IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-386

ANTHONY E. SMITH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

* *

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Petitioner was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" refers to the Appendix attached to this jurisdictional brief, which solely includes a conformed copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent cannot accept Petitioner's statement of the case and facts appearing on pages 1-4 of his jurisdictional brief due to its argumentative nature. Therefore, Respondent sets forth the following statement of the case and facts pertinent to the jurisdictional issue before this Court:

On appeal, Petitioner raised the issue of whether the trial court erred in denying defense counsel's peremptory challenge of a prospective juror named Buchholz. The district court, on January 31, 2007, issued its opinion affirming the trial court's denial of defense counsel's peremptory challenge of prospective juror Buchholz upon determining that the reasons proffered were not genuine. Petitioner thereupon filed a motion for rehearing.

On January 28, 2009, the district court denied Petitioner's motion for rehearing, but withdrew its prior opinion and issued a substitute opinion. (A. 1-7). In its new opinion, the district court again affirmed the trial court's ruling, and held that although the State did not specifically articulate that the basis for its objection to the defense's peremptory challenge was the ethnic class of the prospective juror, the trial court could properly make an inquiry as to Petitioner's reason for exercising the peremptory challenge where the trial court

clearly understood the nature of the objection, i.e., that the objection was made on ethnic grounds. (A. 4). Citing to other appellate decisions, the Third District observed that, "This Court and the other district courts of this State have likewise repeatedly held that as long as the trial court understands the nature of the objection, an inquiry may be made." (A. 5-6). Furthermore, noting that it had been "clearly rejected" by this Court and the Third District, the district court expressly rejected the premise that an inquiry cannot be made by the trial court unless the threshold, i.e., demonstrating that the challenged juror is a member of a distinct racial or ethnic group or gender, is met. (A. 7). The Third District therefore concluded that, like this Court's holding in Franqui v. State, 699 So. 2d 1332 (Fla. 1997), the trial court did not abuse its discretion in requesting the defense to provide an ethnic-neutral reason for its peremptory challenge of juror Buchholz.

Petitioner thereafter timely filed his notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate that the decision of the Third District Court of Appeal expressly and directly conflicts with a decision of this Court on the same question of law, or that it falls under any of the subdivisions provided in Fla. R. App. P. 9.030(a)(2), or Art. V, Section 3(b)(3), Fla. Const. (1980), for review by this Court. Express and direct conflict simply does not appear within the four corners of the Third District's decision. As such, this Court should decline to exercise discretionary jurisdiction in this matter.

ARGUMENT

THIS COURT SHOULD DECLINE DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISIONS IN FRANQUI v. STATE, 699 So. 2d 1332 (FLA. 1997), OR STATE v. ALEN, 616 So. 2d 452 (FLA. 1993), ON THE SAME QUESTION OF LAW.

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Here, Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner's allegation that the district court's decision below expressly and directly conflicts with decisions of this Court in Franqui v. State, 699 So. 2d 1332 (Fla. 1997), and State v. Alen, 616 So. 2d 452 (Fla. 1993), is without merit. The Third District's opinion expressly makes clear that as long as the trial court understands that the objection to the peremptory challenge is made on racial or ethnic grounds, the

court may properly inquire as to the party's reason for exercising the peremptory challenge. This holding is perfectly consistent with this Court's decision in Franqui, where this Court affirmed the trial court's decision to request the defense to provide a race-neutral reason for its peremptory challenge since it was clear that the trial court understood that the objection was made on racial grounds. Id., 699 So. 2d at 1335. Like the facts in Franqui, the instant facts reflect that there was never any contention made to the trial court that prospective juror Buchholz was not a member of a cognizable minority or that there should not be a Neil[1] inquiry. In fact, defense counsel expressly agreed that being German placed Buchholz in a cognizable group or class by stating that, "This is a recognized minority group within the law,…" (A. 2). Additionally, the defense did not object to proffering its reasons for challenging Buchholz. (A. 3). Thus, it is clear that no express and direct conflict exists between the Third District's decision and this Court's decision in Franqui.

Moreover, contrary to Petitioner's assertion, the Third District's decision did not expressly and directly conflict with this Court's decision in State v. Alen, 616 So. 2d 452, 454

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

(Fla. 1993), where this Court held that a cognizable ethnic class entitled to protection under Neil "inherently demands that the group be objectively discernible from the rest of the community." The trial court's reference to Mr. Buchholz's surname in determining his German ethnicity was fully consistent with this Court's teachings in Alen. Id. at 455. Most importantly, Petitioner overlooks the fact that defense counsel below ***conceded*** that Germans were a cognizable class under the law. (A. 2). Thus, given the state of the instant record, it is clear that no express and direct conflict with Alen exists. Furthermore, it is well established that any inherent or "implied" conflict cannot serve as a basis for the discretionary jurisdiction of this Court. See Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986).

Accordingly, since Petitioner has not shown any express and direct conflict of decisions within the four corners of the district court's opinion, this Court's jurisdiction has not been established. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court DECLINE to accept discretionary jurisdiction of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction was furnished by U.S. Mail to Beth C. Weitzner, Asst. Public Defender, Counsel for Petitioner, 1320 NW 14th Street, Miami, FL 33125, on this ____ day of April, 2009, and that the 12 point Courier New font used in this brief complies with the requirements of Fla. R. App. P. 9.210(a)(2).

_____

DOUGLAS J. GLAID
Senior Assistant Attorney General