IN THE SUPREME COURT OF FLORIDA

RICHARD SUGGS, a/k/a
TIMOTHY BOMAR,

Appellant,

v.

CASE NO. 80,529
5DCA NO. 91-1641

STATE OF FLORIDA,

Appellee.
_____/

# RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID G. MERSCH
ASSISTANT ATTORNEY GENERAL
Fla. Bar # 841160
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4996

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGES:

## TABLE OF AUTHORITIES

CASES: PAGES:

OTHER AUTHORITIESD:

## SUMMARY OF ARGUMENT

The Fifth District's ruling in *Suggs v. State*, 603 So.2d 6 (Fla. 5th DCA 1992), that a defendant who fails to move to strike the jury panel fails to preserve his objection to the composition of the jury is not in direct conflict with this Court's opinion in *State v. Neil*, 457 So.2d 481 (Fla. 1984), or any of its progeny, and is, in fact, consistent with the basic rules of appellate procedure noted in this Court's opinions in *Neil, supra*; *State v. Fox*, 587 So.2d 464 (Fla. 1991); and *Floyd v. State*, 569 So.2d 1225 (Fla. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991), that a defendant must not waive an objection and that he must raise the specific objection below that he seeks to raise on appeal if he wishes to properly preserve his claim of error for appellate review.

The opinion sub judice is not in direct conflict with *Jefferson v. State*, 595 So.2d 38 (Fla. 1992); *Bryant v. State*, 565 So.2d 1298 (Fla. 1990); *Charles v. State*, 565 So.2d 871 (Fla. 4th DCA 1990); and *Adams v. State*, 559 So.2d 1293 (Fla. 3rd DCA 1990). Moreover, the Third District has expressly adopted the Fifth District's position in the instant case. *See, Moorehead v. State*, 597 So.2d 841 (Fla. 3rd DCA 1992).

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

## ARGUMENT

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THE CASE SUB JUDICE, EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT ON THE SAME QUESTION OF LAW AS REQUIRED BY FLA.R.APP.P. 9.030(A)(2)(A)(IV).

The Petitioner contends, "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*, 17 FLW D1618 (Fla. 5th DCA July 2, 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." (Petitioner's Jurisdictional Brief, hereinafter abbreviated as PJB., at page 5; Emphasis added). The Petitioner subsequently states, "The fact that the parties ultimately picked a panel from the venire does not remove the taint of racially motivated challenges." (PJB., at page 6).

First of all, the State will note that the Petitioner is attempting to establish conflict jurisdiction between two different questions of law, not the same question of law, as required by Fla.R.App.P. 9.030(a)(2)(A)(iv). The Fifth District's opinion in *Suggs v. State*, 603 So.2d 6 (Fla. 5th DCA 1992), addresses the question of what a party must do to preserve

a *Neil*[1] objection when the trial court specifically finds that the non-moving party did not use a peremptory challenge in a racially biased manner. The Fifth District's opinion does not address the question of what remedies are available where the trial court specifically finds that the non-moving party did use a peremptory challenge in a racially biased manner. This second question, addressed by this Court's opinion in *Jefferson v. State*, 595 So.2d 38 (Fla. 1992), is irrelevant to the specific question addressed by the Fifth District. The Fifth District's opinion in *Suggs* and this Court's opinion in *Jefferson* address two entirely different questions under totally opposite factual situations.

Second, the State will note that the Petitioner maintains that his jury was "otherwise acceptable," yet nonetheless "taint[ed]" by the State's use of an allegedly racially motivated peremptory challenge. In short, the Petitioner is contending that he is permitted to tell the trial court judge that he accepts the jury (as impartial), and then turn around on appeal and argue that his jury was constitutionally tainted and that he is entitled to a new jury and a new trial as a result thereof, because there is nothing in *Neil* that requires him to object to the jury panel (i.e., by moving to strike the panel as being unconstitutionally tainted) in order to preserve that objection. On the contrary, in footnote 9 at page 486 of this Court's opinion in *Neil*, this Court cites to its opinion in *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978), wherein this Court said,

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

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

*Castor*, at 703. [Emphasis added]. If the appellant wishes to contend that his jury has been unconstitutionally tainted as a result of the State's allegedly racially biased use of its peremptory challenges, and that he is entitled to a new jury and a new trial as a result thereof, he must move to strike the allegedly tainted jury in order to fully preserve his objection, and in order to give the trial court judge the opportunity to cure that alleged error. That requirement is, in fact, clearly noted in this Court's opinion in *Neil*. Moreover, it is consistent with the long-standing basic rules of appellate procedure that a party may not subsequently waive an objection, and that a party must make the specific objection below that he seeks to make on appeal. *State v. Fox*, 587 So.2d 464 (Fla. 1991); *Floyd v. State*, 569 So.2d 1225 (Fla. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2912 (1991); *Bertolotti v. State*, 514 So.2d 1095 (Fla. 1987); *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982). The Petitioner's claim on appeal that his jury was unconstitutionally tainted, after specifically telling the trial court judge that the jury was acceptable (impartial), and putting the criminal justice system through the time and expense of affording him a trial by an admittedly acceptable (impartial) jury, constitutes

nothing more than an improper effort to avoid an unfavorable jury verdict.

The Petitioner cites to this Court's opinion in *Jollie v. State*, 405 So.2d 418 (Fla. 1981), and contends that because the Fifth District's opinion in the instant case cites to *Joiner v. State*, 593 So.2d 554 (Fla. 5th DCA 1992), and because this Court has accepted conflict jurisdiction in *Joiner*, this Court should accept conflict jurisdiction in this case. (PJB., at page 5). First of all, the State respectfully submits that in light of the above arguments, this Court may wish to reconsider its acceptance of conflict jurisdiction in *Joiner* (F.S.C. No. 79, 567). Second, the District Court's opinion in *Suggs* notes a second reason why the Petitioner's claim was not preserved in the trial court. The Court said,

> 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.

*Suggs*, *supra* at 7-8. [Emphasis in original and added]. (Ex. A).[2]

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[2] The State will note that contrary to the Petitioner's assertion to the contrary, the State did not strike, "...the only black member of the jury panel up to that point in the jury selection process. (PJB., at page 1). Further, in light of the Petitioner's improperly argumentative statement of the facts outside of the facts provided in the Fifth District's opinion, Hardee v. State, 534 So.2d 706, 708 (Fla. 1988); Reeves v. State, 485 So.2d 829 (Fla. 1986), the State has attached the colloquy of the Petitioner's objection at trial as Appendix B.

As this Court has repeatedly noted, a defendant who fails to challenge the State's reason for the use of its peremptory challenges fails to preserve (waives) his *Neil* objection. *State v. Fox, supra; Floyd, supra*. As the above noted portion of the Fifth District's opinion points out, the Petitioner did not challenge the State's reason for the use of its peremptory challenge in the trial court. (Ex. B). Therefore, the Petitioner failed to preserve his claim on appeal that the State's explanation was not racially neutral, and the Fifth District's ruling that the Petitioner had failed to preserve his objection is consistent with this Court's rulings in *State v. Fox, supra*, and *Floyd, supra*. Therefore, this Court is not compelled to accept jurisdiction in the instant case merely because it accepted jurisdiction in *Joiner*.

The Petitioner contends, "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." (PJB., at page 9). First of all, the same general argument could be made as to rulings on pretrial motions to suppress and motions in limine, and motion for judgment of acquittal, yet that clearly is not the law. Second, in both *Thomas* and *Brown* counsel did, in fact, make an appropriate motion, which the Petitioner did not. Therefore, these cases

provide no legal support for his argument. Third, since the Petitioner never made the claim below that his jury was not impartial, the trial court judge did not rule on that claim. Finally, the record specifically refutes the Petitioner's claim that the objection was not open to further discussion, as the trial court judge specifically asked the Petitioner if he accepted the jury, and the Petitioner stated that he did accept the jury. *Suggs*, at 8.

The Petitioner contends that the Fifth District's opinion in *Suggs* is in conflict with this Court's opinion in *Bryant v. State*, 565 So.2d 1298 (Fla. 1990). (PJB., page 7). *Bryant* does not indicate whether the defendant moved to strike the jury panel, whether the defendant moved for a mistrial as a result of his *Neil* objection, or whether he accepted the jury panel without making any motions. An opinion that does not address a specific issue does not create conflict with an opinion that does address a specific issue. Moreover, in ruling in *Bryant*, this Court relied on its opinions in *Kibler v. State*, 546 So.2d 710 (Fla. 1989) and *State v. Slappy, supra*, in which the defendants did move to strike the jury or move for a mistrial after making their *Neil* objections.

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

> The contention that at the end of the voir dire all defendants agreed to the jury is also unavailing because the

> question posed by the Court regarding acceptance by all was made before Mr. Nurik raised the question of the state's action being racially motivated.

*Charles*, at 872. [Emphasis added].

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

The Petitioner contends that the Third District's opinion in *Adams v. State*, 559 So.2d 1293 (Fla. 3rd DCA 1990), is in conflict with the Fifth District's opinion in *Suggs*. (PJB., page 8). Again, the failure to address a specific issue does not establish conflict with an opinion that does address a specific issue. Moreover, in *Moorehead v. State*, 597 So.2d 841 (Fla. 3rd DCA 1992), the Third District resolved any speculative conflict, wherein the Third District adopted the Fifth District's position in *Joiner*. The court held,

> Even though the trial court may have committed a "Neil" error as to the proper inquiry upon a peremptory challenge of a proposed juror, any such error was waived when after the entire jury panel was selected and before being sworn, both the defendant and his counsel accepted the jury as seated. *Joiner a/k/a John Blue v. State*, 593 So.2d 554 (Fla. 5th DCA 1992).

*Moorehead*, at 841-842. [Footnotes omitted]. *See also, Slaughter v. State*, 585 So.2d 1087 (Fla. 3rd DCA 1991) (and cases cited therein). This later opinion removes any speculative conflict between those two district courts. *See, State v. Walker*, 593 So.2d 1049 (Fla. 1992); *Little v. State*, 206 So.2d 9, 10 (Fla. 1968).

The cases of *State v. Neil, supra*; *State v. Slappy*, 522 So.2d 18 (Fla. 1988); *Kibler v. State*, 546 So.2d 710 (Fla. 1989); *Roundtree v. State*, 546 So.2d 1042 (Fla. 1989); and *Reed v. State*, 560 So.2d 203 (Fla. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990), which involved appeals of a trial court's adverse ruling on a defendant's motion to strike or motion for mistrial following a *Neil* objection, adequately demonstrate that attorneys are well aware of the long-standing rules of appellate procedure that a defendant may not waive an objection, and that he must make the specific objection below that he seeks to make on appeal if he wishes to properly preserve his claim of error for appellate review. There is no need to reiterate these basic rules of appellate procedure every time this Court writes an opinion setting out preservation requirements. Moreover, these basic requirements are noted in this Court's *Neil* opinion; and they provide the implicit foundation for this Court's opinions in *State v. Fox*, supra; and *Floyd*, supra, wherein this Court held that if a defendant fails to challenge the State's given reason for the use of its peremptory challenge, he has waived his *Neil* objection; notwithstanding the fact that *Neil* does not explicitly state such a preservation requirement.

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

## CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

David G. Mersch

DAVID G. MERSCH
ASSISTANT ATTORNEY GENERAL
Fla. Bar # 841160
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished by delivery to James Wulchak, Assistant Public Defender, and counsel for the Petitioner, at the Office of the Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this 28th day of October, 1992.

David G. Mersch

DAVID G. MERSCH
ASSISTANT ATTORNEY GENERAL

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# A P P E N D I C E S

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID G. MERSCH
ASSISTANT ATTORNEY GENERAL
Fla. Bar # 841160
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114
(904) 238-4996

COUNSEL FOR RESPONDENT

# INDEX TO APPENDICES

DOCUMENTS: APPENDIX: