IN THE SUPREME COURT OF FLORIDA

GUY HAMMOND,	:	
Petitioner,	:	
vs.	:	Case No. 94,780
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the case and facts in his brief on the merits.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION TO STRIKE A JUROR FOR CAUSE AS THE JUROR WAS EMPLOYED BY CHILD PROTECTIVE SERVICES.

The issue before this Court is whether the Petitioner properly preserved the trial court's denial of a cause challenge to Juror Mulligan. Juror Mulligan was employed by and familiar with employees of Child Protective Services that had investigated the case and would testify against the Petitioner. Under Trotter v. State, 576 So. 2d 691, at 693 (Fla. 1990),

> Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges were exhausted.

Petitioner's stance is that the district court's decision is in conflict with this Court's decision in Trotter as to the district court's decision that the Petitioner had failed to preserve the issue when he requested more peremptory challenges. Petitioner followed each of the tenets in Trotter by identifying jurors he would strike if he had additional peremptories. Trotter does not require that you state that the additional peremptories

are based upon the denial of the cause challenge of another juror. Petitioner did not accept the jury and there is no evidence to show that he surrendered his objection for cause as to juror Mulligan.

Respondent also argues that this Court's decision in Trotter and Farina v. State, 679 So. 2d 1151 (Fla. 1996)[1], requires a defendant to show that a "biased" juror was seated. This Court in Trotter does note that the Federal law requires that the defendant must show that a biased juror was seated. The Florida law under Trotter is that an "unobjectionable" juror was seated.

Defense counsel argued that his reason for the additional peremptory challenges was:

> that the jurors actually seem to have already made up their minds as to the -- as to how they would decide the case. They had doubts about whether they could be fair. I don't think any of them flat out said that they could be fair. I think all three had doubts about that they seemed not to be willing -- none of the three of them, in fact, seemed to be willing to accept the legal burden of proof, in particular, juror number twenty-eight. So I would ask for more peremptory challenges at this time. (Vol. 6, T270-271)

Respondent argues that Petitioner's reasons for the additional peremptory challenges are unproven. As indicated by counsels reasons, his reasons were not necessarily what the jurors said.

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[1] This Court in Farina held that the trial court had not abused its discretion in failing to excuse certain jurors for cause. It did not matter that the Appellant was forced to exercise his peremptory challenges as the denial of the cause challenge was held to be proper.

It was the rule in Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), that the essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. State v. Thompson, 68 Ariz. 386, 206 P. 2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378 13 S. Ct. 136, 139, 36 L. Ed. 1011 (1892). Even when the Supreme Court reversed Swain, in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the court expressed no view on the exercise of peremptory challenges by defense counsel. In Florida a peremptory challenge is presumed valid unless an objection is made that the challenge is being made in a discriminatory basis. State v. Johans, 613 So. 2d 1319 (Fla. 1993). No such objection was made here. There is no requirement in Florida that a basis for a peremptory challenge be proven.

Respondent also argues that Juror Mulligan's statement that she "thinks" she could be impartial is merely parroting the words of defense counsel. Based upon questioning by the State Attorney as to her ability to be fair and impartial, Juror Mulligan states: "I mean I think I could be impartial." (Vol. V, T52) The answer is not in response to the questioning by defense counsel and is not merely parroting the question presented to her.

Respondent also argues that Joiner v. State, 618 So. 2d 174 (Fla. 1993) and Mitchell v. State, 620 So. 2d 1008 (Fla. 1993) also

apply to the situation here. Joiner was found to not be able to complain about a possible Neil violation as he had "affirmatively accepted" the jury prior to its being sworn. Petitioner herein did not affirmatively accept the jury and noted his displeasure with the jury by requesting additional peremptory challenges.

The basis for the preservation problem in Trotter was the defense attorney's failure "to object to any venireperson who ultimately was seated" and thus any objection to the denial of a cause challenge of a prospective juror was waived. Defense counsel for Petitioner made no such mistake. The second district has created an additional step to Trotter by requiring a defendant to mention the juror who was not struck for cause when he requested additional peremptory challenges. The failure to do this results in the defendant's waiver of the issue. Trotter provides no such requirement. The additional requirement is an impermissible extension of Trotter and is in direct conflict with this Court's decision in Trotter.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia Davenport, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of January, 2000.

Respectfully submitted,

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