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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DARRELL E. MITCHELL,)
)
 Petitioner,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

S. CT. CASE NO. 79,838

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

PAOLO G. ANNINO
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On November 26, 1990, the State filed an Information charging Petitioner, Mr. Mitchell, with Sale of Substance in Lieu of Controlled Substance, in violation of Sections 817.563 and 893.03, Florida Statutes (1989). (R185) The State alleged that the above sale occurred on November 6, 1990. (R108)

On May 22, and 23, 1991, a jury trial was held in the instant case. During jury selection, the defense counsel objected to the State's use of a peremptory challenge to excuse a black juror, Miss Booker. (R317) The trial court held a Neil inquiry. (R318) And the State gave the following reason for striking Miss Booker:

MR. GREEN: I don't know if he's raising an issue whether you should even inquire.

I asked her, and she said she was no member of any religious groups. She's single; 37. From her questionnaire, she likes to read. And I asked her what type of reading.

And she said -- I thought she said "horror reading." I must have mis-heard her. So based on that I would strike her.

I would point out that juror number one and number three are both black.

The defense objected to the State's alleged race-neutral reasons, and the trial court allowed the State to strike Miss Booker.

(R320)

At the end of jury selection, the trial court stated:

At this time we're going to seat six jurors and seventh will serve as an alternate in this case.

All right. The first one is Helen Sanders, Juror Number 430; Leslie Lewis, Juror Number 431; Lillian Paff, Juror Number 437; Marcia Berman, Juror Number 439; Lucia Cruz, Juror Number 446; Carol Patterson, Juror Number 449; and, Gerard White, Juror Number 450.

All right. What says the State? Is this jury acceptable to the State?

MR. GREEN: Yes, your Honor.

THE COURT: What say defense?

MR. JEWETT: Yes, your Honor, subject to the objection that we made.

THE COURT: I understand. That's fine.

(R324)

At the end of the trial, during jury deliberation, the trial court stated:

I also am going to note for the record, because we had an objection to the State striking of one of the original jurors, that in the jury that has retired to consider this case are two black jurors, Mr. Lewis and Miss Sanders, Jurors Numbers one and two.

(R156)

During trial, the defense did not raise the Neil issue in a motion for mistrial or motion to strike panel or motion for judgment of acquittal. (R105,112)

On May 30, 1991, the defense raised the Neil issue in his Motion for New Trial. (R223)

On May 30, 1991, the trial court adjudicated Mr. Mitchell guilty as charged. (R220) The trial court sentenced Mr. Mitchell to seven years in the Department of Corrections as an Habitual Offender. (R247)

Mr. Mitchell filed timely Notice of Appeal to the Fifth District Court of Appeal, and the trial court appointed the Office of the Public Defender to represent Mr. Mitchell on this appeal. (R250-251)

In his Initial Brief to the Fifth District Court of Appeal, Mr. Mitchell raised the following issue:

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXCLUDE A BLACK JUROR BY PEREMPTORY CHALLENGE WHERE THE RECORD WOULD NOT SUPPORT A FINDING THAT THE JUROR WAS EXCLUDED FOR REASONABLE, RACE NEUTRAL REASONS.

On April 10, 1992, the Fifth District Court of Appeal issued a per curium affirmed opinion citing Joiner v. State, 17 F.L.W. D308 (Fla. 5th DCA January 24, 1992).

On May 7, 1992, Petitioner filed Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF THE ARGUMENT

The law is well-established that where a District Court of Appeal affirms a case with a citation to another case which is currently pending review before the Florida Supreme Court, this court automatically has discretionary jurisdiction to review the case. See, Jollie v. State, 405 So.2d 418 (Fla. 1981).

ARGUMENT

THE FLORIDA SUPREME COURT HAS JURISDICTION
TO ACCEPT THE INSTANT CASE FOR REVIEW
WHERE THE DECISION WAS AFFIRMED ON THE
AUTHORITY OF A CASE WHICH IS CURRENTLY
PENDING REVIEW BEFORE THIS COURT.

In the instant case, the Fifth District Court of Appeal affirmed on the authority of Joiner v. State, 17 F.L.W. D308 (Fla. 5th DCA January 24, 1992). On March 23, 1992, the defense filed a timely Notice to Invoke Jurisdiction in the Joiner case. The case is currently pending before this Honorable Court in Joiner v. State, Supreme Court Case Number 79,567.

The law is well-established that where a District Court of Appeal affirms a case with a citation to another case which is currently pending review before the Florida Supreme Court, this court automatically has discretionary jurisdiction to review the case. See, Jollie v. State, 405 So.2d 418 (Fla. 1981).

In the instant case, the Fifth District Court of Appeal never addressed the merits of this appeal. Instead, the Fifth District cited Joiner, which stands for the proposition that a Neil issue is not preserved for appellate review if the defense only objects to the State striking an African American juror based on non-race neutral reasons. Under Joiner, the defense must also move for mistrial or to strike the panel. The Joiner decision is simply unsound. This Honorable Court has never required the defense to move for a mistrial or to move to strike the panel in order to preserve for appellate review a Neil issue. See, State v. Neil, 457 So.2d 481, 486-487 (Fla. 1989); State v.

Catillo, 486 So.2d 565 (Fla. 1986); Bryant v. State, 565 So.2d 1298, 1300 (Fla. 1990); Jefferson v. State, 17 F.L.W. 139, 140 (Fla. February 27, 1992).

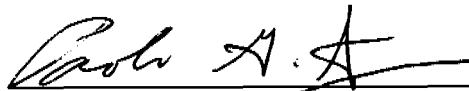
In conclusion, Petitioner respectfully requests this Honorable Court to accept jurisdiction in order to overturn the unsound decision in Joiner and in order for this Court to address the merits of this appeal.

CONCLUSION

BASED ON the argument contained herein, and authorities cited in support thereof, Petitioner requests that this Honorable Court accept jurisdiction.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER




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112 Orange Avenue, Suite A
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COUNSEL FOR PETITIONER

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 Darrell E. Mitchell, Inmate No. 092045, #I-78, Madison Corr. Inst., P.O. Box 692, Madison, Fla. 32340-0692, on this 18th day of May, 1992.



PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DARRELL E. MITCHELL,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

SUPREME COURT CASE NO.

A P P E N D I X

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

JANUARY TERM 1992

✓ 91-1643
ff
Extra

DARRELL MITCHELL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

CASE NO. 91-1643 ✓

RECEIVED

APR 10 1992

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Opinion filed April 10, 1992 ✓

Appeal from the Circuit Court
for Orange County,
Alice Blackwell White, Judge.

James B. Gibson, Public Defender,
and Paolo G. Annino, Assistant
Public Defender, Daytona Beach,
for Appellant.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Nancy Ryan, Assistant
Attorney General, Daytona Beach,
for Appellee.

PER CURIAM.

AFFIRMED. See Joiner v. State, 17 F.L.W. D308 (Fla. 5th DCA January
24, 1992).

SHARP, W., GRIFFIN and DIAMANTIS, JJ., concur.