IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,

Petitioner,

vs.

HARRY K. SINGLETARY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

DEATH PENALTY CASE

CASE NO. 87694

MR. BOTTOSON'S PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, **LINROY BOTTOSON**, through his undersigned legal counsel and pursuant to Art. I, § 13, Fla.Const., respectfully petitions this Court for a Writ of Habeas Corpus directed to respondent, Harry K. Singletary, Jr., Secretary, Florida Department of Corrections, and as grounds therefore states as follows.

I.

BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a Writ of Habeas Corpus under Art. V, § 3(b)(9), Fla.Const., § 79.01 Fla.Stat.(1995), and Fla.R.App.P. 9.030(a)(3).

Habeas corpus is the appropriate remedy for ineffective assistance of appellate counsel. Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992); State v. District Court of Appeal, 569 So.2d 439, 442 n.1 (Fla. 1990).

II.

NATURE OF RELIEF SOUGHT

MR. BOTTOSON moves this Court to provide the following relief:

A. an order directing the respondent to show cause why the Petition should not be granted, and then

B. an order granting this Petition;

C. an order vacating the judgment and sentence in the above-styled cause; and

D. an order requiring the Trial Court to conduct a new trial and sentencing hearing for **MR. BOTTOSON**.

III.

REQUEST FOR JUDICIAL NOTICE

Rather than burden the attached appendix with numerous documents already in possession of both the Court and the Office of the Attorney General, **MR. BOTTOSON** respectfully requests this Court take judicial notice, pursuant to § 90.202(6) and (12), Fla.Stat. (1995) of the briefs and record on appeal in Bottoson v. State, Florida Supreme Court Case No. 60,708 (direct appeal from judgment and sentence) and in Bottoson v. State, Florida Supreme Court Case No. 81,411 (appeal from denial of Rule 3.850 motion).

IV.

PROCEDURAL BACKGROUND

1. On November 15, 1979, the grand jury for the Ninth Judicial Circuit indicted **MR. BOTTOSON** on a single count of first-degree murder. Trial began March 16, 1981, and **MR. BOTTOSON** was convicted on April 6, 1981. At trial **MR. BOTTOSON** was represented by William J. Sheaffer. .

2. The jury recommended a sentence of death on April 10, 1981, which sentence the court imposed on May 1, 1981. A timely notice of appeal was filed on May 29, 1981, and A. Thomas Mihok was appointed appellate counsel on July 13, 1981. Attorney Mihok filed

initial and reply briefs on behalf of **MR. BOTTOSON**, in which eight issues were raised. The Neil[1] issue, which is discussed below, was not one of the eight issues raised by attorney Mihok in this direct appeal, despite the fact that the issue was properly raised and preserved at the trial level (R.616). This Court affirmed **MR. BOTTOSON'S** conviction and sentence in Bottoson v. State, Case No. 60,708, 443 So.2d 962 (Fla.), cert. denied, 469 U.S. 873 (1984), without any discussion of the Neil issue.

3. On December 23, 1985, **MR. BOTTOSON** filed a motion in the Circuit Court to vacate judgment and sentence under Rule 3.850, Florida Rules of Criminal Procedure. After various amendments to the Rule 3.850 motion were filed, the circuit court denied all relief on February 5, 1993.

4. An appeal was timely taken from the circuit court's denial of the Rule 3.850 motion on March 8, 1993.

5. On January 18, 1996, this Court affirmed the denial of **MR. BOTTOSON'S** motion for post-conviction relief. Bottoson v. State, Case No. 81,411, 21 Fla.L. Weekly S38, motion for rehearing pending. In its opinion, this Court held that several of **MR. BOTTOSON'S** claims were barred for failure to raise them on direct appeal. One of these claims which was held barred was **MR. BOTTOSON'S** claim that the state's use of a peremptory challenge to exclude the sole perspective black juror denied **MR. BOTTOSON** his

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

fundamental constitutional rights under the Florida and federal constitutions to due process of law, a fair trial, an impartial jury, and a jury fairly representative of a cross section of society - the Neil claim. 21 Fla. L. Weekly at S41 n.1.

6. **MR. BOTTOSON** now brings this Petition for Writ of Habeas Corpus on the ground that he received ineffective and prejudicial assistance of appellate counsel based on appellate counsel's failure to raise the Neil claim in **MR. BOTTOSON'S** direct appeal.

7. **MR. BOTTOSON** has not previously filed a Petition for Writ of Habeas Corpus based on ineffective and prejudicial assistance of appellate counsel.

V.

FACTS

8. The jury selection process at trial, which consisted of both collective and individual examinations, extended over a period of six (6) court days (R.48-775). A number of potential jurors were immediately excused or challenged for cause for such reasons as the anticipated duration of the trial, pretrial publicity, and attitudes concerning the death penalty. Concerning the persons who progressed beyond this first stage, the prosecutor exercised a total of six (6) peremptory challenges (R. 297, 504, 616-17, 750). The only black person to be qualified and tentatively seated as a juror was among these six (6) persons challenged by the prosecutor. Defense counsel objected to the exercise of this specific, state peremptory challenge against this sole black juror (R. 616).

9. This black juror, Mr. Newton, was questioned at length by both counsel during the first day of jury selection as a member of the first panel of prospective jurors (R. 230-244). In the course of his questioning, Mr. Newton stated under oath that he could return a verdict of guilty to the charge of first degree murder and, under appropriate circumstances, vote for the death penalty. Thereafter, both counsel accepted Mr. Newton as a member of the jury (R. 309-310). However, three (3) days after he had been examined, Mr. Newton was back-struck by the prosecutor peremptorily, without any reason given (R. 615-616). Immediately defense counsel made the following objection and motions, which were summarily denied by the trial court:

> MR. SHEAFFER: Your Honor, for the record, I would like it to be known that Mr. Newton was the only black juror that had been tentatively seated that the State has just excused. I believe, again, that this is of deliberate exclusion on the part of the Prosecution because the Defendant in this case is also a black man, and, again, I don't believe we're getting a cross representation of the citizens that will hear Mr. Bottoson's case as in this here group. I move this Court to dismiss the panel and declare a mistrial.
>
> THE COURT: Denied. Okay, let's go back now to what we've got here.

(R. 616). This occurred on Thursday, March 19, 1981.

10. After defense counsel's objection and motions concerning the peremptory challenge of Mr. Newton were rejected, without the Trial Court requiring a hearing on the reasons for the state's

peremptory challenge (R. 616), an all white jury was impaneled. This all white jury convicted **MR. BOTTOSON** of first degree murder and by a vote of 10-2 recommended the sentence of death.

11. Following the trial court's imposition of the death sentence on May 1, 1981, a timely notice of appeal was filed and attorney A. Thomas Mihok was appointed appellate counsel.

12. Attorney Mihok filed initial and reply briefs on behalf of **MR. BOTTOSON** in this Court, and a Petition for Writ of Certiorari in the United States Supreme Court. Bottoson v. State, 443 So.2d 962 (Fla.), cert. denied, 469 U.S. 873 (1984). The Neil issue was not raised by attorney Mihok in this direct appeal process.

VI.

ARGUMENT

A. Introduction

Under the Florida and federal constitutions, **MR. BOTTOSON** is entitled to a direct appeal as a matter of right from his conviction and sentence of death in the circuit court. Art. V, § 3(b)(1), Fla.Const.(1995); Amend. V, VIII, XIV, U.S. Const. In this direct appeal process, both the Florida and federal constitutions mandate that **MR. BOTTOSON** be provided the effective assistance of an appellate attorney. Art. I, §§ 9, 16, Fla.Const.; Amend. V, VI, XIV, U.S. Const.; see Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

In determining whether or not appellate counsel rendered effective and non-prejudicial assistance, the Florida courts have followed the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Downs v. Wainwright, 476 So.2d 654, 656 (Fla. 1985). This standard requires the petitioner to show both the substandard performance of counsel, and prejudice to the appellant. The prejudice prong requires a showing that but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. Strickland, 104 S.Ct. at 2068; Downs, 476 So.2d at 655-56. In an appellate context, the Florida Supreme Court has stated that the prejudice prong requires a showing that the deficiency in performance prejudiced the essential fairness and reliability of the appeal. Middleton v. State, 465 So.2d 1218, 1227 (Fla. 1985). See Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) (appellate counsel rendered ineffective assistance on direct appeal for, among other things, failure to raise claims of insufficiency of evidence to support a finding of premeditation, and insufficiency of evidence to support the death sentence); Thompson v. Singletary, 20 Fla. L. Weekly D1341 (Fla. 4th DCA 6/7/95) (appellate counsel rendered ineffective assistance on direct appeal when he failed to appeal a preserved, meritorious "cause" jury challenge issue; this failure required a new trial), vacated on motion for rehearing and to recall mandate, 659 So.2d

435 (Fla. 4th DCA 1995)[2]; Wilner v. Singletary, 647 So.2d 187 (Fla. 2d DCA 1994)(appellate counsel rendered ineffective assistance on direct appeal where he failed to appeal the stacking of mandatory minimum sentences issue which required the defendant's sentence be vacated); Tippett v. State, 641 So.2d 908 (Fla. 2d DCA 1994) (appellate counsel rendered ineffective assistance on direct appeal where he failed to appeal two sentences which exceeded the statutory maximum).

B. Substandard Performance of Appellate Counsel

MR. BOTTOSON'S appellate counsel rendered ineffective assistance of counsel in failing to raise the following claim, the merits of which are discussed below, in **MR. BOTTOSON'S** direct appeal process:

> **THE STATE'S USE OF A PEREMPTORY CHALLENGE TO STRIKE A BLACK POTENTIAL JUROR, AND THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY INTO THE REASONS FOR THAT CHALLENGE, VIOLATED MR. BOTTOSON'S RIGHTS UNDER ART. I, §§ 9, 16(A), OF THE FLORIDA CONSTITUTION, AND UNDER AMEND. V, VI, XIV, OF THE UNITED STATES CONSTITUTION.**

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[2] Upon rehearing, the Fourth District Court of Appeal denied the petition for writ of habeas corpus because of a critical fact - that trial counsel had been offered, and refused, an additional peremptory challenge - not brought to its attention previously. 659 So.2d 435, 436 (Fla. 4th DCA 1995). The cause challenge issue was therefore not preserved at the trial level. The opinion at 20 Fla. L. Weekly D1341, although not binding, lends support to **MR. BOTTOSON'S** claim of ineffective assistance of appellate counsel, as it represents a correct application of the law of ineffective assistance of appellate counsel to a given set of facts. **The failure to raise a valid Neil issue, like the failure to raise a valid challenge for cause issue, is ineffective assistance of appellate counsel.**

When **MR. BOTTOSON'S** trial was held in the Spring of 1981, the United States Supreme Court had previously and repeatedly recognized and condemned, as unconstitutional, the prosecutorial misuse of the peremptory challenges on racial grounds in criminal trials, on the grounds that it denied the accused equal protection, due process of law, a fair trial, an impartial jury, and a jury fairly representative of a cross section of society. Peter v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972); Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). However, these United States Supreme Court decisions did not stop this odious practice due to the insurmountable procedural and proof burdens placed on the accused to establish systematic and purposeful racial discrimination. The first step by the Florida Supreme Court toward solving this problem and framing a realistic and meaningful judicial solution occurred on September 27, 1984, when this Court decided State v. Neil, 457 So.2d 481 (Fla. 1984).

Following earlier decisions of New York, California, and Massachusetts courts[3], this Court rejected the Swain test for evaluating the constitutionality of peremptory challenges because the Swain test impeded the right to an impartial jury guaranteed by

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[3] People v. Thompson, 79 A.D.2d 87 (N.Y. 1981), People v. Wheeler, 583 P.2d 748 (Cal. 1978), and Commonwealth v. Soares, 387 N.E.2d 499 (Mass.), cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), are all cases decided prior to November 17, 1981, the date on which Attorney Mihok filed the initial brief on behalf of **MR. BOTTOSON**. See also, State v. Crespin, 612 P.2d 716 (N.M.App. 1980).

the Florida Constitution. However, it limited the Neil test "... to peremptory challenges of distinctive racial groups solely on the basis of race." 457 So.2d at 486-487.

When attorney Mihok filed the initial brief in this Court on behalf of **MR. BOTTOSON** in November 1981, his failure to raise the Neil issue constituted a substandard performance of appellate counsel. This racially-based peremptory challenge was clearly objected to, and the issue was preserved, by trial counsel. The circuit court erroneously denied the objection and defense motions without conducting any inquiry of the state concerning its reasons for the challenge. Had appellate counsel raised this peremptory challenge issue before this Court, **MR. BOTTOSON** would have been entitled to the same application of Soares, Wheeler, Thompson, and Crespin as Mr. Neil received approximately eight months later. **MR. BOTTOSON** also would have been entitled to the same result - the vacation of his judgment and sentence, with a remand for a new trial.

This is not hindsight fourteen years after the fact[4]. In the late 1970's and early 1980's, what eventually evolved into the Neil/Batson doctrine was a matter of clear concern to the courts administrating the American criminal justice system. By the time of **MR. BOTTOSON'S** trial, at least three states had broken from the

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[4] In Ruff v. Armontrout, 77 F.3d 265 (8th Cir. 1996), the Eighth Circuit considered a federal habeas corpus claim involving a Neil issue, i.e., application of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In Ruff, the Eight Circuit pointed out that the legal theory applied in Batson was not novel, but had been based on law in existence for over one hundred years.

Swain test and ruled that the exercise of peremptory challenges on racial grounds was illegal. People v. Thompson, 79 A.D.2d 87 (N.Y. 1981), People v. Wheeler, 583 P.2d 748 (Cal. 1978), and Commonwealth v. Soares, 387 N.E.2d 499 (Mass.), cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979)[5]. This evolving law supported trial counsel's objection in Bottoson. It is clear that trial counsel was aware of this evolving trend in the law. There was no valid legal reason for appellate counsel to ignore trial counsel's objections and this evolving case law by failing to assert the state and federal constitutional issue in the direct appeal process.

C. Prejudice to Essential Fairness and Reliability of Appeal

The substandard performance of **MR. BOTTOSON'S** appellate counsel prejudiced the essential fairness and reliability of **MR. BOTTOSON'S** appeal. A review of the Neil decision demonstrates that had this issue been presented to this Court, **MR. BOTTOSON** would have been entitled to have his conviction and judgment reversed, and his case remanded for a new trial. That is the prejudice he has suffered for appellate counsel's failure to appeal the Neil issue. Had the Neil issue been raised, a different appellate result would have occurred. Therefore, the essential fairness and reliability of **MR. BOTTOSON'S** direct appeal was lost due to appellate counsel's inaction.

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[5] An Illinois court broke with the Swain test in People v. Payne, 436 N.E.2d 1046 (Ill.App. 1980). Although that decision was later reversed at 457 N.E.2d 1202 (Ill. 1983), it was nonetheless in existence at the time of **MR. BOTTOSON'S** appeal in 1981.

In Neil the Florida Supreme Court ruled that the state use of peremptory challenges to exclude prospective jurors on the basis of race entitled the accused to a new trial before a new jury. The Neil Court set forth the following test to be applied in deciding this issue.

NEIL TEST	**BOTTOSON APPLICATION**
Presumption that peremptories will be exercised in non-discriminatory manner.	
Timely objection.	Immediate objection, motion to dismiss panel, and motion for mistrial (R. 616).
Defense counsel must demonstrate on the record that the challenged persons are members of a distinct racial group.	Defense counsel stated on the record that Mr. Newton was black.
Defense counsel must demonstrate on the record that there is a strong likelihood that the juror has been challenged solely because of his race.	Defense counsel stated that the challenge was a deliberate racial exclusion because Mr. Newton was the only black juror, and this deprived Mr. Bottoson of his right to a fair cross-representation of the community on the jury (R. 616).

NEIL TEST	BOTTOSON APPLICATION
If party accomplishes this, then Trial Court must decide if there is a substantial likelihood that the peremptory challenge is being exercised solely on the basis of race. If no such likelihood, no inquiry of person exercising peremptory. If there was a likelihood, burden shifts to the prosecutor to show challenges were not based on race, but for reasons related to the witness. If racially motivated, jury pool must be dismissed.	The trial court, without any explanation, denied the defense objection without any argument or comment from the state. This procedure clearly violates Neil.

On the day Neil was decided, **MR. BOTTOSON'S** petition for certiorari was pending in the United States Supreme Court, the final judicial step in his direct appeal process. Four days later on October 1, 1984, this petition for certiorari was denied Bottoson v. Florida, 469 U.S. 872, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984).

Following the Neil decision, there was confusion concerning the applicability of the Neil test. This confusion flowed from imprecise language to the effect that the decision was not retroactive. Neil, 457 So.2d at 488. In subsequent cases Neil was held to be applicable to cases on direct appeal when Neil was decided (September 27, 1984). State v. Safford, 484 So.2d 1245 (Fla. 1986), affirming, Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985); State v. Jones, 485 So.2d 1283 (Fla. 1986), affirming, Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); Wright v. State,

491 So.2d 1100 (Fla. 1986), reversing, Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985). However, the case that finally clarified the Neil applicability question is State v. Castillo, 486 So.2d 565 (Fla. 1986), affirming in part, Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985). The Florida Supreme Court now cites these two cases as a unit, "State v. Neil, 457 So.2d 481, clarified sub. nom. State v. Castillo, 485 So.2d 565 (Fla. 1986)." Blackshear v. State, 521 So.2d 1083 (Fla. 1988); State v. Slappy, 522 So.2d 18, 20 (Fla. 1988).

The rule of applicability clarified and finalized in Castillo is as follows:

> [G]enerally, an appellant is entitled to the benefit of the law at the time of appellate disposition. (citation omitted). We see no exception to this principle in this case. Our comment in Neil that it should not be applied retroactively was intended to apply to completed cases.

486 So.2d at 565 (emphasis added).

If a case is not "completed," then the Neil test applies. A Florida criminal case is not completed if, in the primary direct appeal process, there is a petition for writ of certiorari pending in the United States Supreme Court. Addressing the question of when a Florida criminal judgment and sentence become final, the Florida Supreme Court has held that this event does not occur "until the writ of certiorari filed with the United States Supreme Court is finally determined." Burr v. State, 518 So.2d 903, 905 (Fla. 1987).

In considering the applicability of the parallel U.S. Supreme Court decision, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the U.S. Supreme Court came to the same conclusion. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Griffith holds that Batson applies to all cases, state and federal, pending on direct review or not yet final when a new rule for the conduct of criminal prosecutions was announced, with no exception for cases in which the new rule constitutes a "clear break" with past. Like the petitioners in Griffith, **MR. BOTTOSON'S** petition for certiorari was pending in the United States Supreme Court when the underlying case (under which he now seeks relief) was decided.

Because **MR. BOTTOSON'S** case was still in the direct appeal process when this Court issued its Neil decision, attorney Mihok should have sought to bring that issue back before this Court at that time, through the filing of a motion to withdraw the mandate with a request to brief the Neil issue. The failure to make such a motion indicates that appellate counsel was ignorant of the Neil issue, and its potential impact on **MR. BOTTOSON'S** case, when it came down. Since the failure to raise the issue initially indicated a failure to understand the case law on that issue in 1981, it is not surprising that appellate counsel ignored a second opportunity to bring the Neil issue before this Court in 1984.

Since **MR. BOTTOSON'S** judgment and sentence were not final until his petition for writ of certiorari was denied by the United States Supreme Court on October 1, 1984, Neil must now be applied

to his appeal from the underlying judgment and sentence. **MR. BOTTOSON** presented this claim for judicial review in his Rule 3.850 motion which was denied, and thereafter appealed to this Court. In this Court's decision affirming the denial of that 3.850 motion, this Court declined to address the Neil issue, finding that the issue was procedurally barred in a Rule 3.850 proceeding for failure of **MR. BOTTOSON'S** appellate counsel to raise the issue on direct appeal. As the Safford line of cases cited above, pp. 13-14, dictates, **MR. BOTTOSON** was entitled to the application of Neil because his case was still in the direct appeal process at the time Neil was denied. However, even now, over eleven years after Neil has been decided, **MR. BOTTOSON** has not been given the benefit of the Neil decision. Had appellate counsel brought this issue to the court's attention on direct appeal, or immediately upon the release of the Neil decision while the direct appeal process was still underway, this delay could have been averted. While this Court was correct in declining the address the Neil issue in the appeal from the Rule 3.850 proceeding, this Neil issue now must be addressed in this habeas corpus proceeding. As argued above, the correct application of Neil to **MR. BOTTOSON'S** trial mandates that his judgment and sentence be reversed. Therefore, this Court must conclude that appellate counsel's failure to bring the Neil issue to this Court on direct appeal prejudiced the essential fairness and reliability of that direct appeal because the result would have been different. There is no clearer case for ineffective assistance of appellate counsel.

VII.

CONCLUSION

By failing to appeal the preserved, meritorious Neil claim, **MR. BOTTOSON'S** appellate counsel engaged in a substandard performance which denied **MR. BOTTOSON** his fundamental right to effective assistance of counsel on his direct appeal to this Court.

Based on the arguments and authorities set forth in this Petition, this Court must grant the Petition and provide the relief sought in Section II of this Petition.

VIII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 3d day of April, 1996, to the **OFFICE OF THE ATTORNEY GENERAL**, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118, with the original being sent by Federal Express to **HONORABLE SID J. WHITE**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

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