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IN THE SUPREME COURT OF FLORIDA

RICHARD SUGGS a/k/a TIMOTHY BOMAR a/k/a DENNIS BOMAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 80,529

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATE OF FLORIDA, Respondent,	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner Suggs appealed to the District Court of Appeal, Fifth District, following his conviction for grand theft. On appeal, the district affirmed the petitioner's judgment and sentence over a claim that the state had been permitted to improperly utilize a peremptory challenge on a black member of the jury panel without being able to provide a sufficient race neutral reason for the challenge. Suggs v. State, 603 So.2d 6 (Fla. 5th DCA 1992). (Appendix A) In so doing, the district court did not rule on the merits of the claim, but rather on what the court perceived to be an improper preservation of the issue. Id.

During jury selection, the state had excused Juror Green, the only black member of the jury panel up to that point

in the selection process.[1] (R 42) Upon defense counsel's objection to the peremptory challenge, the trial court required the state to provide its reason for striking Mr. Green. (R 42) The state initially admitted that it did not have a reason for the peremptory challenge. However, when pushed by the court for a reason, the state indicated that the potential juror had stated that, because the defendant had previous convictions, he would look closely at the evidence. (R 42-43; see R 36) Suggs v. State, supra. The court responded that this reason appeared to be one that would cause the defense to desire the juror stricken, not the state. (R 43) However, the court then ruled that the defense had not met its burden, and allowed Juror Green to be stricken, noting that there was "a tremendous overreaction to these Neil inquiries." (R 44) Following the completion of jury selection, the court inquired whether the panel was acceptable, to which the defense replied, "That's acceptable, your Honor, other than our prior objection to the striking of number one." Suggs v. State, supra.

The defendant filed a motion for new trial, alleging, inter alia, that the court erred in allowing the state to exercise a peremptory challenge to strike Juror Green from the jury. (R 220-221) The court denied the motion for new trial, stating

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[1]Although the district court opinion states that the defendant had previously struck another black potential juror, the record belies this claim. At R 42, defense counsel notes that Mr. Green was the only black juror on the panel so far. While the State notes that Juror Morter, who was stricken by the defense, was a member of a minority, it appears that she was not a black, but rather an hispanic. (See R 43-44)

that although the state could not give an adequate reason for its peremptory challenge, the court had a "feeling" that the juror was not struck for racial reasons. (R 174-175)

The district court, in affirming the defendant's conviction, ruled that in order to properly preserve the issue of the state's use of a racially-motivated challenge, the defense must not only object to the challenge (as was done here), but must also move to strike the **entire jury panel**. Relying on and quoting from its prior ruling in Joiner v. State, 593 So.2d 554 (Fla. 5th DCA 1992), **jurisdiction accepted,** Fla. Sup. Ct. Case No. 79,567, the district court stated:

> 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.

Suggs v. State, supra. Although Suggs had objected to the challenge and further took exception with the trial court's denial of his objection, by accepting the panel "other than our prior objection to the striking of number one," the district court affirmed because of lack of preservation since "defense counsel did not move to strike the jury panel before the members were sworn." Id.

The petitioner filed a motion for rehearing and rehearing en banc, arguing that in adopting this requirement for moving to strike the entire jury venire in order to preserve the issue

for appeal, the district court was ruling that the only appropriate remedy where racially-motivated challenges have been utilized is to strike the entire jury panel. Otherwise, the petitioner contended on rehearing, simply objecting to the striking of the particular juror and taking exception to the state's explanation to the strike would seem entirely sufficient to preserve the issue for appeal. In making this ruling, the petitioner argued, the district court had ignored or overlooked this Court's holding in Jefferson v. State, 595 So.2d 38 (Fla. 1992) (which case had been cited by Suggs as supplemental authority prior to oral argument in the case), that the sole remedy of such a racially-motivated challenge is **not** the striking of the entire panel. Rather, the party may seek, and the trial court may order, the seating of the improperly challenged juror (which this Court indicated may, in fact, be the preferred remedy). Jefferson v. State, supra at 40. Therefore, the petitioner contended, the issue was properly preserved by counsel's objecting to the challenge and taking exception to the trial court's ruling, as was done in the instant case. The district court denied rehearing and rehearing en banc.

Following a notice to invoke discretionary jurisdiction and jurisdictional briefs, this Court granted jurisdiction. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The opinion of the District Court of Appeal, Fifth District, improperly establishes new requirements for obtaining review of the state's use of a racially-motivated peremptory challenge, to-wit: the defense must move to strike the entire, otherwise acceptable, jury venire in order to preserve the issue for appeal. However, the issue should be adequately preserved for appeal where the defense has objected to the state's challenge. Here, the defendant timely and properly objected to the state's backstrike on the black juror. The burden then shifted to the state to justify the peremptory challenge on race neutral grounds. The state clearly failed to carry this burden; the state's explanation of its peremptory challenge of the sole black juror from the jury box was clearly insufficient. The court's overruling of defendant's objection to the challenge violated the defendant's federal and Florida constitutional rights to a fair, impartial jury.

ARGUMENT

DEFENSE COUNSEL PROPERLY PRESERVED FOR REVIEW THE STATE'S USE OF A PEREMPTORY CHALLENGE TO THE ONLY BLACK JUROR ON THE POTENTIAL PANEL WHERE THE REASON GIVEN BY THE PROSECUTOR WAS INSUFFICIENT AND PRETEXTUAL.

An individual's right to an impartial jury representing a cross-section of the community is guaranteed by Article I, §16, Florida Constitution, and the Sixth and Fourteenth Amendments to the United States 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); See also Batson v. Kentucky, 476 U.S. 79 (1986).

Here, the state utilized a peremptory challenge to backstrike the lone black juror in the jury box which it had previously accepted. Upon objection from the defense, the court required the state to give its reason for the use of the peremptory. Initially, the state indicated that it did not have a reason for the strike; however, when pushed by the court, it gave a pretextual, insufficient reason for the excusal. The state indicated that it was striking Mr. Green because, upon being told that the defendant had prior felony convictions, he said he would

examine the evidence closely. That reason is simply not sufficient.

The District Court of Appeal, Fifth District, refused to address the merits of this claim on appeal. Instead, the court ruled that, despite the defendant's objection, despite the trial court requiring the state to give its reason for the peremptory challenge, and despite the defendant taking exception to the trial court's ruling and allowing the juror to be stricken, the defendant somehow failed to properly preserve the issue for appeal. The district court ruled that an additional step, asking that the entire jury venire be stricken, was necessary to preserve the issue for appeal.

The Florida Supreme Court and other District Courts of Appeal have never required that the moving party move to replace the entire venire in order to preserve review of a Neil issue. To require such action ignores the fact that other, less severe remedies, short of striking the entire panel, may be applied by the trial court. The opinion of the district court, in Suggs v. State, 603 So.2d 6 (Fla. 5th DCA 1992), stating that a party must move to strike the entire, otherwise acceptable, jury venire in order to preserve an objection to a racially-discriminatory peremptory challenge, is erroneous and must be vacated.

This Court established the procedure under State v. Neil, 457 So.2d 481 (Fla. 1984), to protect a party from constitutionally impermissible prejudice where the opposing party has used its peremptory challenges to exclude a distinct racial group

from serving on the jury. Nowhere in that case does the Court require the procedure for preservation undertaken by the Fifth District in the instant case and in Joiner v. State, 593 So.2d 554 (Fla. 5th DCA 1992), **jurisdiction accepted,** Fla. Sup. Ct. Case No. 79,567. See Jefferson v. State, 595 So.2d 38 (Fla. 1992). The fact that the parties ultimately picked a panel from the venire does not remove the taint of racially motivated challenges. The precedent in this area has also established that the issue is preserved for appeal when a defendant timely objects, demonstrates that the challenged jurors are black, and establishes the likelihood that the peremptory challenges resulted from impermissible bias.

The proper procedure in order to preserve a Neil issue for review, was referred to in State v. Castillo, 486 So.2d 565 (Fla. 1986). This Court in Castillo found that the procedure was outlined in Neil, supra. The procedure is as follows:

> A party concerned about the other sides' use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood no inquiry may be made of the person exercising the questioned peremptory. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised

> solely because of the respective jurors' race. . . . If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged person other than race, then the inquiry should end and jury selections should continue. On the other hand if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Neil, 457 So.2d at 486-487. There is no requirement, however, that the complaining party move to dismiss the panel, or move for mistrial.

In the instant case, the defense counsel followed the procedure outlined above. There was an objection to the State's challenge as being racially motivated. The court required the prosecutor to provide a reason for these challenges. The State then provided its alleged race neutral reason. The trial court determined that the inquiry was based on a reason other than the prospective juror's race. At this point, according to Neil, supra, the inquiries should end and jury selection should continue. (The defense even went further here and took exception to the ruling prior to the jury panel being accepted and sworn.) The trial court was only required to dismiss the jury pool if it was determined that the challenge had been based on the juror's race. In Bryant v. State, 565 So.2d 1298, 1300 (Fla. 1990), "we find that this record demonstrates that the appellants satisfied their burden. They timely objected, demonstrated that the challenged jurors were black, and established a likelihood that

the peremptory challenges resulted from impermissible bias, specifically, that the State exercised five of its first seven peremptory excusals against black persons." This was the same procedure used to preserve the objection in the instant case. Thus, according to Bryant, the issue was properly preserved for appeal.

Furthermore, in the case of Jefferson v. State, supra, this Court found that striking the entire panel is not the exclusive remedy to be used for discriminatory peremptory challenges. "The rationale behind striking the entire jury pool is to provide the complaining party with a proper venue and not one that has been partially or totally stripped of the potential jurors through the use of discriminatory peremptory challenges." Jefferson, supra. This Court authorized the remedy chosen by the trial judge in Jefferson, which was to seat the impermissibly challenged juror. This decision therefore is at direct odds with the District Court's decision in the instant case which seems to indicate that the sole remedy, and thus a requirement for preservation, is to move to strike the entire jury or move for a mistrial. According to Jefferson, though, this action is not required of defense counsel. The Third District has recently cited Jefferson, supra, as authority in ruling that the error is adequately preserved simply upon a showing that a timely objection was interposed and overruled. Law v. State, 17 FLW D2747 (Fla. 3d DCA December 8, 1992).

The district court opinion here faults the defendant

for failure to object to the "**composition** of the jury panel." Suggs v. State, supra at 8 (emphasis added). This ruling completely ignores the purpose of a 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 a Neil inquiry focuses on the manner in which the peremptory challenges were made, and the possibility of an underlying improper motivating factor. As this Court stated in Kibler v. State, 546 So.2d 710, 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. Suggs "failed to preserve his objection to the composition of the jury panel," the district court wholly disregards the reason the defendant lodged his objection, and ignores the point behind a Neil inquiry. Just because the state, over defense objection, has 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 is made to the discriminatory practices of the prosecutor. "It may 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 v. State, supra at 713. Here, defense counsel effectively lodged his objection to the prosecutor's improper challenge, preserving the issue for review. There was thereafter no reason whatsoever to move to strike the panel, as the remaining jurors were competent to serve (despite their color). In Kibler, the trial judge refused to dismiss the jury on the ground that the prosecutor used racially motivated strikes. That opinion nowhere provides that a motion to dismiss the panel was required to bring the issue up on appeal.

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

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

court held specifically that the defendant had made a timely objection and preserved the Neil issue for appellate review. Again, the actions taken by the defense counsel in Adams were identical to those taken by Mr. Suggs' counsel in the case at bar. The trial counsel: first, pointed out the juror struck by the State was black, secondly, pointed out that Adams was black, and lastly asserted that the State could not furnish a reasonable explanation for challenging the black juror. The trial judge's response showed that he had been apprised of the defendant's objection and felt that no error had occurred at this point in the proceedings. The issue was properly preserved for review. A lawyer is not required to pursue a completely useless course when it would be fruitless. Thomas v. State, 419 So.2d 634 (Fla. 1982); Brown v. State, 206 So.2d 377, 384 (Fla. 1968). Requiring that defense counsel move to strike the jury panel or move for mistrial as suggested in the instant opinion, would be essentially mandating an attorney to complete a useless act.

Therefore, 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 to the contrary.

Turning to the merits of the claim, it is clear that the prosecutor here did not have an adequate race-neutral reason for the peremptory challenge of Juror Green. This Court in State

v. Slappy, 522 So.2d at 21, indicated that the issue is not whether several jurors have been excused because of their race, but whether **any** jury has been so excused.

> The striking of a single black juror for racial reasons violates the equal protection clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.

Id. Even the striking of one black juror is enough to make the initial showing required by the defense if that person is the only potential black juror to be seated. Reynolds v. State, 576 So.2d 1300, 1302 (Fla. 1991); Martinez v. State, 592 So.2d 688 (Fla. 3d DCA 1991); Johans v. State, 587 So.2d 1363 (Fla. 5th DCA 1991).

Here, the court apparently felt that the defense had met the initial burden and required the state to voice its reason for the challenge. See St. Louis v. State, 584 So.2d 180 (Fla. 4th DCA 1991) (wherein the appellate court reversed because of the state's lack of an adequate reasons for justifying the excusal, rejecting the state's claim that the court should not have even required the state to give a reason). That reason, then, turned out to be insufficient and blatantly pretextual.

Once the trial court requires reasons from the state for the strike, the burden of proof shifts to the state to prove race neutral and non-pretextual reasons for the strike. According to Slappy, supra at 22, this rebuttal by the state "must consist of a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the state's use of its

peremptory challenges. (citing Batson v. Kentucky, 476 U.S. at 96-98). The court must be able to conclude from the reasons given that they are neutral and not a pretext. Slappy, supra at 22.

Five non-exclusive factors to consider which would weigh against the legitimacy of a race-neutral explanation were listed by the court in Slappy. Of those five, there are at least three are present here, as well as a fourth reason not listed in Slappy. The reasons listed in Slappy which are present here include: (1) the failure of the state to examine the juror or a perfunctory examination on the questioned issue; (2) the singling out of this juror for this question; and (3) a challenge based on reasons equally applicable to juror who were not challenged by the state. Here, the state did not question Juror Green further concerning his response that, in considering the defendant's testimony, he would listen more intently to the evidence because the defendant had prior convictions. Juror White indicated similarly that he would listen to facts of the case (yet he was not stricken by the state). No other potential jurors were questioned concerning the issue.

Additionally, and more telling as the pretextual nature of the reason is that, at first the state indicated it had no reason for the challenge. When pressed, the reason given, as recognized by the trial court, was one which would seem to be in the state's favor of wanting to keep Mr. Green on the jury.

The state is required to show convincing neutral

reasons for the strike **and** the absence of a 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 a racially motivated challenge, it should have been resolved in the defendant'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, supra, quoting Slappy, supra at 21-22. The trial court, at the hearing on the motion for new trial, even indicated that the prosecutor did not have a decent reason which he could articulate for the striking of Juror Green (although the court had a "feeling" that the juror was not struck for racial reasons). (R 174)

The state, by its indication first that it had no reason, and then by giving as a reason one that should not have caused the state concern, but instead the defense, failed to rebut the inference of discrimination. It failed to offer a clear and specific, racially neutral reason for the use of its peremptory challenge, as required under Neil and Slappy. The reason must be deemed a pretext for discrimination based on defense counsel's objection.

The state thus failed to give an adequate reason, once required by the court to do so. The court erroneously indicated that the defendant had not met his burden, when, in fact, by that

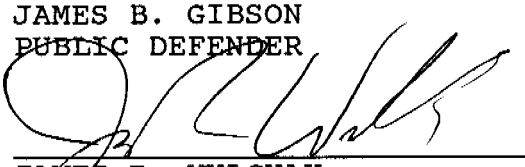
time the burden had shifted to the state and the reason was wholly pretextual and unreasonable. This Court must vacate the opinion of the district court and grant a new trial.

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, reverse the petitioner's judgment and sentence, and remand for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



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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 Mr. Richard Suggs, a/k/a Dennis Bomar, a/k/a Michael Brown, #339516, P.O. Box 4900, Malone, FL 32445, this 19th day of January, 1993.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RICHARD SUGGS a/k/a TIMOTHY BOMAR a/k/a DENNIS BOMAR, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 80,529

A P P E N D I X

District Court Opinion in Suggs v. State, 603 So.2d 6 (Fla. 5th DCA 1992)

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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lieved that the Newcombs should have won the case, concluded that she ought to speak to a juror and find out what went wrong. She randomly selected a juror, and contacted her by telephone. At the time, counsel had no grounds upon which to make a legal challenge to the verdict, nor support a motion to interview jurors. A request to interview a juror requires something more than conjecture and speculation by movant's counsel. *Dover Corp. v. Dean*, 473 So.2d 710 (Fla. 4th DCA 1985) (Hurley, J., dissenting), *pet. for review denied*, 475 So.2d 693 (Fla.1985).[1]

[2] In making that telephone call, counsel violated two rules. Florida Rule of Civil Procedure 1.431(h) provides the procedure to be followed if a party believes that grounds for legal challenge to a verdict exist, and wants to interview a juror. The rule requires an order of the trial judge after notice and hearing. Rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar provides that even if a lawyer believes that grounds exist to challenge a verdict, no interview of a juror may take place unless before the interview, the lawyer files notices of intention to interview a juror, and delivers copies to opposing counsel and the trial judge. None of these procedures were complied with. Nonetheless, the interview of the juror, conducted in violation of the Rules, produced results. Based upon what she learned, the attorney concluded that two members of the jury conducted an experiment outside of court using Windex, and communicated their findings to other members of the jury. Ultimately, the trial judge found that the jury may have been influenced by these matters, and he ordered a new trial.

[3] Ordinarily, the grant or denial of a motion for new trial lies within the sound discretion of the trial judge. The usual test is whether or not reasonable persons could differ as to the propriety of the action taken by the trial court. *Baptist Memorial Hosp., Inc. v. Bell*, 384 So.2d 145 (Fla.1980). But here we are faced with the question of whether or not the trial judge should have considered the motion at all once he discovered that the information upon which it was based was obtained in direct violation of existing rules. The trial judge was presented with a motion to interview jurors which contained allegations of the out-of-court experiment. However, the facts supporting those allegations were obtained in violation of the Rules. A party ought not be able to obtain relief by violating the Rules when the relief could not be obtained by compliance with the Rules.

Once the trial judge found out the method by which the facts supporting the motions for interview and new trial were obtained, he should not have entertained the motions any further.

Reversed and remanded with directions to vacate the order granting a new trial, and enter judgment in accordance with the verdict.

GLICKSTEIN, C.J., and GUNTHER, J., concur.

1. *Dover* addressed itself to cases in which an attack is made based upon matters inherent in the verdict. *Cf. Baptist Hospital of Miami, Inc. v. Maler*, 579 So.2d 97 (Fla.1991); and *State v. Hamilton*, 574 So.2d 124 (Fla.1991).

Richard SUGGS a/k/a Timothy Bomar a/k/a Dennis Bomar, Appellant,

v.

STATE of Florida, Appellee.

No. 91–1641.

District Court of Appeal of Florida, Fifth District.

July 2, 1992.

Rehearing Denied Aug. 24, 1992.

Defendant was convicted of grand theft after jury trial in the Circuit Court, Orange County, Richard F. Conrad, J., and

he appealed. The District Court of Appeal, W. Sharp, J., held that defense counsel had failed to preserve point with respect to prosecutor's strike of only black member of jury who had, at that point, been accepted by both sides.

Affirmed.

Criminal Law ⇐1035(5)

Defense counsel's expression of disagreement with trial court's determination after inquiry as to prosecutor's reason for back-strike of the only black member of jury who had been, at that point, accepted by both sides was not sufficient to preserve issue for appeal, absent motion to strike jury panel before members were sworn.

James B. Gibson, Public Defender, and James R. Wulchak, Chief, Appellant Div., and Kenneth Witts, Asst. Public Defenders, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David G. Mersch, Asst. Atty. Gen., Daytona Beach, for appellee.

W. SHARP, Judge.

Suggs appeals from his judgment of guilt and sentence for grand theft after a jury trial. He argues the trial court departed from the directives of *State v. Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988) and *State v. Neil*, 457 So.2d 481 (Fla.1984) when it allowed the state attorney to back-strike the only black member of the jury who had been (at that point) accepted by both sides for service on the jury panel, through the exercise of a peremptory challenge. Because we do not think defense counsel preserved this point below, we affirm.

During *voir dire* in this case, the state attorney questioned and talked with many members of the *venire*, including the juror in question, Green. He inquired about Green's job and responsibilities as a supervisor for UPS. Nothing remarkable occurred during that exchange.

When the public defender took his turn at *voir dire*, he told the *venire* that his client would probably testify at trial. However, he told them that Suggs had prior criminal convictions. He asked what effect that information would have on the prospective jurors' thinking.

To juror Green, defense counsel directed the following question: "Will that make you judge his testimony?" Green replied, "Make me listen more intently to the actual evidence in this case." To another member of the *venire* (White), he posed the same question. White said, "I'd just listen to the facts." White was not later struck by a peremptory challenge, but it is also clear from the record that he was not ever seated as a prospective juror.

After the *venire* was excused, the process of selecting the jury commenced. Neither side challenged any prospective juror for cause. Both initially accepted Green as juror number one. The public defender exercised three peremptory challenges against jurors number three, four and eight. Both accepted juror number nine. At that point, the state attorney back-struck Green. Both accepted juror number ten.

Then, defense counsel objected. He said, "Your Honor, we'd ask that the State give reasons why Mr. Green was struck, the only black juror we've gone through?" The prosecutor argued that the public defender had not made a sufficient showing to require him to explain his reasons for striking Green. However, the judge pressed him to state his reasons.

The prosecutor admitted he did not have a reason he could fully express. He said he had a "bad feeling" about Green, which stemmed from his response to Jewett's question at *voir dire* concerning Sugg's prior criminal record. "He said I'm going to have to look at the evidence a little bit more carefully.... That's the response I didn't like."

The prosecutor refused to admit the peremptory challenge was exercised for an improper reason—racial bias. He pointed out that Green was the only black juror he had struck. There were still other blacks

left on the *venire*. And defense counsel had also exercised a peremptory challenge against another black (Ms. Morter) who had been called to sit on the jury panel. The public defender explained his reasons for striking Morter, but he had no further basis to attack the state's peremptory against Green.

After hearing argument and considering the conduct of the trial up to that point by both attorneys, the trial judge ruled that he did not think there was a pattern of racial discrimination at this trial by either side. Further, he determined that the state's challenge of Green (in particular) was not based on a racial or other improper motive. He said, "When you start striking based on race or religion or nationality or begin—that's something else again. I don't have any indication that is the case here. So I'm going to allow the strikes."

The attorneys and the court then completed selecting the balance of the jurors for the panel. The court asked the attorneys whether the panel was acceptable. The prosecutor accepted the jury panel. Defense counsel said, "That's acceptable, your Honor, other than our prior objection to the striking of number one."

In *Joiner v. State*, 593 So.2d 554 (Fla. 5th DCA 1992), this court held that defense counsel failed to preserve his objection to the composition of the jury panel, in a similar situation. We said:

> 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 this case, as in *Joiner*, defense counsel did not move to strike the jury panel before the members were sworn. His expression of disagreement with the trial court's determination after a *Neil*[1] inquiry was not sufficient to preserve this issue for appeal.

AFFIRMED.

DAUKSCH and DIAMANTIS, JJ., concur.

1. *See State v. Neil*, 457 So.2d 481 (Fla.1984).

Alejandro ARPAYOGLOU, Appellant,

v.

DEPARTMENT OF PROFESSIONAL REGULATION, Appellee.

No. 90–3072.

District Court of Appeal of Florida, First District.

July 2, 1992.

Disciplinary proceedings were brought against physician. On appeal from order of Department of Professional Regulation suspending physician's license, the District Court of Appeal, Smith, J., held that physician's license could not be suspended for conduct not charged in administrative complaint.

Affirmed in part, reversed in part and remanded.

Physicians and Surgeons ⇐11.3(2)

Physician's license could not be suspended for conduct not charged in administrative complaint, regarding his failure to give notice to patients of relocation of practice and availability of patient records.

Alejandro Arpayoglou, pro se.

Lisa S. Nelson, Dept. of Professional Regulation, Tallahassee, for appellee.