067

IN THE SUPREME COURT OF FLORIDA

79,838

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

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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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, 593 So. 2d 554 (Fla. 5th DCA 1991) (Appendix A).

During the voir dire proceedings in 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 trial court requested that the State respond to this objection (R299). The State provided an arguably race-neutral reason for striking the first black juror.[1] 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, providing "We struck her

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[1] As to the first black juror struck, Mr. Sanders, the prosecutor explained "We struck Mr. Sanders because we felt someone who goes to the Rainbow Club [where offense occurred] and doesn't really know there's a drug problem is either very naive or not telling the truth" (R300).

[Mrs. Gamble] because I would like to constitute the jury with some people down the line I prefer more, and including another juror" (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 the reason the State provided clearly was not a non racial reason for striking the juror (R301-302). The trial court found that the justification the prosecutor offered was valid, and ruled 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 the objection to the State's improperly motivated challenges for appeal. 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. Id.

Mr. Joiner filed a timely motion for rehearing, rehearing en banc, and for certification of conflict. On February 26, 1992,

the district court denied the motion for rehearing. A notice to invoke this Honorable Court's jurisdiction was timely filed in the District Court on March 3, 1992. Jurisdiction was accepted by this Honorable Court on August 10, 1992.

SUMMARY OF THE ARGUMENTS

POINT I: The opinion of the District Court of Appeal, Fifth District, improperly establishes new requirements for obtaining review of a Neil inquiry. The district court ruled the issue was not preserved for review. The record, however, establishes that defense counsel timely objected to the prosecutor's systematic exclusion of black jurors, and to the reasons provided by the State. Contrary to the district court's ruling, there is no requirement that defense counsel move to strike the entire panel.

POINT II: The trial court erred in accepting the State's insufficient explanation of its peremptory challenge of the second black juror. Mr. Joiner's trial counsel timely and properly objected to the State's use of peremptory challenges on two black jurors. The burden then shifted to the State to rebut the inference of racial discrimination by a clear and reasonably specific racially neutral explanation. The State clearly failed to carry this burden, and the trial court's acceptance of the venire as challenged violated Mr. Joiner's right to an impartial jury, and constituted reversible error.

ARGUMENTS

POINT I

DEFENSE COUNSEL PROPERLY PRESERVED FOR REVIEW THE ISSUE OF WHETHER THE STATE EXCLUDED JURORS FROM THE PANEL BECAUSE OF THEIR RACE, WHERE DEFENSE COUNSEL OBJECTED TO THE PROSECUTOR'S CHALLENGES BASED ON STATE V. NEIL, 457 SO. 2D 481 (FLA. 1984), AND FURTHER OBJECTED TO THE EXPLANATION FOR THE PEREMPTORY CHALLENGES OFFERED BY THE STATE, ARGUING THAT THE REASONS PROVIDED WERE INSUFFICIENT.

The Fifth District Court of Appeal in Joiner v. State, 593 So. 2d 554 (Fla. 5th DCA 1992), established new requirements to be followed before review of a Neil inquiry may be obtained. The opinion additionally suggested that the only appropriate remedy where racially-motivated challenges may have been used by a party is to strike the entire jury panel, or declare a mistrial. Joiner, 593 So. 2d at 556; State v. Neil, 457 So. 2d 481 (Fla. 1984). Petitioner urges this Honorable Court to vacate the district court's decision in Joiner, based on the following.

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 procedure fashioned by the district court in the instant case directly contradicts decisions of this Court and other district courts. This Court established the procedure for an inquiry under State v. Neil, 457 So.2d 481 (Fla. 1984), in order to protect a defendant from constitutionally impermissible prejudice. The fact that the parties ultimately agreed on the

panel does not remove the taint of racially motivated challenges. Precedent in this area has 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 dealt directly with the issue of preservation, ruling that the objection to the improper use of peremptories must be raised prior to the jury being sworn, and explained, "In Neil we outlined the procedure required to preserve this issue. A timely objection must be raised and the state must be given and opportunity to demonstrate that the use of a peremptory was not motivated solely by race." Castillo, 486 So. 2d at 565. No mention whatsoever is made as to a requirement that the defense move to strike the entire panel, or move for a mistrial.

The procedure for preserving the issue provided in Neil 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. Again, there is no rule that the complaining party move to dismiss the panel, or move for a 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. At this point, the defense had properly objected, establishing the likelihood that the juror had been challenged solely because of race. Defense counsel noted the State moved to strike this prospective black juror, regardless of the fact that the prosecutor had not directed even one question to the juror.[2] The court then appropriately required the

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[2] A review of the entire voir dire proceedings shows that no direct questions were addressed to the second black juror struck, Mrs. Gamble. The only time her name appears on the record prior to the State's challenge is when she is asked if she had raised her hand, and she responded "No," and when she, along with all the other prospective jurors, said "Yes" when asked if

prosecutor to provide a reason for challenging the two black jurors. The State provided its alleged race neutral reasons. The trial court determined that the challenges were based on a reason other than the prospective juror's race, specifically ruling that the prosecutor's explanation that he preferred another juror down the line is a sufficient and race neutral reason for the challenge (R301-302). According to Neil, supra, once the trial court makes this determination, the trial judge is required to dismiss the jury pool only upon a ruling that the challenge had been based on the juror's race.

The trial judge's ruling in the case sub judice was definite and final. The prosecutor had the burden to demonstrate valid, nonracial reasons why the black juror had been stricken. The trial judge argued back and forth with defense counsel about whether the prosecutor had in fact met this burden, in the following colloquy:

> THE COURT: So don't they have the right to do it as long as it's not racially motivated?
>
> MR. GARMANY: I don't believe we stated a non-racial reason.
>
> THE COURT: You don't think preferring the next juror down the line would be a valid reason for having peremptory challenges, and just saying I'd rather have this man or this woman than this person. You don't think that's a valid reason?
>
> MR. GARMANY: No.
>
> THE COURT: I do. I think that's the reason for peremptory challenges you may have as a

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they would hold the State to its burden of proof (288, 289).

> lawyer. You may have gone through this whole thing, and you may find persons you're working for in the sceme (sic) of peremptory challenges to try to eliminate to get to this person because you feel they're a very preferable person, and I think that's a valid reason.
>
> MR. GARMANY: I accept the general theory of peremptory challenges. However, I don't think -- the Florida Supreme Court, the United State's Supreme Court has held in starting wherein Florida which predated the Supreme Court State v. Neil, again, in State v. Slappy that the state has to come forward and show a non -- a neutral reason for striking a particular minority.
>
> THE COURT: Haven't they done that?
>
> MR. GARMANY: I don't believe they have.
>
> THE COURT: I do. I think that's a valid reason to have someone preferable. There's been no showing that any of the strikes here are anything but racially neutral. Okay. Juror number 12, Mr. Garmany?

(R301-302).

Clearly, the trial judge had unequivocally concluded that the prosecutor's proffered reason was sufficient to overcome a suggestion of racial discrimination. "This process [a Neil inquiry] was established to assure that trial counsel gives his or her reasoning at or near the time the challenges are made and to permit the trial judge to evaluate those reasons in light of the jurors' responses to determine whether the reasons are neutral and reasonable and not pretext." Bryant v. State, 565 So. 2d 1298, 1301 (Fla. 1990). The trial court made his determination (which Petitioner argues was in error), and although defense counsel expressed his disagreement with this

finding, the trial judge had spoken. The objection was preserved on the record, overruled, and was not open to further discussion. A lawyer is not required to pursue a 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).

The futility in proceeding in the manner established by the district court's decision in Joiner was recently recognized in Jefferson v. State of Florida, 595 So. 2d 38 (Fla. 1992), where this Court found that striking the entire panel is not the exclusive remedy to be used for discriminatory peremptory challenges. The decision acknowledges the fact that striking the panel as the district court has suggested would "result in exactly what the improper challenge was put forth to achieve: a jury panel without a member of that particular race." Jefferson, supra note 4, at 40. The opinion further provides that "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, 595 So. 2d at 40. Put in another way by the Third District Court of Appeal in Wright v. State, 592 So. 2d 1123, 1125 (Fla. 3d DCA 1991), argued logically against the propriety of dismissing the whole panel, stating, "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 had been made and impartial panel members already selected, facilitates the perpetration of racial discrimination rather than thwarts it." This Court authorized the remedy chosen by the trial judge in Jefferson, which was to seat the impermissibly challenged juror. The decision in Jefferson conflicts 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, defense counsel need not seek this "remedy," and the trial judge may not necessarily be compelled to strike the entire panel and begin with a new venire.

The district court in Joiner stated, "We hold that Joiner failed to preserve his objection to the composition of the jury panel. . . . We believe it takes stronger language to indicate to the trial court that a defendant does not wish to subject his case to that jury panel." Joiner, 593 So. 2d at 556. This ruling completely ignores the purpose of Neil inquiry. The inquiry is made in an effort to assure "a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. See Art. I, § 6, Fla. Const." State v. Slappy, 522 So. 2d 18, 21 (Fla. 1988). The ultimate goal of conducting the procedure set forth in Neil is of course to protect a defendant's right to an impartial jury, however, the review of Neil inquiry issue focuses on the manner in which the preemptory challenges were made, and the possibility

of an underlying improper motivating factor. As this Court stated in Kibler v. State, 546 So. 2d 714 (Fla. 1989), "[T]he Neil inquiry must necessarily focus on the reasons given by the prosecutor for making the challenge" (emphasis added).

In ruling that Mr. Joiner "failed to preserve his objection to the composition of the jury panel," the district court wholly disregards the reason the defense lodged his objection, and ignores the point behind a Neil inquiry. Just because the State, over defense objection, successfully excluded a black venireperson from sitting on the panel, does not necessarily mean that the remaining jurors are not qualified to hear the case as impartial jurors and should be replaced. An objection pursuant to Neil is **not supposed to be made to the "composition of the jury panel,"** but rather to the discriminatory practices of the prosecutor. It is not a matter of whether "a party is dissatisfied with a jury panel," as the Fifth District has found, but whether the prosecutor was employing discriminatory practices. Maybe defense counsel would have preferred to have the black juror sit on the jury, because Mr. Joiner is black; counsel recognized, however, that a defendant does not have a constitutional right to have members of any certain race sit on the panel. "It may often be that no members of a particular race will be on a given jury because of the racial composition of the community as reflected by the random section of the venire or because all members of that race will have been challenged for specific reasons relating to the case. Parties are only

constitutionally entitled to the assurance that peremptory challenges will not be exercised so as to exclude members of discrete racial groups solely by virtue of their affiliation." Kibler, 546 So. 2d at 713. Defense counsel effectively lodged his objection to the prosecutor's improper challenges, preserving the issue for review. There was thereafter no reason whatever to move to strike the panel, as the remaining jurors were competent to serve (despite their color).

The opinion of the Fifth District Court of Appeal states, "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, 593 So. 2d at 556. This finding exposes additional problems with the district court's ruling. First, the objection made by defense counsel alleged that the prosecutor had already in fact challenged black jurors solely because of their race. The purpose of a Neil inquiry is not to "forewarn" a party, but to afford a chance to review if a challenge has been made improperly. Second, 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. In ruling that "the party initiating the inquiry may ultimately decide that the panel finally selected is acceptable," the district court is condoning the use of racially motivated strikes, so long as the final panel is "acceptable." It is

Petitioner's position that the ends do not justify the means in this manner.

The opinion in Joiner further provides that "The trial court should not assume that a party wishes to have a panel stricken simply because a Neil inquiry is requested." Joiner, 593 So. 2d at 556 (emphasis added). It is obvious even from the excerpt of the discussion contained above that defense counsel did much more than "simply" request an inquiry.

The Fifth District opinion further provides 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 should have moved to strike the jury panel at some time during the selection process, but before the jury was sworn, at the latest." Joiner, 593 So. 2d at 556. The case-law in this area clearly establishes that while it is the moving party's burden to demonstrate the "likelihood" of impermissible bias, once this likelihood is shown, the burden then shifts to the challenging party (the State in this case) to explain its neutral reasons for the challenge, and to "demonstrate that the proffered reasons are, first, neutral and reasonable and, second, not a pretext." Bryant, 565 So. 2d at 1300. What the district court has done in Joiner is shift the burden once again to the defense to provide an argument to the trial court as to why the panel should be stricken, or why the trial court should declare a

mistrial. The decisions which have been handed down from this Court, however, do not provide that the burden again shifts to the objecting party to take action once the trial judge has evaluated the reasons proffered. For example, this Court's decision in Bryant v. State, 565 So.2d 1298, 1300 (Fla. 1990), clearly conflicts with Joiner, in stating "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.

The opinion in Joiner also conflicts 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 contrary to 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:

> [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 (emphasis added).

In Floyd v. State, 569 So. 2d 1225, 1226 (Fla. 1990), the lack of an objection to the State's alleged race-neutral reason defeated the defendant's opportunity to argue the Neil issue on appeal. As opposed to the situation in Floyd, defense counsel in the case sub judice clearly and strenuously objected to the prosecutor's explanation for striking the second black juror. 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, and the issue was properly preserved for review.

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 vacate the decision of the Fifth District Court of Appeal.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN ACCEPTING THE STATE'S INSUFFICIENT REASONS FOR CHALLENGING BLACK JURORS WHERE THE PROFFERED REASONS DID NOT SATISFY THE STATE'S BURDEN OF ESTABLISHING THAT THE CHALLENGES WERE NOT RACIALLY MOTIVATED.

An individual's right to an impartial jury is guaranteed by Article I, § 16, of the Florida Constitution. The purpose of peremptory challenges used during jury selection is to promote the selection of an impartial jury. "It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury." State v. Neil, 457 So. 2d 481, 486 (Fla. 1984).

In the instant case, defense counsel made a timely objection to the State's use of two peremptory challenges on black jurors, relying on the doctrine set forth in Neil, supra, and State v. Slappy, 522 So. 2d 18 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988) (R298-299, 300-302). The defense pointed out that Mr. Joiner is black, and argued that there was an absence of any apparent reason for excluding the black jurors, and the exclusion therefore appeared to be racially motivated (R299). Defense counsel then requested that the court inquire as to why the State struck these black jurors (R299). In response, the prosecutor stated:

> MR TURNER: I would point out for the record that the defense struck one black juror, the

> first one, and that we struck Mr. Sanders because we felt someone who goes to the Rainbow Club and doesn't know there's a drug problem is either very naive or not telling the truth. To my knowledge and experience [there] is a very strong drug use. There's a lot of enforcement out there. Also as to Mrs. Gamble, basically, we struck her because 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 Mrs. Gamble is.

(R300).

The reason the State offered for striking Mr. Sanders could arguably be characterized as race-neutral. As the defense counsel correctly noted, however, reversible error is committed when the court allows just one juror to be impermissible excluded because of racially motivated reasons. Smith v. State, 574 So. 2d 1195, 1196 (Fla. 3d DCA 1991) ("... the exercise of a single racially-motivated prosecution strike is constitutionally forbidden."). This Court in Williams v. State, 574 So. 2d 136 (Fla. 1991), held that if there is a doubt as to the exclusion of any person on the venire because of their race, the trial court must require the state to explain each one of the allegedly discriminatory challenges. Id., at 137 (emphasis in original). Since the striking of a single black juror violates the equal protection clause, "the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused ..." Slappy, supra at 21.

In examining the prosecutor's basis for striking the second black juror (Mrs. Gamble), the State's failure to provide an

adequate "race-neutral" explanation for the exclusion is clear. Specifically, in Kibler v. State, 546 So. 2d 710 (Fla. 1989), the Florida Supreme Court found that the reason provided by the prosecutor to excuse black jurors was not sufficient in carrying the burden of showing that the challenges were not racially motivated. The prosecutor in Kibler stated that the black jurors were excluded in order to allow for the inclusion of other jurors on the panel. This is exactly the same explanation offered in the instant case, and under Kibler, Id., this reason fails to satisfy the State's burden of proof.

More importantly, there is absolutely nothing in the record to arguably support a reason for challenging Mrs. Gamble. The State did not direct any relevant questions to this prospective juror. (See n. 2, Point I, supra). The defense successfully established the likelihood that she was challenged because of her race, and the State failed to rebut this likelihood.

Furthermore, this Court found in Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992), that "the elimination of potential jurors by discriminatory criteria is an invalid exercise of peremptories and does not assist in the creation of an impartial jury. Such discrimination in the selection of jurors offends the dignity of persons and the integrity of the courts. . . [A] party's right to use a peremptory challenge can be subordinated to a venireperson's constitutional right not to be improperly removed from jury service" (citations omitted). Mrs. Gamble's constitutional rights were sacrificed when the prosecutor excused

her from service, presumably because of her race. The prosecutor failed to establish any other reason for her dismissal from the panel.

A reasonable explanation is not enough. The State is required to show convincing neutral reasons for the strikes, and the absence of pretext. Since the State utterly failed to offer a convincing rebuttal to the defense's objection, the State's explanation must be deemed a pretext. Slappy, supra at 23. If there was any doubt in the trial judge's mind as to the possibility of racially motivated challenges, it should have been resolved in Appellant's favor. "[A] "broad leeway" must be accorded to the objecting party, and [..] any doubt as to the existence of a "likelihood" of impermissible bias must be resolved in the objecting party's favor." Bryant v. State, 565 So. 2d 1298 (Fla. 1990), quoting Slappy, 522 So. 2d at 21-22.

The State therefore failed to rebut the inference of discrimination by offering a clear and reasonably specific, racially neutral reason for the use of its peremptory challenges, as required under Neil, and Slappy. The State did not present specific reasons based on the juror's responses at voir dire to explain the challenge. The reasons given must be therefore be deemed a pretext for discrimination based on defense counsels objection. The trial judge reversibly erred in accepting the State's explanation of the peremptory challenges.

CONCLUSION

BASED ON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, and reverse the Petitioner's judgment and sentence, and remand for a new trial.

Respectfully submitted,

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PUBLIC DEFENDER

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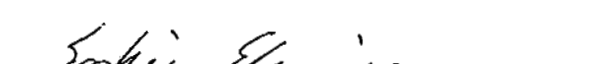
COUNSEL FOR PETITIONER

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 Eddie Joiner, Inmate No. C-886992, Polk Corr. Inst., 3876 Evans Rd., Box 50, Polk City, Fla. 33868-9213, on this 4th day of September, 1992.



SOPHIA B. EHRINGER
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. 79,567

A P P E N D I X

✓91-165 SE

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

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

EDDIE JOINER a/k/a JOHN BLUE,

Appellant,

v.

CASE NO. 91-99 ✓

STATE OF FLORIDA,

Appellee.

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.