IN THE SUPREME COURT OF FLORIDA

DAVID WAYNE KIBLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,067

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case but would not set forth record facts as the petitioner has done. Respondent relies and will argue from the facts solely on the basis of the opinion under review herein, to-wit: **Kibler v. State**, 12 F.L.W. 274 (Fla. 5th DCA Jan. 23, 1987).

SUMMARY OF ARGUMENT

Point I

No direct and expressed conflict exists between the present case under review and **Castillo v. State**, 466 So.2d 7 (Fla. 3d DCA 1985), because that decision has been quashed by this court pursuant to **Castillo v. State**, 486 So.2d 565 (Fla. 1986). Since this issue was noted in a footnote in the district court's opinion in **Castillo**, supra, this court could have decided that issue when it quashed that decision. This court chose not to do so and there is, in the case at bar, likewise no reason for this court to review the issue since the Fifth District Court of Appeal decided the case based upon the merits, i.e., that there was no **State v. Neil**, 457 So.2d 41 (Fla. 1984), violation, assuming that the petitioner had standing.

Point II

No expressed and direct conflict exists between the case under review and **Slappy v. State**, 12 F.L.W. 433 (Fla. 3d DCA Feb. 3, 1987), because petitioner seeks to create the conflict by looking at the underlying record. This Court's jurisdiction can only be exercised based upon the face of the opinion. In any event, the basic premise of **Slappy**, does not conflict with the decision under review because the basic holding of the former case was that the trial court was not compelled to accept a state attorney's explanation for using preemptories when the record would contradict his explanations. **Kibler**, supra, certainly does not conflict with that premise.

ARGUMENT

POINT I

NO EXPRESSED AND DIRECT CONFLICT EXISTS BETWEEN THE DECISION UNDER REVIEW AND CASTILLO V. STATE, 466 SO.2D 7 (FLA. 3D DCA 1985), BASED UPON THE FACE OF THE OPINIONS PURSUANT TO ARTICLE V, § 3(b), OF THE FLORIDA CONSTITUTION.

Petitioner asserts that there is a direct and express conflict between the case under review and **Castillo v. State**, 466 So.2d 7 (Fla. 3d DCA 1985), (hereinafter referred to **Castillo I**), despite this court's decision quashing the latter opinion in **Castillo v. State**, 486 So.2d 565 (Fla. 1986) (hereinafter referred to as **Castillo II**). The basis of the alleged conflict appears in a footnote in **Castillo I** where this issue about standing is designated a "sub-issue." Respondent submits that this latter footnote can hardly be the basis for conflict jurisdiction especially in light of this court's holding in **Castillo II** that the portion of the district court's opinion dealing with the **State v. Neil**, 457 So.2d 41 (Fla. 1984), issue was quashed.

This court could have addressed the issue when it reviewed **Castillo I**. Since **Castillo I** was reversed on other grounds pursuant to the **Neil** issue, this court decided that it would not be appropriate to decide this standing issue. In **Marley v. Saunders**, 249 So.2d 30 (Fla. 1971), when this court accepted discretionary review based upon conflicting opinions in the district courts, this court noted that it could retain jurisdiction for all purposes in order to avoid needless steps in

litigation and decide the cause on its merits. This court, in **Castillo II**, could have decided this issue based upon the premise asserted in **Marley**. Yet in **Castillo II**, this court held that **Neil** was not retroactive vis-a-vis completed cases and that a timely objection pursuant to **Neil** was needed. In other words, this court implicitly found that the standing issue was moot. The same scenario exists in the case at bar. The majority opinion (as well as the concurring opinion) both decided that petitioner's argument based on the merits of **Neil**, was incorrect, whether or not petitioner had standing.

Moreover, not only has this court decided not to review this issue in **Castillo II**, but to review this opinion now would merely be an advisory opinion, which of course, this court should not do. Moreover, such an advisory opinion would have no effect on the ultimate decision in the case at bar that there was no substantive **Neil** violation. In any event, no express and direct conflict exists between the opinion in the case at bar and the opinion of **Castillo I** because this court must look to the decision rather than a conflict in the opinions. **Niemann v. Niemann**, 312 So.2d 733 (Fla. 1975). The ultimate decision both for **Castillo I** (based upon this court's holding in **Castillo II**) and the case presently under review, was that no **Neil** violation occurred. As such, there is no need to find any express and direct conflict pursuant to **Article V, § 3(b), of the Florida Constitution.**

POINT II

BASED UPON THE FACE OF THE DECISIONS, NO DIRECT AND EXPRESS CONFLICT EXISTS BETWEEN **KIBLER V. STATE**, 12 F.L.W. 274 (FLA. 5TH DCA JAN. 23, 1987), AND **SLAPPY V. STATE**, 12 F.L.W. 433 (FLA. 3D DCA FEB. 3, 1987).

Petitioner argues that conflict exists but does so based upon a recitation of portions of the underlying record and not based upon the face of the decisions. This court clearly held that in order to establish conflict, a petition of this nature must confine itself within the four corners of the majority decision and could not look to either a dissent nor the underlying record. **Reaves v. State**, 485 So.2d 829 (Fla. 1986). Hence, merely looking at the four corners of the opinion and the ulitmate decisions, there is no basis for conflict jurisdiction.

Petitioner's contention is that **Slappy v. State**, 12 F.L.W. 433 (Fla. 3d DCA Feb. 3, 1987), stands for the proposition that a trial court must take a critical look at the reasons offered by a party for preemptory challenges. Petitioner then argues: "In petitioner's case, the Fifth District Court accepted a total lack of jusitification from the prosecutor and was apparently willing to search the record for reasons not offered by the state." The latter premise is certainly not reflected on the face of the opinion.

Moreover, the petitioner's argument must fail because the ultimate holding of **Slappy**, does not conflict with anything that was said by the Fifth District Court of Appeal in **Kibler v. State**, 12 F.L.W. 274 (Fla. 5th DCA Jan. 23, 1987). In **Slappy**,

the ultimate holding was that the trial court was not compelled to accept the state attorney's explanations as to why he used the preemptories to exclude all blacks from the jury. **Slappy**, explained that the prosecutor's reasons were not established on voir dire or were inconsistent. For example, the prosecutor explained that he preemptorily challenged a black because he was a teacher although he did not challenge a white who was also a teacher. Nowhere, contrary to petitioner's assertions, does **Slappy**, supra, require that an appellate court, in reviewing this issue, disregard the record altogether. Although the district court in **Slappy**, did not accept the prosecutor's explanation where the record contradicted his explanation, the **Kibler** opinion does not contradict that holding. No where does **Kibler**, even imply that a trial court must accept any explanation given by the prosecutor as a matter of law. Thus, petitioner has not demonstrated any irreconcilable conflict between the two decisions. [In **Macklin v. State**, 491 So.2d 1153 (Fla. 3d DCA 1986), the Third District Court of Appeal held that based upon the record revealing a valid basis for the exclusion of three blacks from the jury, that the defendant failed to show that there was a strong likelihood that the fourth juror was challenged solely on the basis of race. Under petitioner's premise, **Macklin**, would also "conflict" with the case at bar and there would be "intra-district conflict between **Macklin**, and **Slappy**, supra. Yet the latter two opinions of the third district are consistent.] No conflict exists between **Slappy** , and **Kibler**, supra, based upon the face of the decisions. **Niemann**, supra.

CONCLUSION

Based on the arguments and authorities presented herein, the respondent prays this honorable court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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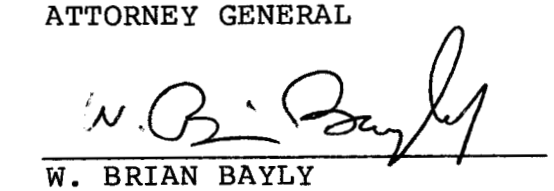

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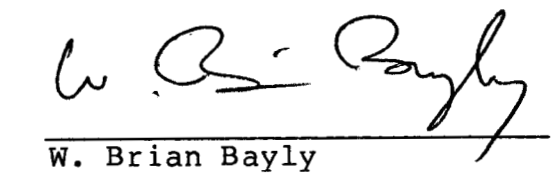
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above adn foregoing Brief on Jurisdiction has been furnished, by mail, to Daniel J. Schafer, Assistant Public Defender for petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 4th day of March, 1987.



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