IN THE SUPREME COURT OF FLORIDA

CASE NO. 77624

STATE OF FLORIDA,

Petitioner,

vs.

TIMOTHY LEE FOX

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the Appellant and the defendant, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Petitioner's Appendix, which is a conformed copy of the Appellate Court's opinion.

STATEMENT OF THE CASE AND FACTS
(Limited to the issue of jurisdiction)

Respondent was tried by a jury for armed robbery in Circuit Court Case No. 89-9365CF. The facts as presented in the District Court's opinion of January 23, 1991, are as follows:

Upon the state's announcement of its intention to strike prospective juror Mr. Williams, appellant's trial counsel raised a timely objection. He established that the appellant was black, and that there were only two prospective black jurors out of a panel of thirty. He made specific reference to Neil and requested the court to conduct an appropriate hearing.

In response, the state indicated it was excusing Mr. Williams on the premise that he had been on prior jury duty and it was a hung jury, and therefore it did not want a juror that couldn't make a decision. The court found this to be a racially neutral basis for excusing Mr. Williams, and therefore overruled appellant's Neil objection.

Respondent timely appealed the judgment and sentence to the District Court of Appeal, Fourth District. By opinion filed January 23, 1991, reported at Fox v. State, __ So.2d __, 16 FLW 254 (Fla. 4th DCA Jan. 23, 1991), attached as Exhibit A, the Court of Appeal found that while the trial court employed the proper procedure for determining a Slappy/Neil violation, the state had failed to show a "racially neutral" reason for excusing juror Williams which was supported by the record. The court found that the state was incorrect in its assertion that Mr. Williams had previously served on a hung jury. The court also noted that, "Regrettably, neither defense counsel nor the trial judge had the voir dire testimony read back to determine if the state's assertion was factually correct."

Petitioner filed a Motion for Rehearing on February 6, 1991 (See Exhibit B), but same was denied by Order dated February 27, 1991 (See Exhibit C). Notice to Invoke the Discretionary Jurisdiction of this Honorable Court was filed March 15, 1991. Thus, pursuant to Fla.R.App.P. 9.120(d), this Brief on Jurisdiction follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court's opinion reversing on the basis of the Neil/Slappy violation despite the absence of further objection by Respondent is in direct and express conflict with this Court's opinion in Floyd v. State, 569 So.2d 1225 (Fla. 1990).

REASON FOR GRANTING DISCRETIONARY REVIEW

Petitioner seeks to establish this Court's "conflict" jurisdiction under Art. V, §3(b)(3) Fla. Const. (1980), and Fla.R.App.P. 9.030(a)(2)(A)(iv). Conflict exists between the instant decision and the decision of this Court in Floyd v. State, 569 So.2d 1225 (Fla. 1990).

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the supreme court or another district, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). The District Court of Appeal, Fourth District, created conflict by announcing a rule of law contrary to that announced in Floyd v. State, supra.

The Fourth District in the instant case held:

> While the trial court employed the proper procedure for determining whether or not a Slappy/Neil violation had occurred, it is necessary that the state's "racially neutral" explanation for exercise of its peremptory challenge be supported by the record. Hill v. State, 540 So.2d 175, 177 (Fla. 4th DCA 1989). In the case before us, the record shows that the state was incorrect in its assertion that Mr. Williams had previously served on a hung jury. Regrettably, neither defense counsel nor the trial judge had the voir dire testimony read back to determine if the state's assertion was factually correct. Nonetheless, the state failed to meet its burden of showing a "racially neutral" reason

> for excusing juror Williams that was supported by the testimony in the record. Accordingly, we are compelled to reverse and remand for a jury trial.

Fox v. State, 16 FLW at 254.

In this Court's recent decision in Floyd, this Court held that where defense counsel failed to object to the prosecutor's explanation for striking a black juror, the Neil issue is not properly preserved for review. Floyd, 569 So.2d at 1230. Although noting in Floyd that it is the state's obligation to advance a facially race-neutral reason supported by the record, this Court found that it was opposing counsel's obligation to contest the factual existence of the reason. Floyd, 569 So.2d at 1230. As this Court explained, "when the state asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged." Floyd, 569 So.2d at 1230. Thus, this Court held that "once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason." Floyd, 569 So.2d at 1230. The rationale of this requirement was explained thus:

> Here, the error was easily correctable. Had defense counsel disputed the state's statement, the court would have been compelled to ascertain from the record if the state's assertion was true. Had the court determined that there was no factual basis for the challenge, the state's explanation no longer could have been considered a race-neutral explanation, and Juror Edmonds could not have been peremptorily excused. Floyd, 569 So.2d at 1230.

Accordingly, this Court held that the Neil issue had been waived by defense counsel's failure to object to the prosecutor's explanation. Floyd, 569 So.2d at 1230.

Similarly, in the instant case, Respondent failed to challenge the state's asserted facially race neutral reason for striking juror Williams. This failure to request a read back of the pertinent testimony or otherwise object was expressly noted in the Fourth District's opinion (Ex. A). As in Floyd, had Respondent done so, the trial court could have quickly ascertained from the record whether Williams had actually served on a hung jury and denied the state's peremptory challenge if the court found that Williams did not. Floyd, 569 So.2d at 1230. Thus, the Respondent failed to satisfy his burden of placing the court on notice that he contested the factual existance of the state's asserted reason. Floyd, 569 So.2d at 1230.

In the absence of such a challenge by Respondent, the trial court was clearly under no obligation to verify the existence of factual support for the Petitioner's facially race neutral reason for the strike. Floyd, 569 So.2d at 1230. Accordingly, pursuant to Floyd, because Respondent failed to object to the prosecutor's reason for the strike, the Neil issue was not properly preserved for review. Floyd, 569 So.2d at 1230. Thus, the Fourth District decision reversing the trial court on the Neil/Slappy issue was improper since Respondent waived this issue below. The State urges

this Honorable Court to accept discretionary jurisdiction to review the opinion filed by the District Court of Appeal in the case at bar.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests that this Honorable Court **ACCEPT** discretionary jurisdiction in the instant case.

Respectfully Submitted,

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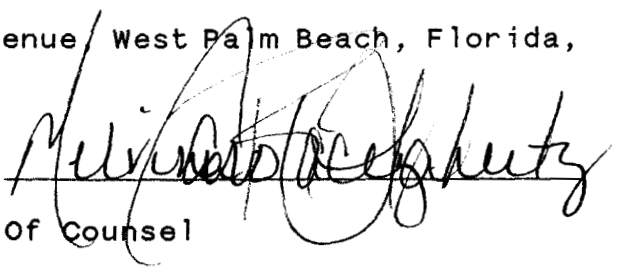
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by Courier to: JEFFREY L. ANDERSON, Counsel for Defendant, Fifteenth Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 21st day of March, 1991.



Of Counsel

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APPENDIX TO

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