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IN THE SUPREME COURT OF FLORIDA

DON BROWN,

Petitioner,

v. Case No.: 80,713

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Petitioner, DON BROWN, the defendant in the trial court and appellant below, will be referred to in this brief as petitioner. Any record references to the record on appeal will be noted by the symbol "R," and references to hearing transcripts will be noted by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

Due to the completely inadequate statement of the case and facts by petitioner, the state submits the following.

The state charged petitioner with attempted first degree murder, attempted armed robbery, and armed robbery (R 38). During jury selection, black venirewoman Kyle told the jury and prosecutor that she was a counselling professor at the local community college doing vocational, athletic, and professional counselling (T 83). The trial court then presented each venireperson by name. The state accepted black venireman McGill (T 139) and struck black venirewoman Brackett (T 140). Defense counsel did not contemporaneously challenge this strike (T 140). The state then struck venirewoman Kyle (T 143). Defense counsel objected:

> Your Honor, at this time I would objection to the State using a peremptory challenge to strike Ms. Kyle. She is a black female [and] my client is a black male. It appears that the State used another strike to strike Ms. Brackett, who is also black, and those are the only blacks that have come into seats on the panel so far.

(T 143). Although the state pointed out that it had accepted black venireman McGill, defense counsel contended that there was no racially neutral reason for the state to strike black venirewoman Kyle (T 143-44).

The state explained its strike as follows:

> Your Honor, the reason for selecting the challenge on her is her occupation. She's a mental health counselor, and she's also a professor of psychology. I specifically questioned her as to her occupation. That part of her counselling deals with vocational training, and that type of training[.] I typically make it my practice not t[o] seat psychology majors or mental health counselors as jurors, because I feel they have an undue sympathy toward a defendant, perhaps tend to believe it's a societ[al] problem and not a defendant problem for the crime that's committed, and so that's why I challenge her, for that particular reason.
>
> And would also cite that the State has accepted M[r]. McGill, who is a black juror, and the State struck Ms. Brackett for the reason that her family has -- numerous members of her family have numerous convictions involving crimes of dishonesty, and we struck her for that reason.

(T 144-45).

Defense counsel responded:

> Just for the record, she's a professor of psychology at FCCJ. Her husband owns a day car[e] center. She appears to be a very qualified juror in this case, and just that she may at some point do vocational counselling I don't think is a significant enough problem for the State to exercise a peremptory challenge.

(T 145).

The trial court ruled:

> I'll find that the reasons are supported by her answers given in response to the questions, that they are reasonable[,] race neutral and non-pretextual. When I was a prosecutor many years ago I would not let a psychology major, or professor, for that matter, sit on a jury with regards to prejudice, and therefore I find . . . [that] the State's reasons are race neutral for exercising a peremptory challenge as to Ms. Kyle.

(T 145). Subsequently, jury selection proceeded and both sides accepted the jury as ultimately constituted, without further objection or motion to strike the panel (T 145-58).

The jury found petitioner guilty as charged (R 48-50), and the trial court adjudicated petitioner guilty and sentenced him to three concurrent terms of 20 years' incarceration (R 56-61). Petitioner timely appealed to the First District (R 73), presenting one issue for review: "Whether the prosecutor improperly struck black jurors."

On October 22, 1992, the First District affirmed petitioner's convictions and sentences, but certified the instant question as one of great public importance. Brown v. State, 17 Fla. L. Weekly D2451 (Fla. 1st DCA Oct. 22, 1992). The district court found Suggs v. State, 603 So.2d 6 (Fla. 5th DCA 1992), on point. Based on the Suggs holding that "expression of disagreement with the trial court's

determination after . . . inquiry was not sufficient to preserve this issue for appeal," id., this court found that defense counsel's failure to request a remedy failed to preserve the issue for appellate review. Petitioner timely filed his notice to invoke and brief on the merits. This answer brief follows.

SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the affirmative. If a defendant initially objects to a particular peremptory strike, it is not clear if the objection is made with the intent to strike the jury panel, terminate the trial, or simply warn opposing counsel. Thus, when the trial court accepts the state's explanation for a given strike, if the defense still objects to the seating of that particular venireperson, it should again object and request some sort of action from the trial court to correct the problem and preserve the issue. Only at that point does the trial court become fully aware of the purpose behind the defendant's objection and then become capable of correcting the problem. After all, this is the underlying current of the principle of preservation: To place the trial court on notice contemporaneously so that the court may correct any problem at the earliest juncture possible.

In any event, it is clear that the prosecutor offered a reasonable, non-pretextual, race neutral reason for striking venirewoman Kyle: Kyle's involvement in vocational training could have created an "undue sympathy" toward petitioner (T 144). Further, the state struck another venirewoman employed in the same profession as venirewoman Kyle.

ARGUMENT

Issue

DOES A DEFENDANT FAIL TO PRESERVE FOR APPEAL HIS OBJECTION TO THE COMPOSITION OF A JURY PANEL WHEN, AFTER HEARING AN EXPLANATION ELICITED THROUGH A NEIL INQUIRY, HE EXPRESSES DISAGREEMENT WITH THE EXPLANATION BUT NEVERTHELESS ACCEPTS THE JURY PANEL AS ULTIMATELY CONSTITUTED, AND DOES NOT AGAIN RAISE THE ISSUE UNTIL AFTER AN ADVERSE VERDICT AND JUDGMENT HAS BEEN RECEIVED?

This Court should answer the question in the affirmative. The opinion of the First District is based on sound, well-reasoned case law from other district courts of appeal and this Court, and petitioner has offered no persuasive reason why this Court should deviate from this established path of law.

In Joiner v. State, 593 So. 2d 554 (Fla. 5th DCA 1992), Joiner objected to the state's strike of juror number eleven. The trial court asked the prosecutor to explain the strike, and the prosecutor stated that he simply preferred other jurors "down the line." Id. at 555. The court ruled that the reason was race neutral, after which defense counsel disagreed. The voir dire continued, the jury was accepted by both parties, and the defendant was found guilty.

The Fifth District held 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.

Id. at 556.

In so holding, the Fifth noted that three seminal cases decided by this Court had been "properly preserved," i.e., the defendants had done more than simply disagree, and had actually requested remedies. In State v. Slappy, 522 So. 2d 18 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988), the trial court denied a motion to strike the jury panel after the 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 trial court refused the 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.), cert. denied, 111 S.Ct. 230 (1990), the trial court denied a

motion for mistrial following a State v. Neil, 457 So. 2d 481 (Fla. 1984), inquiry.[1]

Based on the posture of these three cases, the Fifth District concluded:

> 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

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[1] More recently, in Jefferson v. State, 595 So. 2d 38 (Fla. 1992), the Florida Supreme Court once again addressed a Neil issue which had been properly preserved, i.e., Jefferson asked the trial court to discharge the venire and repeat voir dire with a new jury pool. Id. at 39.

> 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.

Joiner, 593 So. 2d at 556.

The First District found the instant case "on all-fours" with Joiner:

> Here, defense counsel objected on the similar ground that venireman Kyle was the second black struck by the state, and similarly did no more after the trial court accepted the prosecutor's explanation than disagree with its validity. Defense counsel thereafter affirmatively accepted the jury as ultimately constituted, and it was sworn without further objection or motion to strike. As in Joiner, there was no mention of jury selection in the motions for acquittal made during the trial, and it was only after receiving the adverse verdict and judgment that the issue was again raised in a motion for new trial.

Brown, 17 Fla. L. Weekly at D2451. Likewise, in Moorehead v. State, 597 So. 2d 841 (Fla. 3d DCA 1992), the Third District followed Joiner, in finding that Moorehead waived any error when, after the jury panel was selected and before being sworn, both Moorehead and his counsel accepted the panel as seated. Finally, in Suggs v. State, 603 So. 2d 6

(Fla. 5th DCA 1992), the Fifth District followed its own Joiner decision: "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 inquiry was not sufficient to preserve this issue for appeal." Id. at 8 (footnote omitted).

The Joiner reasoning makes eminent sense. If a defendant initially objects to a particular strike, it is not clear if the objection is made with the intent to strike the jury panel, terminate the trial, or simply warn opposing counsel. Thus, when the trial court accepts the state's explanation for a given strike, if the defense still objects to the seating of that particular venireperson, it should again object and request some sort of action from the trial court to correct the problem and preserve the issue. Only at that point does the trial court become fully aware of the purpose behind the defendant's objection and then become capable of correcting the problem. This is the underlying current of the principle of preservation: To place the trial court on notice contemporaneously so that the court may correct any problem at the earliest juncture possible. Nixon v. State, 572 So. 2d 1136, 1341 (Fla. 1990); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Without a request for affirmative action in the area of Neil challenges, a trial court is simply not put on full notice of any problem.

If this Court finds that the issue was preserved for appellate review, it is clear that the prosecutor offered a reasonable, non-pretextual, race neutral reason for striking venirewoman Kyle. As the prosecutor pointed out, Kyle's involvement in vocational training could have created an "undue sympathy" toward petitioner (T 144). Nevertheless,

> a reasonable explanation is not sufficient if the record demonstrates that it is a mere pretext. Slappy laid out five factors which would tend to show that the tendered explanation is an impermissible pretext.
>
> > (1) alleged group bias not shown to be shared by the juror in question; (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.
>
> Slappy at 22.

Gadson v. State, 561 So. 2d 1316, 1317 (Fla. 4th DCA 1990).

In the present case, none of these factors is operative. In fact, the record fully supports the validity and neutrality of the reason, as the state struck another venirewoman employed in the same profession as venirewoman

Kyle, i.e., Ms. Lee, who was a counselor at Northeast Florida State Hospital (T 39, 146).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to answer the certified question in the affirmative.

Respectfully submitted,

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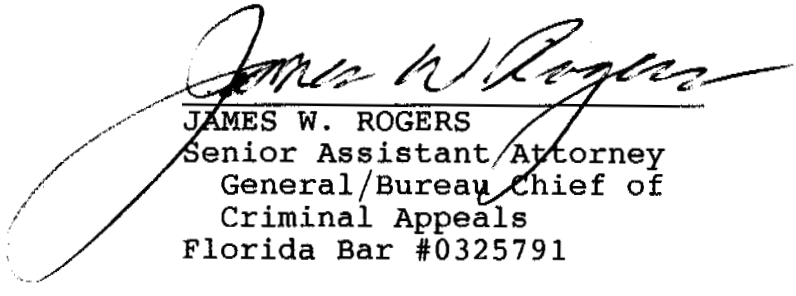

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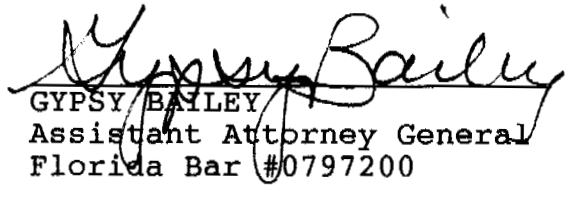

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JEFFERSON W. MORROW, ESQ., of DAVID, MORROW & BLOCK, P.A. Suite 2501 Gulf Life Tower, Gulf Life Drive, Jacksonville, Florida 32207, this 4th day of January, 1993.

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