IN THE SUPREME COURT OF FLORIDA

EDDIE JOINER,
a/k/a JOHN BLUE,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 79,567

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0473944
112-A Orange Avenue
Daytona Beach, FL 32114
Phone: 904-252-3367

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner Eddie Joiner, a/k/a John Blue, appealed to the District Court of Appeal, Fifth District, following his conviction of possession of cocaine and resisting arrest without violence. On appeal, he raised an issue concerning the trial court's error in accepting the State's alleged race neutral reason for challenging black jurors, after his trial counsel argued that the State's exclusion of certain black jurors was racially motivated. The district court in its opinion affirmed the conviction, finding that the error was not preserved for review on appeal because Petitioner's counsel did not move to strike the panel, continue the trial, or declare a mistrial. Joiner v. State, 17 F.L.W. 308 (Fla. 5th DCA Jan. 24, 1992) (Appendix A).

During the voir dire proceedings of Mr Joiner's trial, defense counsel made a timely objection to the State's striking of two black jurors (R298-299). Defense counsel noted that no one had even directed a question to the second black juror that the State struck peremptorily. The court requested that the State respond to this objection (R299). The State provided an arguably race-neutral reason for striking the first black juror. As to the second black juror struck, however, the prosecutor stated that the challenge was made because there were other preferable jurors down the line (R300). Defense counsel objected, arguing that it is error for the court to allow even one juror to be excluded because of racially motivated reasons. The prosecutor responded again with, "I'm saying the State may

prefer to have someone else" (R300-301). Defense counsel objected further, arguing that this was not a non racial reason for striking the juror (R301-302). The trial court found the reason the prosecutor offered to be valid, and the challenge to be racially neutral (R301-302).

Before the jury was sworn, defense counsel asked the trial court to inquire if Mr. Joiner was satisfied with the jury selected (R304). The trial judge responded, "He said he was. I didn't even have to inquire" (R304).

On appeal, Mr. Joiner argued that the trial court reversibly erred in finding that the reason offered by the prosecutor was sufficient to satisfy the State's burden to rebut the inference of racial discrimination. Specifically, under Kibler v. State, 546 So. 2d 710 (Fla. 1989), this Court found that the reason provided by the prosecutor to justify the exclusion of black jurors was not sufficient to carry the burden of showing that the challenges were not racially motivated. The prosecutor in Kibler, as in Mr. Joiner's case, stated that the black jurors were challenged in order to allow for the inclusion of other jurors on the panel. Mr. Joiner argued that the reason given should have been deemed a pretext for racially motivated strikes, relying on the language in State v. Slappy, 522 So. 2d 18, 23 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988).

In further support Mr. Joiner cited the following cases. Williams v. State, 574 So. 2d 136 (Fla. 1991) (where doubt exists as to the exclusion of any person on the venire because of race, the trial court must require the state to explain each of the

challenges) (emphasis in original); Bryant v. State, 565 So. 2d 1298 (Fla. 1990); State v. Neil, 457 So. 2d 481 (Fla. 1984); Smith v. State, 574 So. 2d 1195, 1196 (Fla. 3d DCA 1991) ("... the exercise of a single racially-motivated strike is constitutionally forbidden").

The district court did not reach the merits of this argument, but rather found that Mr. Joiner failed to preserve his objection to the composition of the jury panel. The opinion stated, "We believe that a party must do more than request a Neil inquiry and voice disagreement with an opponent's explanation.... The initiation of a Neil inquiry and a dissatisfaction with the opponent's answer does not necessarily mean that the one who initiates the inquiry wishes to terminate a trial or request that the jury panel be stricken" Joiner, supra. The district court also noted that the problem with the jury selection was not mentioned during Mr. Joiner's motion for a judgment of acquittal. Joiner, supra.

Mr. Joiner filed a timely motion for rehearing, rehearing en banc, and for certification of conflict (Appendix B). On February 26, 1992, the district court denied the motion for rehearing (Appendix C). A notice to seek discretionary review was timely filed. This petition follows.

SUMMARY OF THE ARGUMENT

The opinion of the District Court of Appeal, Fifth District, in the instant case conflicts with cases of this Court and other district courts, wherein a different result was reached on essentially the same facts, so as to cause confusion among precedents.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE THIRD AND FOURTH DISTRICT COURTS OF APPEAL.

The Florida Supreme Court and other District Courts of Appeal have never required that the moving party move to replace the entire venire in order to preserve review of a Neil issue. The opinion of the District Court stated that, "The inquiry can be initiated to forewarn an opponent that caution should be exercised in exercising peremptory challenges without racially neutral reasons. Also, the party initiating the inquiry may ultimately decide that the panel finally selected is acceptable." Joiner v. State, 17 F.L.W. 308 (Fla. 5th DCA January 24, 1992). The opinion embraces the view that racially motivated strikes may be permissible as long as there is no objection to the final panel which is ultimately selected. This Court, however, established the procedure under State v. Neil, 457 So.2d 481 (Fla. 1984), in order to protect from constitutionally impermissible prejudice. The fact that the parties ultimately agreed on the panel does not remove the taint of racially motivated challenges. The precedent in this area has also established that the issue is preserved for appeal when a defendant timely objects, demonstrates that the challenged jurors are black, and establishes the likelihood that the peremptory challenges resulted from impermissible bias.

The proper procedure in order to preserve Neil issue for review, was referred to in State v. Castillo, 486 So.2d 565 (Fla.

1986). This Court in Castillo found that the procedure was outlined in Neil, supra. The procedure is as follows:

> A party concerned about the other sides' use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood no inquiry may be made of the person exercising the questioned peremptory. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the respective jurors' race. . . . If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged person other than race, then the inquiry should end and jury selections should continue. On the other hand if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Neil, 457 So.2d at 486-487.

There is no requirement that the complaining party moved to dismiss the panel, or moved for mistrial.

In the instant case, the defense counsel followed the procedure outlined above. There was an objection to the State's challenges as being racially motivated, and defense counsel noted that the second black juror who was challenged was not questioned by either party. The court then required the prosecutor to provide a reason for these challenges. The State then provided its alleged race neutral reason. The trial court determined that

the inquiry was based on a reason other than the prospective juror's race. At this point, according to Neil, supra, the inquiries should end and jury selection should continue. The trial court was only required to dismiss the jury pool if it was determined that the challenge had been based on the juror's race.

In Bryant v. State, 565 So.2d 1298, 1300 (Fla. 1990), "we find that this record demonstrates that the appellants satisfied their burden. They timely objected, demonstrated that the challenged jurors were black, and established a likelihood that the peremptory challenges resulted from impermissible bias, specifically, that the State exercised five of its first seven peremptory excusals against black persons." This was the same procedure used to preserve the objection in the instant case. Thus, according to Bryant, the issue was properly preserved for appeal. Furthermore, in the recent case of Jefferson v. State of Florida, 17 F.L.W. 139 (Fla. February 27, 1992), this Court found that striking the entire panel is not the exclusive remedy to be used for discriminatory peremptory challenges. "The rationale behind striking the entire jury pool is to provide the complaining party with a proper venue and not one that has been partially or totally stripped of the potential jurors through the use of discriminatory peremptory challenges." Jefferson, 17 F.L.W. at 140. This Court authorized the remedy chosen by the trial judge in Jefferson, which was to seat the impermissibly challenged juror. This decision conflicts, albeit indirectly, with the District Court's decision in the instant case. The District Court held that the moving party must move to strike the

entire jury or move for a mistrial. According to Jefferson, this action is not required of defense counsel.

The decision in the instant case conflicts with Kibler v. State, 546 So.2d 710 (Fla. 1989), in that the explanation offered by the prosecutor, namely that he wished to make room for other potential jurors to be added to the panel, was held to be insufficient to rebut the defendant's prima facia showing of discrimination. In Kibler, the trial judge refused to dismiss the jury on the ground that the prosecutor used racially motivated strikes. The opinion nowhere provides that this motion to dismiss the panel was required to bring the issue up on appeal.

The opinion in the case at bar is also in conflict with the Fourth District Court of Appeal's decision in Charles v. State, 565 So.2d 871 (Fla. 4th DCA 1990). In Charles, the court rejected the State's argument that the Neil issue was waived due to the defendant's response that he was satisfied with the jury panel. Despite the defendant's acceptance of the jury, the court dealt with ruling on the merits of the Neil issue.

The ruling in the instant opinion is also in conflict with the Third District Court of Appeal's decision in Adams v. State, 559 So.2d 1293 (Fla. 3d DCA 1990). In Adams, the District Court held specifically that the defendant had made a timely objection and preserved the Neil issue for appellate review. Again, the actions taken by the defense counsel in Adams were identical to those taken by Mr. Joiner's counsel in the case at bar. The trial counsel: First, pointed out the juror struck by the State

was black, secondly, pointed out that Adams was black, and lastly asserted that the State could not furnish a reasonable explanation for challenging the black juror. The trial judge's response showed that he had been apprised of the defendant's objection and felt that no error had occurred at this point in the proceedings. The issue was properly preserved for review. As noted in Mr. Joiner's motion for rehearing, a lawyer is not required to pursue a completely useless course when it would be fruitless. Thomas v. State, 419 So.2d 634 (Fla. 1982); Brown v. State, 206 So.2d 377, 384 (Fla. 1968). Requiring that defense counsel move to strike the jury panel or move for mistrial as suggested in the instant opinion, would be essentially mandating an attorney to complete a useless act.

The decisions from this Court and from the District Courts of Appeal have never required that the complaining party move to dismiss the panel or move for mistrial in order to preserve a Neil issue for review on appeal. This Court should exercise its discretionary jurisdiction, and vacate the decision of the Fifth District Court of Appeal.

CONCLUSION

BASED ON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court accept jurisdiction of this cause and reverse the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0473944
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/ 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Eddie Joiner, Inmate No. C-886992, Polk Corr. Inst. - Work Camp, 3876 Evans Rd., Box 50, Polk City, Florida 33868-9213, on this 1st day of April, 1992.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

EDDIE JOINER, a/k/a JOHN BLUE, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	S.Ct. CASE NO.

A P P E N D I X

Case No. 91-782. Opinion filed January 24, 1992. Appeal from the Circuit Court for Orange County, Charles N. Prather, Judge. James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) L.S., a twelve-year-old, pled no contest to grand theft auto. A restitution hearing was held at which a different judge presided. The state proceeded with its case in the absence of any witness to prove its case. The state's presentation to the court included a letter from the president of the victim corporation, a repair bill, and hearsay by the prosecutor regarding statements made by the victim's president at the previous plea hearing.

Defense counsel objected to the repair bill as inadmissible hearsay, as well as the prosecutor's oral statement of the evidence previously submitted at the sentencing hearing. The court then announced that it would rule based upon what was previously furnished at the plea hearing and awarded $1,000 to the victim and $1,791.86 to the victim's insurance company. Defense counsel further questioned whether it was proper to award restitution to an insurance company but stated there was no objection to the $1,000 awarded to the victim.

Aside from the problem that incorrect information[1] was supplied by the state to the judge at the restitution hearing, a successor judge may not enter an order or judgment based upon evidence heard by the predecessor. *Beattie v. Beattie,* 536 So. 2d 1078 (Fla. 4th DCA 1988).

Section 775.089, Florida Statutes, 1989, is the general statute that requires restitution to victims. Its provisions are mandatory and places the onus upon the court to order the defendant to repay the victim for crimes. § 775.089(1)(a). If a court does not order restitution, section 775.089(1)(b) requires a court to state on the record in detail the reasons for noncompliance with the statute. A recent news article quoted the auditor general's report that some Florida judges are not complying with the legislature's directive. Florida Bar News, Vol. 18, No. 24, p. 15, Dec. 15, 1991. However, the onus of the legislative mandate is shared by the state since it has the burden of demonstrating the amount of the loss sustained by the victim as a result of an offense. § 775.089(7). The most that the court can do is to schedule time for a hearing and rule impartially on the evidence presented. In the instant case, while the trial court may have erred in entering both restitution orders on the evidence presented, it was correctly executing the legislative mandate to enter orders of restitution. The state failed to carry out its responsibility either to have the witnesses present to testify or to seek a continuance to a time when the witnesses could be present. While the argument that the insurance company is not entitled to restitution is meritless, the failure to present admissible evidence requires that the order requiring restitution of $1,791.86 for the benefit of United States Fire Insurance Company be quashed. The thought that a perpetrator should escape paying for his act simply because he chose a victim with insurance is without logic. An insurance company is subrogated to the rights of a victim. *Amison v. State,* 504 So. 2d 473 (Fla. 2d DCA 1987); *see M.E.I. v. State,* 525 So. 2d 467 (Fla. 1st DCA 1988); *Jarawdi v. State,* 521 So. 2d 261 (Fla. 2d DCA 1988).

We affirm the restitution order of $1,000 for the benefit of Sunskins, Inc., since defense counsel stated to the court that he did not have a problem with the $1,000 restitution to the corporate victim, but we quash the order of restitution of $1,791.86 to the insurance company to which the defense objected.

AFFIRMED in part. (GOSHORN, C.J., and DIAMANTIS, J., concur.)

[1]A comparison of the transcript of the sentencing hearing and the restatement of that evidence by the state at the restitution hearing easily reveals the inconsistencies. For example, the president of the victim testified at the sentencing hearing that he did not have the final bill but that damages were around $1,581 for mechanical repairs and $600 to $800 for body repairs. The state represented that:

> Mr. Davidson, the representative of [the victim], was present on the 27th, had provided both the State and the Court with copies of the repair bill to his vehicle, and went over the damage at that time.
>
> . . . He essentially described the condition of the vehicle prior to its being stolen, and the damage that occurred and the repair bills. He went through each individual item, and I believe, he indicated what damage was actually done to the vehicle. The repair bill is a fairly detailed one. It was a total of $2,741.86.

* * *

Criminal law—Sentencing—Seven-year sentence does not exceed statutory maximum for third degree felony, as enhanced under habitual offender statute

JOHN ALLEN DASHER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-759. Opinion filed January 24, 1992. Appeal from the Circuit Court for Brevard County, Clarence T. Johnson, Jr., Judge. James B. Gibson, Public Defender, and Paolo G. Annino, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellee.

(DAUKSCH, J.) Defendant appeals judgments and sentences rendered in two lower court cases, but the only issue on appeal concerns a seven-year sentence imposed for a third degree felony. Defendant claims that this sentence exceeds the statutory maximum incarceration of five years. *See* § 775.082(3)(d), Fla. Stat. (1991).

It appears from the record that defendant was sentenced as a habitual felony offender for the third degree felony, a burglary offense. The statutory maximum penalty for a third degree felony is enhanced under the habitual offender statute to ten years incarceration. *See* 775.084(4)(a)3, Fla. Stat. (1991). The lower court adjudicated defendant a habitual felony offender for the burglary offense at sentencing, and the original written sentence reflected that action. The court subsequently entered an amended judgment and sentence and left the habitual offender box blank. However, this omission appears to be inadvertent, as nothing in the record indicates that the court intended to vacate the habitual offender adjudication. We therefore correct this oversight by noting the habitual offender designation with regard to the burglary sentence, and affirm the appealed judgments and sentences.

AFFIRMED. (SHARP, W., and PETERSON, JJ., concur.)

* * *

Criminal law—Jurors—Peremptory challenge—Racial discrimination—Race-neutral explanation—Defendant failed to preserve for appeal his objection to composition of jury panel where defendant's request for inquiry into state's challenge of prospective black juror and his language expressing disagreement with trial court's finding that explanation was race-neutral did not rise to level of a request to strike jury panel, continue trial or declare mistrial—Defendant cannot accept jury panel and wait until receipt of adverse judgement before asserting objection—Trial court should not assume that party wishes to have jury panel stricken simply because *Neil* inquiry is requested

EDDIE JOINER a/k/a JOHN BLUE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-99. Opinion filed January 24, 1992. Appeal from the Circuit Court for Orange County, Charles N. Prather, Judge. James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David G. Mersch, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Eddie Joiner appeals his convictions for possession of a controlled substance and resisting arrest without violence. He contends that the state gave an inadequate reason for a peremptory challenge of a prospective black juror—Joiner is also black. We affirm.

The record reflects that defense counsel first excused a black person from the jury panel. The state then excused jurors number three and four, a white and a black person respectively. This was followed by the excusal of a white person by the defense. Finally, juror number eleven, a black person, was excused by the state. Immediately following the excusal of juror number eleven, the

defense called to the attention of the substitute judge who presided over voir dire that two of the state's strikes were of black persons and asked the court to inquire as to the reason.

Such an inquiry is appropriate under *State v. Neil*, 457 So. 2d 481 (Fla. 1984), which requires a party concerned about the opponent's use of peremptory challenges to demonstrate that there is a strong likelihood that jurors have been challenged solely because of their race. *Id.* at 486. If the party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. *Id.* If the court finds no such likelihood, no inquiry may be made of the person exercising the peremptories. *Id.* On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. *Id.* at 486-487. A judge cannot accept the reasons proffered at face value but must evaluate those reasons as he or she would weigh any disputed fact. *State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed. 2d 909 (1988).

In the instant case, after juror number eleven was excused by the state, defense counsel stated:

> Before we go [on] I want to call it to the court's attention at least two of the strikes the state has made are black. . . .
>
> The jurors are black in this case, and that there's at least here the suggestion these jurors are being struck on a racial basis. . . .

The trial judge complied with defense counsel's request and asked the state to explain its reasons for excusing the two black jurors. Joiner concedes that the reason given for the excusal of juror number four was valid but contends that the prosecutor failed to give a race neutral reason for excusing juror number eleven and that Joiner is entitled to a new trial.

The reason offered by the prosecutor for striking number eleven was, "I would like to constitute the jury with some people down the line I prefer more, and including another juror. I think they're more preferable to the state's case than [juror eleven] is." The trial judge ruled that the strike was racially neutral. The defense disagreed with the trial judge that the state's reason was valid. The voir dire continued, the jury was accepted by both parties, and Joiner was found guilty.

We hold that Joiner failed to preserve his objection to the composition of the jury panel. Neither the language used by the defense in calling the court's attention to the possibility of racially motivated strikes nor his language expressing disagreement with the trial court's ruling rise to the level of a request that the trial judge obtain a different jury panel, continue the trial, or declare a mistrial. We believe that it takes stronger language to indicate to the trial court that a defendant does not wish to subject his case to that jury panel. It is not sufficient to accept the jury panel and then wait until receipt of an adverse judgment before asserting an objection.

In *State v. Slappy*, it was held that the trial court erred in denying a motion to strike the jury panel after the trial court accepted the state's inadequate explanation of multiple peremptory challenges of black jurors. In *Kibler v. State*, 546 So. 2d 710 (Fla. 1989), the issue on appeal was the trial judge's refusal to dismiss the jury on the ground that the prosecutor used peremptory challenges to strike all three black persons called for services on the prospective jury panel. In *Reed v. State*, 560 So. 2d 203 (Fla. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990), the action of the trial court assigned as error was the denial of a motion for mistrial following a *Neil* inquiry. The opinions in *Neil*, *Williams v. State*, 574 So. 2d 136 (Fla. 1991), *Thompson v. State*, 548 So. 2d 198 (Fla. 1989), and *Johans v. State*, 587 So. 2d 1363 (Fla. 5th DCA 1991), do not discuss how the objections were preserved, perhaps because the issue was not raised.

We believe that a party must do more than request a *Neil* inquiry and voice disagreement with an opponent's explanation. If a party is dissatisfied with a jury panel after hearing an explanation elicited through a *Neil* inquiry, some remedy should be requested of the trial court. For example, the defense in the instant case should have moved to strike the jury panel at some time during the jury selection process, but before the jury was sworn, at the latest. *See State v. Castillo*, 486 So. 2d 565 (Fla. 1986). The defense did not do this; on the contrary, at the end of the jury selection, the defense stated that the jury was acceptable. Further, no mention of the jury selection was made in the motions for acquittal during the trial, and it was only after receiving the adverse verdict and judgment that the issue was again raised in a motion for acquittal or new trial.

The initiation of a *Neil* inquiry and a dissatisfaction with the opponent's answer does not necessarily mean that the one who initiates the inquiry wishes to terminate a trial or request that the jury panel be stricken. The inquiry can be initiated to forewarn an opponent that caution should be exercised in exercising peremptory challenges without racially neutral reasons. Also, the party initiating the inquiry may ultimately decide that the panel finally selected is acceptable. The trial court should not assume that a party wishes to have a panel stricken simply because a *Neil* inquiry is requested. An affirmative action of a trial court must be clearly requested by a party before inaction can be assigned as error.

Accordingly, we affirm the judgment of conviction.

AFFIRMED. (GOSHORN, C.J., and DIAMANTIS, J., concur.)

* * *

Mortgages—Lender is entitled to interest on delinquent installment payments where mortgage note fails to specify otherwise—Contention that there was no delinquency because payments were made within thirty days of their respective due dates without merit where mortgage note provides that untimely payment of any installments constitutes default, although lender's right to accelerate is forestalled for thirty days—Remand for evidentiary hearing to determine interest rate

GENVEST GENERAL INVESTMENTS, et al., Appellants, v. LAKE NONA CORPORATION, Appellee. 5th District. Case No. 90-2424. Opinion filed January 24, 1992. Appeal from the Circuit Court for Orange County, B. C. Muszynski, Judge. A. Kurt Ardaman of Fishback, Dominick, Bennett Stepter & Ardaman, Orlando, for Appellants. Stephen C. Sawicki of Hendry, Stoner, Townsend & Sawicki, P.A., Orlando, for Appellee.

(UNGARO, U., Associate Judge.) Appellee Lake Nona Corporation ("Lake Nona") sued appellant Genvest Investments ("Genvest"), pursuant to Chapter 86, Florida Statutes, for a judicial declaration that it had paid all sums due under a certain mortgage note entitling it to cancellation of the mortgage note and a satisfaction of the underlying mortgage. Genvest responded that the mortgage note had not been paid in full because Lake Nona owed interest on delinquent installment payments. The trial court, on cross-motions for summary judgment, found that the mortgage note was non-interest bearing with respect to the late-paid installments and entered final sumary judgment for Lake Nona. We reverse and remand with directions.

The subject mortgage note in the stated principal amount of $20,371,076 was made on May 27, 1983, payable in three installments on each succeeding anniversary date as follows:

	Total Payment	Principal	Interest
First Annual	$ 8,894,012.00	$ 8,894,012.00	$ -0-
Second Annual	7,932,497.00	7,932,497.00	-0-
Third Annual	6,971,002.00	3,544,567.00	3,426,435.00
Total	$23,797,551.00[1]	$20,371,076.00	$3,426,435.00

Lake Nona did not pay the first annual installment in full until June 28, 1984,[2] and it did not pay the second annual installment until June 11, 1985.

The mortgage note provides that in the event of a default "in the payment of any of the principal sums or interest mentioned herein . . . . within 30 days next after the same shall become

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

EDDIE JOINER a/k/a/ JOHN BLUE, Appellant,	)	
v.	)	DCA CASE NO. 91-99
STATE OF FLORIDA, Appellee.	)	

MOTION FOR REHEARING AND REHEARING EN BANC AND/OR CERTIFICATION OF CONFLICT

Appellant, by and through the undersigned counsel, hereby requests that this Honorable Court grant rehearing and rehearing en banc, pursuant to Florida Rule of Appellate Procedure 9.330 and 9.331, in this cause. As grounds, Appellant states:

1. In an opinion dated January 24, 1992, this Court affirmed Appellant's conviction. The affirmance was based on a ruling that regardless of Appellant's request for a Neil inquiry, and Appellant's objection to the State's ensuing allegedly race-neutral explanation for striking a black juror, the issue was not preserved because Appellant did not move to strike the entire panel, or move for a mistrial, once the trial judge ruled that the State's explanation was sufficient.

2. The Florida Supreme Court has never required that the moving party move to replace the entire venire in order to preserve review of a Neil issue. The Florida Supreme Court in State v. Castillo, 486 So. 2d 565 (Fla. 1986), found that the objection to the improper use of peremptories must be raised

prior to the jury being sworn. The opinion stated, "In Neil we outlined the procedure required to preserve this issue." Castillo, 486 So. 2d at 565.

3. The procedure to be followed to preserve this issue, as provided in State v. Neil, 457 So. 2d 481 (Fla. 1984), is as follows:

> A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race ... If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, **then the inquiry should end and jury selection should continue.** On the other hand, **if** the party has actually been challenging prospective jurors solely on the basis of race, **then** the court should dismiss that jury pool and start voir dire over with a new pool [footnotes omitted] [emphasis added].

Neil, 457 So. 2d at 486-487. In order to preserve the issue on appeal, there is no requirement that the complaining party move to dismiss the panel. In fact, once the trial judge decides that the reason given for the questioned challenge is sufficient, as the judge ruled in the instant case, jury selection is to

continue as provided above.

3. The instant opinion provides, "In State v. Slappy, it was held that the trial court erred in denying a motion to strike the jury panel after the trial court accepted the state's inadequate explanation of multiple peremptory challenges of black jurors." The Florida Supreme Court in State v. Slappy, 522 So. 2d 18 (Fla. 1988), did not expressly hold that the trial court's error was in denying the motion to strike the panel, but rather ruled that the Third District Court of Appeal was correct in determining that the state's facially neutral explanations were not supported by the record. The language in Slappy, Id., in no way suggests that the motion to strike the panel was essential in bringing this issue up on appeal.

4. Appellant's attorney properly requested a Neil inquiry, and also objected to the inadequacy of the explanation for the improperly motivated challenge provided by the prosecutor. The trial court, however, was not persuaded by the defense counsel's argument and overruled the objection. The trial court ruled that "preferring the next juror down the line" was a valid, race-neutral reason (R298-301). The objection was preserved on the record, overruled, and not open to further argument. A lawyer is not required to pursue a completely useless course when it would be fruitless. Thomas v. State, 419 So. 2d 634 (Fla. 1982); Brown v. State, 206 So. 2d 377, 384 (Fla. 1968).

5. Appellant's objection to the prosecutor's explanation for the questionable challenges placed the trial court on notice, and properly preserved the issue for review. See State v. Fox,

16 F.L.W. 664 (Fla. Oct. 10, 1991); Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

6. In Wright v. State, 17 F.L.W. 16 (Fla. 3d DCA Dec. 17, 1991), the Third District Court of Appeal reversed and remanded the case for a new trial because the trial judge, in finding the state's allegedly race-neutral reasons insufficient, remedied the situation by involuntarily seating the challenged juror. The court, however, certified a question concerning what a trial judge's remedial options are after finding discriminatory challenges have been used. The opinion argued logically against the propriety of dismissing the entire panel as a remedy for discriminatory practices:

> Why reward the party who has made an impermissibly motivated strike, by ordering exactly what that party seeks - elimination of the juror he considers undesirable? Today, I observe that in some instances, dismissal of the entire venire, the juror to whom an impermissibly motivated challenge has been made and impartial panel members already selected, facilitates the perpetration of racial discrimination rather than thwarts it. First, the juror at whom the impermissible strike was aimed is eliminated. Second, the start anew permits an advocate to make a deliberate detectable impermissible strike to achieve the end result of a new panel where the advocate is dissatisfied with the racial composition of the panel and his client's interests.

Wright, 17 F.L.W. at 17.

6. The alleged race-neutral reason offered by the prosecutor in the instant case was that he preferred other jurors down the line. The Florida Supreme Court has specifically held that this explanation is insufficient to rebut a prima facie showing of discrimination. Kibler v. State, 546 So. 2d 710 (Fla.

1989) (under Neil, the prosecutor is required to give nonracial reasons for challenging black jurors instead of white, in an attempt to make room for other jurors sought to be a part of the panel).

7. The opinion in the case at bar is in conflict with the Fourth District Court of Appeal's decision in Charles v. State, 565 So. 2d 871 (Fla. 4th DCA 1990), where the court found that the Neil inquiry issue brought up on appeal (namely, the trial court's error in permitting the state to challenge black prospective jurors) was **not** waived due to the defendant's acceptance of the jury.

8. The instant opinion is also in conflict with the Third District Court of Appeal's opinion in Adams v. State, 559 So. 2d 1293 (Fla. 3d DCA 1990). In Adams, the district court held that:

> [D]efense counsel: (1) pointed out that the juror struck by the state is black, (2) pointed out that Adams is black, and (3) asserted that the state could not furnish a reasonable explanation for challenging the black juror. The trial judge's response indicated that he had been apprised of the putative error, but felt that no error had occurred at that point in the proceedings. Accordingly, a timely objection was made and the issue is preserved for appellate review.

Adams, 559 So. 2d at 1295.

9. I express belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

10. If this Court disagrees with the holdings in Charles v. State, supra, and Adams v. State, supra, Appellant alternatively moves to certify conflict so that further review is possible.

WHEREFORE, Appellant requests that this Honorable Court grant rehearing and rehearing en banc, or alternatively certify conflict in this cause.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

KENNETH WITTS
Assistant Public Defender
Florida Bar No. 0473944
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to John Blue, a/k/a Eddie Joiner, Inmate No. C-886992, Polk Correctional Institute - Work Camp, 3876 Evans Road, Box 50, Polk City, Florida 33868-9213, on this 4th day of February, 1992.

Kenneth Witts

KENNETH WITTS
Assistant Public Defender

91-165
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

EDDIE JOINER a/k/a
JOHN BLUE,
Appellant,

v. Case No. 91-99

STATE OF FLORIDA,
Appellee.

DATE: February 26, 1992

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING AND REHEARING EN BANC AND/OR CERTIFICATION OF CONFLICT, filed February 4, 1992, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Office of the Public Defender, 7th JC
Office of the Attorney General, Daytona Beach
Eddie Joiner