except that, in reversing the lower tribunal, the First District Court of Appeals did not apply a new standard. See "Petitioner's Brief On the Merits", p.5.

III SUMMARY OF ARGUMENT

ISSUE 1

The trial court in McClain was reversed because it failed to apply the correct procedures for peremptory challenges as established by Neil. The trial court challenged Appellant's peremptories, sua sponte, in violation of the Neil requirement that an 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." Any reliance upon the holding of Elliott for its decision is completely congruous with the constitutional standards set forth by Neil, Slappy and Kibler regarding the complaining party's initial burden to establish that likelihood of discrimination.

ISSUE II

Although the lower court's opinion seemed to acknowledge Respondent's failure to argue the issue below, Respondent did, in fact, argue the trial court wrongly conducted a Neil inquiry since the majority status of the challenged jurors belied a finding of a strong likelihood of discrimination. Hence, the issue was properly preserved and argued so that the First District Court of Appeals could review it.

IV ARGUMENT

ISSUE I

WHETHER 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.

Petitioner asserts the lower court's reversal of McClain v. State, 596 So.2d 800 (Fla. 1st DCA 1992) was based on the holding in Elliott v. State, 592 So.2d 981 (Fla. 1st DCA 1991). This is wrong, The First District Court said:

> 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.

McClain v. State, 596 So.2d 800, 801 (Fla. 1st DCA 1992).

In order to contest the use of a party's peremptories, the objecting party must demonstrate on the record that 1) the struck jurors are members of a distinct racial group, and 2) that there is a strong likelihood they have been struck solely because of their race. State v. Neil, 457 So.2d 481, 486 (Fla. 1984). The trial court was reversed by the First District Court of Appeals because the record did not support such a finding by the trial court. Rather, with no objection from the State, the trial judge, sua sponte, ordered this black Respondent to provide race neutral reasons for his peremptories

exercised against six white jurors. This procedure violated the plain requirements of Neil, thereby necessitating reversal.

Petitioner seeks to re-litigate Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991); rev. denied, 599 So.2d 658 (Fla. 1992) a case referred to in dicta by the McClain court and which has already been denied review by this Court. Because this was not the basis for the lower court's ruling, the merits of the Elliott holding are not properly before this court for review. Nonetheless, Respondent makes the following reply to Petitioner's arguments concerning that case.

Petitioner asserts that the following language contained in Elliott and referred to in McClain creates a new standard, separate, and in violation of the dictates of Neil, State v. Slappy, 522 So.2d 18 (Fla. 1988), and Kibler v. State, 546 So.2d 710 (Fla. 1989):

> [W]here the peremptory challenges are being used to strike members of the majority race, the state, as the objecting or complaining party, carries an enormous burden to establish invidious racial motivation.

Elliott, at 986. This is not a new standard, but the same standard espoused by those cases. This is evident from the language in Kibler.

> [I]t is unnecessary that the defendant who objects to peremptory challenges directed to members of a cognizable racial group be of the same race as the jurors who are being challenged. This does not mean, however, that the respective races of the challenged jurors and of the person who objects to the challenges may not be relevant in the determination of whether the challenges are being unconstitutionally exercised because

> of group bias. 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." (emphasis added)

Id., at 712.

Hence, the respective races of the challenged jurors and the defendant **may** be relevant in determining whether the challenges are being unconstitutionally exercised. In the same manner that it would be more difficult for an objecting party to initially demonstrate bias when the challenged jurors are of a different race, so also is it more difficult to demonstrate bias when the challenged jurors represent the majority race on the venire.

Presumably then, a prosecutor would **face** more difficulty convincing the trial court that there is a strong likelihood that a black defendant's strikes of exclusively white jurors were motivated solely by race where the venire was predominately white. This is merely to express the logical converse of Neil. If the state's strike of all minority race jurors is evidence which tends to indicate the strike was racially motivated, then the strike of majority race jurors is not.

Petitioner asserts the relative balance of the challenged jurors' races is irrelevant and unauthorized by the opinions of

this court. In fact, the opposite is true. It is precisely the relative balance of the minority race jurors to the majority race on the venire, which gives meaning to the striking of those minority jurors. Without the racial imbalance, there would be no minority juror and the strike could not overcome the presumption of nondiscrimination.

Petitioner's argument regarding the confusion over how to define "majority race" misses the most fundamental and common-sensical foundations of the Neil, Slappy, Kibler decisions. The definition of majority race is restricted to the representation of that race on a given venire. Whether a particular juror's race was the majority race in the community or nation has no bearing on whether that juror was struck for racial reasons. It is the unlikely coincidence that all or some of the minority race jurors would be struck, whatever their color, which demands inquiry from the court. The Neil opinion did not give meaning to the act of striking the first three black jurors because blacks represented a minority anywhere outside of that venire. Rather, the act was sufficient evidence to prompt inquiry precisely because those jurors were a minority on that particular venire. Conversely, had blacks represented the majority of the panel in Neil, use of peremptories by the state, exclusively against blacks, would not have been sufficient evidence to require inquiry by the court. The act, by itself, would not have established a strong likelihood of racial bias.

This is the situation in McClain -- the black defendant's strike of only white jurors on a venire which contained only two blacks does not constitute an unusual coincidence evincing racial bias.

Petitioner seizes upon a line from Slappy which says, "We know, for example, that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated a juror or alternative,'' for the proposition that cognizance of racial ratios creates artificial barriers. See "Petitioner's Brief On the Merits", p.11. To say that number alone is not dispositive does not dispute the fact that the relative number of jurors by race may be the key, or only evidence of racial discrimination by which to establish the initial burden as the objecting party.

Petitioner asserts that recognizing an increased burden when challengeing the strike of majority race jurors creates artificial barriers. To the contrary, establishing a set percentage or number of jurors struck, in order to meet the objecting party's initial burden, would constitute an artificial barrier in the form of a bright-line test; but, simple recognition of relative racial balances does not. The former would qualify as a new legal standard, the latter is merely observation of the facts. Consequently, the holding in Elliott was precisely consistent with the holdings of Neil, Slappy and Kibler.

Because the holdings of Elliott and McClain do not create a new legal standard, Petitioner's other arguments regarding their constitutional infirmity are, also, without merit.

Petitioner claims the Elliott holding "turns upside down the holding in Slappy wherein this court stated that "any doubt whether a substantial likelihood of discrimination has been shown is to be resolved in favor of the complaining party." "Petitioner's Brief on the Merits", p. 16. Actually, this issue may not even be addressed until the objecting party comes forward with some evidence tending to show a strong likelihood of racial bias, because the initial presumption is that all peremptories are non-discriminatory. Neil, supra at 486.

Because the strike of majority race jurors may as likely be for legitimate reasons as for racially motivated ones, the act by itself does not carry the necessary burden, and so there is nothing to resolve in favor of the complaining party. If Petitioner were right on this point, the objecting party could establish his burden merely by objecting for no logical reason -- any doubt would have to be settled in favor of the objecting party, thereby doing away with the need to establish a strong likelihood of racial bias. The First District Court of Appeals was well aware of this fact when ruling upon Elliott:

> Were we to hold otherwise, based on this record, we would effectively bury the proverbial coffin to which then Chief Justice Ehrlich metaphorically alluded in his dissenting opinion in Kibler. There he expressed his concern that the court, in allowing a white defendant to complain of state peremptory strikes of black jurors, "for all practical purposes, is putting

the final nail in the coffin of peremptory
challenges in criminal trials."
(footnote omitted)

Elliott, **supra** at 986). **In** other words, permitting the state to establish racial bias simply by pointing out that all of the challenged jurors are of a different race, without showing that those jurors also constitute the minority race on the venire, would effectively eliminate the use of peremptaries, altogether.

Petitioner's reliance on Reed v. State, 560 So.2d 203 (Fla. 1990) for the proposition that, the trial **judge's** violation of Neil procedures should not have been reversed because the **standard** of review is abuse of discretion, is pointless. Once again, the judge's discretion may only be applied **after** the complaining party carries its burden of production on the evidence. In this case, where the challenged jurors did not constitute the minority race, there was no evidence on which to **base** a discretionary ruling.

Also, of course, it was the judge, not the state, who made the objection and attempted to carry the initial burden for the state. Even if this were not a violation of Neil procedures, it is because the judge found a strong likelihood of racial bias in the act of striking only white jurors on a predominately white venire that his findings are not supported by the record, and therefore, constitute an abuse of discretion, nonetheless.

Given the racial composition of the venire, there **was** simply no **reason** to believe this act, alone, was evidence of

racial bias. This analysis is consistent with the holdings of Neil, Slappy, Kibler and Blackshear v. State, 521 So.2d 1083 (Fla. 1988) (elimination of every minority venire member constitutes a strong likelihood of racial bias).

Petitioner's argument regarding Defense Counsel's reasons as evincing blatant and pretextual bias in use of peremptories is premature. **See** "Petitioner's Brief on the Merits", p.19. The lower court decided McClain based on the trial judge's failure to follow the Neil procedure which initially presumes all peremptories to be non-discriminatory and, hence, implicitly finding a strong likelihood of race bias without record support. Consequently, the reasons given by Defense Counsel were not the basis for the reversal and have no relevance to this appeal. Nonetheless, Defense Counsel's answers to the Neil inquiry point-up the weakness of Petitioner's argument.

As Petitioner points out, the court correctly accepted two of the peremptories since there was evidence those jurors had previously been the victims of crimes. Of the four peremptories disallowed by the court, two involved women. Defense Counsel gave the reason, in each case, that he exercised the peremptories because the victim in this "robbery with a deadly weapon'' case **was** also a woman. It is not a racial bias to suggest that female jurors may feel more sympathy for a female victim than would male jurors. It may demonstrate a real sexual bias, but it offers absolutely no record to support a finding of racial bias. On the other hand,

had these two jurors also been the only white jurors on the venire, Defense Counsel's reasons may not have been satisfactory.

The same is true for the strike and reason provided in reference to Mr. Baggett:

> DEFENSE COUNSEL: No particular reason, just got a feeling on him.

Had Mr. Baggett been the only white juror or, at least, had he been one of the minority race jurors as represented by the venire, this answer would be insufficient. It would not rebut the demonstrated likelihood of racial bias. But, because Mr. Baggett was a majority race juror, there was no demonstration of a likely bias and, consequently, nothing to rebut.

How can Petitioner possibly call such a reason "blatantly racial and pretextual?" See "Petitioner's Brief On the Merits", p. 18. This is the best reason for a peremptory challenge and underlines the nature and purpose of peremptories. Black's Law Dictionary (6th Ed. 1990) defines "peremptory challenge'' as:

> The right to challenge a juror without assigning, or being required to assign, a reason for the challenge.

They are specifically to be used where the defendant cannot have the juror excused for cause. Again, if the state had already demonstrated a strong likelihood of racial bias, then this reason would not be sufficient -- it fails to rebut the charge, But, without any charge made, the reason cannot be held suspect.

Defense Counsel's reason for striking Mr. Vorhees is similarly devoid of any racial motivation. Petitioner confuses racial bias on the part of a juror with racial bias on the part of the litigating party. The former is a well accepted reason for striking a juror, the latter is not. This response is evidence of a possible racial bias on the part of the juror. Petitioner and the trial court see the reason for the strike as wholely because the juror is white, rather than because the juror is a blue collar worker with a high school education, residing in a rural area, Yet, there were many other white jurors who were not struck. Indeed, Mr. Vorhees represented the majority race on the venire. Consequently, there was no way for the trial court or Petitioner to know whether the strike was motivated by legitimate demographics or by illegitimate racial bias. One thing is clear, however; peremptory challenges are presumptively nondiscriminatory,

This points up the need to insure the objecting party has established a strong likelihood of racial bias prior to the Neil inquiry. This is so because, like the reason given for the strike of Mr. Baggett, few purely peremptory strikes will survive the inquiry. Consequently, when challenging the strike of majority race jurors, the objecting party must carry an increased burden since striking a majority race juror is not an unusual coincidence, regardless of that juror's color. Permitting the State to challenge peremptories simply on the basis that they are exclusively against majority race jurors, without more, would truly eliminate the use of peremptories in

the criminal justice system. Hence, this Court should affirm the ruling of the lower court.

ISSUE II

THE DECISION OF THE LOWER TRIBUNAL DOES NOT CONFLICT WITH DECISIONS OF **THIS COURT ON THE SCOPE OF APPELLATE 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. Petitioner's argument on this issue relies upon the opinion of the lower court which states:

> 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.

This was, in fact, the title of the issue argued by Appellant below, but it was not the sum total of the arguments made under that heading.

Appellant's initial brief to the First District Court of Appeal contained the following statements:

> Applying Neil to the exclusion of white jurors, when whites are the majority on a jury pool, is senseless in at least three ways.
>
> * * *
>
> Third, a complaining party is simply not prejudiced by the peremptory strike of some whites when the jury remains largely white.
>
> * * *

> Thus, when **a** party alleges that whites are being excluded in a discriminatory manner, that party should **also** demonstrate that whites are **a** minority on the jury pool.

"Initial Brief of Appellant" (1st DCA), p. 17, 18.

Irrespective of the opinion in McClain, Appellant clearly argued that it was the majority nature of the challenged jurors, as defined within the jury pool, which was determinative. The court ruled that the trial court did err in seating the jurors, not because they were white, but because striking only majority race jurors makes no showing of a strong likelihood of racial prejudice. Hence, whatever extent to which the lower court relied upon Elliott for its ruling, the issue was solidly preserved, both, at the trial and appellate levels.

Petitioner 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 of those cases. Hence, they have little meaning here.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Appellant requests that this Court affirm the ruling of the First District Court of Appeals.

Respectfully submitted,

NANCY A. DANIELS
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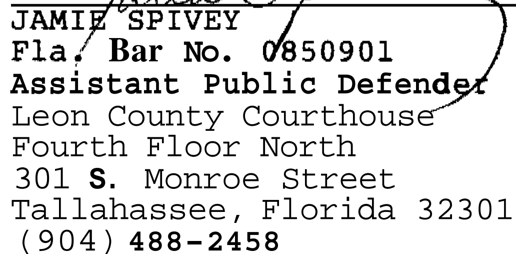
SECOND JUDICIAL CIRCUIT



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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, Criminal Division, Tallahassee, Florida, and a copy has been mailed to respondent, DARRIN O'NEILL McCLAIN, #122709, Pensacola Community Correctional Center, 3050 North L Street, Pensacola, Florida 32501, on this 16 day of December, 1992.

JAMIE SPIVEY