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w/app

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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EDDIE JOINER, a/k/a
JOHN BLUE,

Petitioner,

v.

CASE NO. 79,567
5DCA NO. 91-99

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal's ruling in *Joiner v. State*, 17 F.L.W. D308 (Fla. 5th DCA January 24, 1992), that a defendant who fails to move to strike the jury panel fails to preserve (i.e., waives) his objection to the composition of the jury, is not in direct conflict with this Court's opinion in *State v. Neil*, 457 So.2d 481 (Fla. 1984) or any of its progeny. This Court has already held that a defendant who fails to factually challenge the State's given reasons for the use of its peremptory challenges waives his *Neil* objection, notwithstanding that such a requirement is not stated in *Neil*.

The opinion sub judice is not in direct conflict with *Charles v. State*, 565 So.2d 871 (Fla. 4th DCA 1990); or *Adams v. State*, 559 So.2d 1293 (Fla. 3rd DCA 1990). Moreover, the Third District Court of Appeal has now adopted the Fifth District's ruling in *Joiner*. *See, Moorehead v. State*, 17 F.L.W. D796 (Fla. 3rd DCA March 24, 1992).

The Petitioner has failed to show that the Fifth District's opinion in *Joiner* expressly and directly conflicts with a decision of another district court of appeal, or of this Court on the same question of law, as required by Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

POINT ON APPEAL

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THE CASE SUB JUDICE IS IN DIRECT CONFLICT WITH *STATE V. NEIL*, 457 SO.2D 481 (FLA. 1984); *KIBLER V. STATE*, 546 SO.2D 710 (FLA. 1989); *BRYANT V. STATE*, 565 SO.2D 1298 (FLA. 1990); *JEFFERSON V. STATE*, 17 F.L.W. S139 (FLA. FEBRUARY 27, 1992); *ADAMS V. STATE*, 559 SO.2D 1293 (FLA. 3RD DCA 1990); AND *CHARLES V. STATE*, 565 SO.2D 871 (FLA. 4TH DCA 1990).

In *Eddie Joiner a/k/a John Blue v. State*, 17 F.L.W. D308 (Fla. 5th DCA January 24, 1992), the Fifth District Court of Appeal held,

> 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.

Joiner, at D309.

The Petitioner contends, "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." (Petitioner's Jurisdictional Brief, hereinafter abbreviated as P.J.B., at page 5). This contention is entirely unsupported by the District Court's opinion.

In *State v. Neil*, 457 So.2d 481 (Fla. 1984), and as adopted in *State v. Slappy*, 422 So.2d 18 (Fla. 1988) (and all of their progeny), this Court established a defendant's burden in raising a claim of racial bias as follows,

> Instead of *Swain* [*Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)], trial courts should apply the following test. The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. 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 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 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. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. 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 the jury pool and start voir dire over with a new pool.

Neil, at 486-487. [Footnotes Omitted].

The Petitioner cites *Neil, supra,* and *Bryant v. State*, 565 So.2d 1298 (Fla. 1990), in support of his contention that there is no requirement that a defendant move to strike the jury panel in order to preserve his allegation that the State had used its peremptory challenges in a racially biased manner. (P.J.B., at pages 5-7). First of all, the same argument could be used to claim that a defendant had fully preserved his objection to the State's allegedly racially biased use of its peremptory challenges notwithstanding the fact that he had failed to factually challenge the State's given reasons for the use of its preemptory challenges. The law is clear that a defendant must factually challenge the reasons given by the State for the use of its peremptory challenges, in order to <u>fully</u> preserve (and not <u>waive</u>) his objection to the State's allegedly racially biased use of those challenges, nothwithstanding that neither *Neil*, nor *Slappy* (nor *Bryant*) explicitly state such a requirement. *See, State v. Fox*, 587 So.2d 464 (Fla. 1991); *Floyd v. State*, 569 So.2d 1225 (Fla. 1990), *cert. denied,* ____ U.S. ____, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991).

Secondly, the requirement that the defendant move to strike the entire jury panel in order to fully preserve his argument that the jury was unconstitutionally tainted, and that he is entitled to a <u>new</u> jury and a new trial, is noted in *Neil, supra*. No matter how many times the State rereads that portion of the *Neil* opinion that sets forth the defendant's burden for preserving his objection, the State invariably runs into footnote 9, in which the *Neil* court cites to *Castor v. State*, 365 So.2d 701, 703

(Fla. 1978). *Neil* at 486. In *Castor, supra*, the Supreme Court said,

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor, at 703. [Emphasis added]. If the appellant wishes to contend that his jury has been unconstitutionally tainted as a result of the State's allegedly racially biased use of its peremptory challenges, and that he is entitled to a new jury and a new trial as a result thereof, he must move to strike the tainted jury in order to fully preserve his objection, and in order to give the trial court judge the opportunity to cure the alleged error.

The Petitioner contends that he properly preserved his objection because, "Requiring that defense counsel move to strike the jury panel or move for a mistrial as suggested in the instant opinion, would be essentially mandating an attorney to complete a useless act." (P.J.B., at page 9). First of all, the same argument could be made as to rulings on pretrial motions and motions for judgment of acquittal, yet that clearly is not the law. Secondly, it may readily be said that both parties accept juries composed of less than that party's most preferable jurors. What may have been an objectionable jury panel, at that time, may ultimately have been composed of jurors with whom the defendant

was willing to try his case. If, as the Petitioner contended for the first time on appeal, the exclusion of a particular juror is so constitutionally infirm that he is entitled to a new jury and a new trial, the Petitioner should have contested the jury panel as a whole at the jury selection stage, and not on appeal after he has put the judicial system through the time and expense of affording him a trial. By accepting the jury panel, the appellant told the trial court judge that he was willing to try his case with the jury as it stood. *See*, Appendix A. The Petitioner's challenge to the jury panel for the first time on appeal constituted nothing more than an effort to evade an unfavorable jury verdict, and to obtain a second chance at acquittal.

The Petitioner contends that this Court's opinion in *Jefferson v. State*, 17 F.L.W. S139 (Fla. February 27, 1992), "indirectly" conflicts with the Fifth District's opinion in the instant case. (P.J.B., at pages 7-8). Since indirect conflict is not direct conflict, and since this Court's ruling in *Jefferson* (that a trial court judge may seat on the jury a prospective juror that the judge finds was excused due to racial bias) has absolutely nothing to do with the Fifth District's specific legal ruling in the instant case, there is no direct conflict between this Court's specific legal ruling in *Jefferson* and the Fifth District's specific legal ruling in *Joiner*.

The Petitioner contends that this Court's opinion in *Kibler v. State*, 546 So.2d 710 (Fla. 1989), is in conflict with the Fifth District's opinion in the instant case. The specific issue in

Kibler was whether the trial court judge erred in refusing to dismiss the jury on the ground that the prosecutor had used peremptory challenges to strike all three black persons called for service on the prospective jury. *Kibler*, at 710. The Petitioner contends, "The opinion nowhere provides that this motion to dismiss the panel was required to bring the issue up on appeal." (P.J.B., at page 8). Since the specific issue in *Kibler* was not whether he had to move to strike the jury panel, and since he did, in fact, move to strike the jury panel, there was no need for this Court to have addressed this specific issue. The failure to address a specific legal question in one opinion does not establish direct conflict with another opinion that does address the specific issue.

The Petitioner contends that the Fourth District's opinion in *Charles v. State*, 565 So.2d 871 (Fla. 4th DCA 1990), is in direct conflict with the Fifth District's opinion in the instant case. (P.J.B., at page 8). In *Charles*, the Court said,

> The contention that at the end of the voir dire all defendants agreed to the jury is also unavailing because the question posed by the court regarding acceptance by all was made before Mr. Nurik raised the question of the state's action being racially motivated.

Charles, at 872. [Emphasis added].

In the instant case, the appellant accepted the jury after the appellant objected to the State's use of its peremptory challenges. *See*, Appendix A. Therefore, there is no direct conflict between these two cases.

The Petitioner contends that the Third District's opinion in *Adams v. State*, 559 So.2d 1293 (Fla. 3rd DCA 1990), is in direct conflict with the Fifth District's opinion in the instant case. Again, the failure to address a specific issue does not establish direct conflict with an opinion that does address a specific issue. Moreover, in *Moorehead v. State*, 17 F.L.W. D796 (Fla. 3rd DCA March 24, 1992), the Third District resolved any speculative conflict, wherein the Third District adopted the Fifth District's position in *Joiner*. This later opinion removes any speculative conflict between these two district courts. *See, State v. Walker*, 17 F.L.W. S161 (Fla. March 5, 1992); *Little v. State*, 206 So.2d 9, 10 (Fla. 1968).

In light of the above analysis, it is the Respondent's position that the Petitioner has failed to show that the Fifth District's decision sub judice expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law, as required by Fla.R.App.P. 9.030(a)(2)(A)(iv), and that this Court should, therefore, decline to accept jurisdiction in the instant case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court to refuse to accept jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Jurisdiction with attached Appendices has been furnished by U.S. Mail to Kenneth Witts, Assistant Public Defender, and counsel for the Petitioner, at the Office of the Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 15th day of April, 1992.

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