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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 80,040

DARRIN O'NEILL MCCLAIN,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred herein as either "petitioner" or "the State." Respondent, Darrin O'Neill McClain, will be referred to herein as "respondent" or by proper name. References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

An information was filed against the respondent on September 24, 1990, charging him with two counts of robbery with a deadly weapon. (R 272). The respondent exercised his right to a jury trial and at his trial he was found guilty of two counts of robbery with a weapon. (R 274, 275). The respondent was sentenced to four years concurrent prison on each count, adjudicated guilty and ordered to pay restitution, a fine, and court costs. (R 282). The respondent filed a timely notice of appeal on April 26, 1991. (R 293).

During voir dire of the respondent's trial, the state struck juror Smith, who is black; the appellant objected and asked that race neutral reasons be given. (R 18). The respondent is black and the victims are white. (R 18). The court granted the respondent's request. (R 18). The state said that it struck juror Smith because the juror questionnaire indicated that he or a relative had been accused of a crime, that the juror gave the state a "funny look," and that the juror left the U.S. Navy after 16 years of service. (R 18). The respondent's attorney then asked juror Smith several questions about the previously stated reasons. The respondent asked Smith if he had any family members accused of a crime. The juror said that he had a nephew that was incarcerated in Hamilton County. (R 19). The respondent then asked Smith about his separation from the Navy, and Smith said that he left the Navy due to

hypertension. (R 20). The court found the reasons given by the state were race neutral and allowed the strike. (R 20).

After the inquiry of the prosecutor, the record reflects there was an unreported conference at the bench. After this conference, the court noted that there were six strikes made by the respondent, and all the strikes were made against white jurors. The court asked the respondent to give race neutral reasons for striking the white jurors. The following discussion took place on pages 21 through 23 of the record:

> THE COURT: Now the record will reflect that there were six strikes exercised by the defendant have been all white so I'm going to -- Mr. Voorhees and you can give your reason why each of these have been stricken, Mr. France.
>
> MR. FRANCES: Why I struck Mr. Voorhees, I think the record should be clear that there are only two nonwhite person on this panel.
>
> THE COURT: All right. The record can reflect.
>
> MR. FRANCE: Mr. Voorhees is from Cantonment. He's a pipe fitter and laborer, and I do not find those people to be sympathetic to blacks in general.
>
> THE COURT: That strike is disallowed. That's not a race neutral reasons.
>
> MR. FRANCE: Who is the next one?
>
> THE COURT: The next one is Sondra Parker.
>
> MR. FRANCE: Sondra Parker is a young woman, struck me to be very nervous on the jury here, and the victim in this case is a woman and --

THE COURT: Victim white or black?

MR. FRANCE: Victim is white. This is may be not a sex neutral reasons, but it's a racial terms.

THE COURT: That strike is disallowed. Okay. The next one will be --

MR. FRANCE: I'm sorry Glenora Johnson. She runs a convenience store and that has been robbed.

THE COURT: All right. That strike will be allowed.

THE COURT: All right. Let's see the next is Nancy Linhardt.

MR. FRANCE: Nancy Linhardt prior property victim.

THE COURT: All right I will allow that strike.

THE COURT: Bert Baggett.

MR. FRANCE: No particular reason, just got a feeling on him.

THE COURT: All right. That one is disallowed. Deborah Parker.

MR. FRANCE: Also because she is a woman and approximately the same age as the victim in this case.

THE COURT: That strike is disallowed.

MR. FRANCE: The court is saying they are not going to be excused as strikes?

THE COURT: That is correct.

The respondent objected to the court's denial of the respondent's peremptory challenges, (R 23). Also, the respondent noted that if the court had allowed the peremptory strikes then the next

person on the jury was a black woman. (R 23). The respondent moved to strike the jury panel and to pick a new jury. (R 26). The respondent's motion was denied. (R 28).

On appeal, the defendant raised the following two issues:

> **ISSUE I:**
>
> The trial court erred in accepting the State's reasons to strike a black juror as race neutral.
>
> **ISSUE II:**
>
> The trial court erred reversibly in forcing unwanted jurors onto the appellant's jury since Neil does not apply to white prospective jurors as it does not blacks.

In its opinion the court described the defendant's position as:

> Appellant argues merely that the trial court erred in disallowing the defense's peremptory strikes because Neil does not apply to white prospective jurors as it does to blacks since whites are not members of a minority race.

McClain v. State, 596 So.2d 800, 801 (Fla. 1st DCA 1992)

The court rejected this assertion, but reversed applying a new standard. The lower tribunal held that:

> When peremptory challenges are being used to strike members of the majority race, a heavy burden to establish invidious racial motivation accompanies any attempt to deny, pursuant to Neil, the striking part's right to exercise its peremptory challenges.

Id. at 801.

Based on its application of this standard, the lower tribunal reversed and remanded for a new trial.

Petitioner requested rehearing and the opportunity to file a supplement brief on the issue the case was decided on. This request was denied. (order denying motion for rehearing)

Petitioner then invoked the discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

ISSUE I

In issue one, petitioner asserts that this Court should quash the decision of the lower tribunal because the decision creates and applies an unconstitutional test.

Petitioner asserts that the test is unconstitutional because it denies jurors equal protection of the law and denies them their right to sit on the jury. The test improperly focuses on the limited rights of the parties to object to peremptory challenges instead of the plenary rights of the juror to be free from discrimination.

Further, the test adopted by the lower tribunal creates procedures which directly conflict with the procedures mandated by decisions of this court

Therefore, this court should reject the test promulgated below and quash the decision.

ISSUE II

In this issue, **the petitioner** asserts that the procedure employed by the lower tribunal was improper. In this case the defendant preserved a very limited challenge to the procedures employed by the trial judge. On appeal he raised the **preserved** issue. The lower tribunal raised and decided the case on an

issue that was unpreserved and not briefed by the parties. The lower tribunal even refused a request for rehearing or supplemental briefs on the issue. Petitioner asserts that the procedure was improper and denied the petitioner his due process right to be heard.

Therefore, this court should quash the decision of the lower tribunal.

ARGUMENT

ISSUE I

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE STANDARDS APPLICABLE TO REVIEW THE USE OF PEREMPTORY CHALLENGES

In a series of cases beginning with State v. Neil, 457 So.2d 481 (Fla. 1984), this court has significantly limited the use of peremptory challenges. This line of cases which includes State v. Slappy, 522 So.2d 18 (Fla. 1988), holds that a peremptory challenge cannot be based on the race of the juror. This court has applied the same test regardless of the race of the defendant and without any requirement that the juror and party making the challenge be from the same racial group. Kibler v. State, 546 So.2d 710 (Fla. 1989).

In this case, the lower tribunal departed from test enunciated in Neil, Slappy, and Kibler. It applied a standard it created in the case of Elliott v. State, 591 So.2d 981 (Fla. 1st DCA 1991), which differs from the Neil/Slappy test articulated by this court. The lower tribunal's test has two parts the first involves a determination of a majority race. The second part holds that the objecting party has an enormous burden to establish invidious racial motivation when the juror challenged is a "majority" juror.

There is no question that the lower tribunal created a new test when it required the objecting party to meet an "enormous" burden when challenges are directed towards members of a "majority race." This requirement is a substantial deviation from this court's test which requires the objecting party to establish only a substantial likelihood of discrimination. The lower tribunal's application of the test makes the extent of this deviation clear. In Elliott and the instant case, the lower tribunal determined that the trial court abused its discretion when it found the challenges racially motivated because *the evidence of discrimination did not meet its enormous burden to show inuidious racial motivation.* The court did not address factual matters in making this determination, it addressed only its new test. By creating and applying a new test, the decision of the lower tribunal expressly and directly conflicts with the Neil/Slappy/Kibler cases decided by this court and must be reversed.

The initial problem with the approach taken by the lower tribunal is the use of the amorphous term majority. This term adds needless complications to the Neil/Slappy test. First of all, the court does not define a "majority" race juror. Is the majority we are talking about the majority of the jurors being questioned, the majority in the venire, the majority in the community the venire is selected from, the majority in the state, the majority in the nation. What standard is to be used

when the juror being excused is a national minority historically discriminated against, yet, the juror is in the majority in the venire or the community from which the venire is selected? How is the test to work when the juror being challenged is a national "majority", yet, the juror is the only member of its race in the group of jurors being questioned?

This majority classification presents the first conflict with the substantial likelihood test articulated by this court. In Slappy, this Court stated:

> Deciding what constitutes a "likelihood" under Neil does not lend itself to precise definition. IT is impossible to anticipate and articulate the many scenarios that could give rise to the inference required by Neil and Batson. We know, for example, that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated a juror or alternative. . . .
>
> We nevertheless resist the temptation to craft a bright-line test. Such a rule could cause more havoc than the imprecise standard we employ today, since racial discrimination itself is not confined to any specific number of forms or effects. Instead, we affirm that the spirit and intent of *Neil* was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists.

Slappy at p. 21.

The lower tribunal's ruling has done just what this Court said should not be done, it has created artificial barriers which obscure the issue in procedural rules. Any attempt to apply this

test will cause havoc in the jury selection process. Thus, the ruling should be quashed.

Additionally, the standard created violates basic constitutional principles found in both the United States Constitution and the Florida Constitution. As recognized in State v. Aldret, 17 F.L.W. S592 (Fla. Sept. 24, 1992), Florida's Constitutional right to a fair and impartial jury predominates over the statutory right [section 913.08 Fla. Stat. (1990)] to peremptory challenges. This provision protects the right of the juror to be free from racial discrimination and has been an integral part of this Court's decisions holding that Florida's Constitution prohibits the use of peremptory challenges for racial reasons. Kibler; Jefferson v. State, 595 So.2d 38 (Fla. 1992); Aldret. The lower tribunal has ignored the rights of the juror and the test created violates the juror's rights recognized by these decisions.

Among the basic protections that all citizens enjoy is the right to equal protection of the laws. The equal protection clauses of both the State and Federal Constitutions precludes the creation of artificial distinctions between majority and minority jurors. It also precludes artificial distinctions based on who raises the challenge. The equal protection clauses make unconstitutional the approach of the lower tribunal which places on the objecting party an enormous burden to establish invidious racial motivation only when the juror challenged is a "majority" juror.

In fact, the United States Supreme Court has recently made very clear that the focus must be on the juror and not on who raises the challenge. In Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the United States Supreme Court held that an individual juror possesses the right under the Equal Protection Clause of the United States Constitution not to be excluded from a jury on account of race. In so holding, the Court noted that the 14th Amendment mandates the elimination of race discrimination from all official acts and proceedings of the state, particularly in the judicial system. 113 L.Ed.2d at 428. The court recognized that "[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." Id. at 422.

The Court stated that the parties are constitutionally entitled only 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. The United States Supreme Court subsequently expanded the holding of Powers in the case of Georgia v. McCollum, 505 U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). In McCollum, the Court extended to the state the right to raise a defendant's improper use of peremptory challenges. This Court, in Aldret, specifically recognized the applicability of McCollum in the Florida. Thus, the lower

tribunal's test which focuses on the rights of the parties and ignores the preeminent right, the right of the juror, cannot be allowed to stand.

Furthermore, it is an elementary principle of law that the equal protection clause extends to groups other than minorities. The Fourteenth Amendment requires equal protection for all. It is not a minority protection amendment invocable only if a minority is being discriminated against. Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); City of Richmond v. Croson, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). As the court said in Bakke, the guarantee of equal protection can not mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection then it is not equal. 438 U.S. at 289-290. The test of the lower tribunal which singles out jurors based on race and accords them different treatment violates equal protection.

Moreover, a juror in Florida has right similar to the right afforded by the Equal Protection Clause of the United States Constitution conferred by Article I, Section 2 of the Florida Constitution, which states that "[a]ll natural persons are equal before the law and . . . [n]o person shall be deprived of any right because of race, religion or physical handicap." In Tillman v. State, 522 So.2d 14, 17 (Fla. 1988), which foreshadowed Powers, the court held that the improper exclusion

of a juror on the basis of race is invidious discrimination and cannot be tolerated within the judicial system under this section. Art. I, §2 quite obviously does not limit its strictures to actions by the prosecution, nor does it limit its protection to minority groups. Therefore, defense exercise of a racially motivated challenge clearly violates a prospective juror's right not to be excluded from a jury on account of race. *See*, People v. Kern, 75 NY.2d 638, 554 N.E.2d 1235 (N.Y. 1990). Therefore, the test of the lower tribunal which places a higher legal burden on the state when it is challenging the defendant's use of peremptory challenges against white jurors violates the state and federal constitutions,

In creating this test, the lower tribunal relied on the following language in Kibler:

> A defendant of a different race than the jurors being challenged may have more difficulty convincing the trial court that "there is a strong likelihood that they have been challenged only because of their race.'' Moreover, in those cases in which the inquiry has been directed to the challenging party, the respective races of the challenged jurors and the defendant may also be relevant in the determination of whether the challenging party has met the burden of showing that the challenges were made for reasons not solely related to race.

This language is not authorization for the appellate courts to create new standards applicable to a Neil/Slappy challenge. As this Court noted in Slappy because of the myriad of different factual situations in which peremptory challenges are used a

bright line test is not desirable. The language in Kibler relied upon by the lower tribunal was directed towards the trial judge who is obligated to determine whether a strike was racially motivated. After Slappy was decided a prominent issue was the parameters of "a substantial likelihood". Kibler began the process of defining those parameters. It informed trial judges of factual matters which they could consider relevant to the determination of whether a substantial likelihood had been established. This quoted language neither established a different standard nor intimated that such a standard should be promulgated. Therefore, this court should quash the standard created by the lower tribunal.

Moreover, the lower tribunal's standard turns upside down the holding in Slappy in which this court stated that any doubt about whether a substantial likelihood of discrimination has been shown is to be resolved in favor of the complaining party. The Elliott test resolves any doubts against the complaining party. The essence of the Elliott test of the lower tribunal is to create an impossible burden similar to the burden imposed by Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and apply it to one class of jurors. Such action cannot be allowed to stand.

Application of this standard also violates the principles enunciated in Reed v. State, 560 So.2d 203 (Fla. 1990). In Reed, this Court held that a trial judge's determination

relating to the use of preemptory challenges is reviewed under an abuse of discretion standard. The lower tribunal ignored the reasoning of this Court in Reed that the trial judge is vested with broad discretion because, "only one who is present can discern the nuances of the spoken word and the demeanor of those involved." Importantly, only someone who was present would know what occurred in the unreported bench conference just prior to the judge's asking defense counsel for his reasons for using all his peremptory challenges to strike white jurors.[1]

Further, the lower tribunal totally misapplies the abuse of discretion standard established by this court in Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980). In Elliott, the court states:

> We hold that reasonable persons could *not* arguably agree as to the propriety of the trial court's action on this point, *Files v. State*, 586 So.2d 352 (Fla. 1st DCA 1991)(on rehearing), and therefore reverse and remand for a new trial.

Elliott at 987.

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[1] The defendant at trial did not raise the issue of whether a likelihood had been established. As indicated in the companion issue, the issue of a substantial likelihood was first raised by the lower tribunal in its opinion. By this manner of raising the issue, the state was precluded from reconstructing what occured at the bench conference.

In Canakaris, this court stated:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris at 1203.

Thus, this court has held that if **reasonable persons** could disagree no abuse of discretion exists. Therefore, this Court should quash the test employed by the lower tribunal which mistated the law.

The opinion of the lower tribunal also violates other principles which have developed relating to Neil challenges. One significant principle ignored by the lower tribunal is that regardless of whether a trial court has made a finding that a likelihood exists, if a party places his reasons on the record they may be reviewed by the trial court and the appellate tribunal. Reed.

In the instant case, the defendant used every one of his six challenges to peremptorily challenge six white jurors. The reasons given for **two** of the challenges were accepted by the court as those two individuals had been victims of crime. Counsel's remaining reasons were blatantly racial or pretextual,

thereby violating the Slappy test. As to Mr. Voorhees, counsel stated the he was a pipefitter from Cantonment and "I don't find those people sympathetic to blacks in general". (R 22). Regarding Sondra Parker, counsel indicated she was a young white woman who appeared nervous. When he was asked about Mr. Baggett counsel stated "no particular reason, just got a feeling on him." Finally, as to Deborah Parker, his reason was she is a woman about the same age as the victim. Under the Slappy criteria, these "justifications" are inadequate even if counsel's goal to reach another juror is an acceptable one. Therefore, the trial judge properly rejected respondent's attempt to remove these jurors.

Although not specifically addressed by previous opinions one other point bears discussion. The lower tribunal noted that the trial judge seems to have been the one to raise this issue. Petitioner asserts that based on recent developments in the law that this Court should accept such a procedure as a valid method of protecting a juror's constitutional rights.

From the recently decided cases, we know that a juror has a constitutional right not to be removed from a jury panel on the basis of race. We also know that no racial kinship between the juror and any other participant is needed in order for the challenge to be made. We have been informed that under concepts of third party standing each side has the right to challenge the improper exclusion of a juror. The petitioner can identify no

legal reason for precluding a trial judge who believes a clear violation of a juror's constitutional rights is being perpetrated by a party from raising this issue. In Jefferson v. State, 595 So.2d 38 (Fla. 1992), this court quoted from Powers stating that discrimination in the selection of juror offends the dignity of persons and the integrity of the courts. Cannon Two of The Code of Judicial Conduct states:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

A procedure which mutes and precludes a trial judge from protecting the integrity of the jury selection process when he observes a violation of a juror's constitutional rights would violate that cannon. Authorizing the court to raise the issue does not inject the judge into an arena where his normal role is passive. For the rules provide that the trial judge has a active role in the selection and examination of prospective jurors. Fla.R.Crim.P. 3.330. As noted in Reed, the trial judge who hears the questions and the answers and who observes the nuances of non verbal communication, Tillman, is in the best position to determine whether a reason is race neutral and substantiated by the record. This Court has held that this same judge is also in the best position to require a party to justify the challenge when there is a substantial likelihood that a challenge was racially motivated. This Court has repeatedly stated that in the

application of the Neil/Slappy standards it relies on the inherent fairness and color blindness of the trial judge. Since the process depends on the inherent fairness of the judge, there is no logical reason to preclude the judge from raising the issue when the parties do not recognize it or refuse to raise it.

Therefore, petitioner asserts that this Court should quash the opinion of the lower tribunal because it violates the holdings of numerous decisions of this Court and the State and Federal Constitutions.

ISSUE II

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SCOPE OF APPELLATE REVIEW.

There exists another significant conflict within the decision of the lower tribunal. The court decided the case on an issue not raised by the appellant and not briefed by the parties. In the lower tribunal the defendant raised the following issues:

> **ISSUE I**
>
> The trial court erred in accepting the state's reasons to strike a black juror as race neutral.
>
> ISSUE II
>
> The trial court erred reversibly in forcing unwanted jurors onto the appellant's jury since Neil does not apply to white prospective jurors as it does to blacks.

(appellant'sbrief).

As provided by the rules, the State responded to the issues raised by the convicted defendant. Apparently the lower tribunal was aperating under a different set of rules for in its opinion it stated:

> Appellant argues merely that the trial court erred in disallowing the defense's peremptory strikes because Neil does not apply to white prospective jurors as it does to blacks since whites are not members of a minority race.

McClain v. State, 596 So.2d 800, 801 (Fla. 1st DCA 1992).

The court rejected the argument made by the defendant. However, the court did not decide the case based on the issues argued and briefed. It went beyond the arguments of counsel and decided the jury selection issue based its assertion that the state has a heavy burden to establish invidious racial motivation and that the state failed to meet such burden in the instant case. This standard first articulated in Elliott was not argued in the trial court and a3 acknowledged by the lower tribunal, was not raised as an issue on appeal, or, briefed by the parties. In fact, the defendant's argument below was that the Neil standard did not apply to white jurors. On appeal, the argument was that Neil did not apply to white jurors or applied only when they were a minority. This argument that the Neil standard did not apply is the only one that was preserved by the defendant's general objections in the trial court. Bowden v. State, 588 So.2d 225 (Fla. 1991). Therefore, the lower tribunal violated long held standards of appellate practice by making it the basis for the decision.

The petitioner is not asserting that the court is powerless to deal with an important issue preserved in the trial court but not adequately addressed on appeal. The state recognizes the authority of the court to order supplemental briefs on an issue and in its motion for rehearing asked for the opportunity to file a supplemental brief on this issue. The lower tribunal refused the request precluding the state from raising argument on the issue the case was decided on.

Petitioner asserts that the lower tribunal's action of deciding this case on an issue not preserved, raised, or briefed violates one of the basic tenants of appellate procedure and conflicts with numerous decisions of other courts.

In Anderson v. State, 215 So.2d 618 (Fla. 4th DCA 1968), the court held that professional advocacy requires the points on appeal to be stated and argued. In Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984), this Court said that when issues are raised then the respondent party has the duty to respond so that the issues before the court are joined. These decisions emphasize the responsibility of the parties to present advocacy on the issues and implements this Court's Rule 9.210, Fla.R.App.P., setting out the manner in which issues are to be presented.

Just as the parties are to fully join the issues presented, the appellate court has responsibilities also. It has long been held that an appellate court cannot hear issues which were not presented to the trial judge. Sparta State Bank v. Pape, 477 So.2d 3 (Fla. 5th DCA 1985). In State v. Barber, 301 So.2d 7 (Fla. 1974), this Court held that an appellant court must confine itself to review only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.

These cases are an implementation of the contemporaneous objection rule which requires the parties to present their issues first to the trial court and if unsuccessful the specific issue raised in the trial court may be presented as error when the case is appealed. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Tillman v. State, 471 So.2d 32 (Fla. 1985).

From the contemporaneous objection rule, it follows that the failure of a party to raise an issue amounts to a waiver of that issue. Clark v. State, 363 So.2d 331 (Fla. 1978). This rule applies to the peremptory challenge issues for this Court has held that such issues must be raised in the trial court before the jury has been sworn. State v. Castillo, 486 So.2d 565 (Fla. 1986). Further, this court held in Bowden v. State, 588 So.2d 225 (Fla. 1991), that the failure of defense counsel to object to the reasons given waived the defendant's right to challenge the reasons on appeal. The decision of the lower tribunal recognizes that the issue was not raised, yet, used the unpreserved and unargued matter as a basis for reversal. This action deprived the state of its right to be heard and denied it due process.

Thus, the decision of the lower tribunal directly and expressly conflicts with the precedents of this court on this question of law. This Court should resolve the conflict and quash the opinion of the lower tribunal which deprived the state of due process.

CONCLUSION

Based on the argument and authorities cited in this brief, Petitioner prays this Honorable Court quash the opinion rendered by the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to MR. JAMIE **SPIVEY,** Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 16th day of November, 1992.

EDWARD C. HILL, JR.
Assistant Attorney General