

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The State Attorney for the State of Florida, County of Sarasota, filed an information on October 29, 1996, charging the Petitioner with two counts of the capital sexual battery of K.H. and two counts of capital sexual battery of S.H. in violation of section 794.011, Florida Statutes (1995); and committing a lewd/lascivious act in the presence of a child in violation of section 800.04(4), Florida Statutes (1995). The offenses allegedly occurred between October 1, 1995, and October 8, 1996. (Vol. III, R312-315) An amended information was filed on March 10, 1997, which added an additional count of sexual battery in violation of section 794.011(2), Florida Statutes (1995). (Vol. IV, R449-452) The Petitioner had a jury trial before the Honorable Bob McDonald, Circuit Judge from March 10-13, 1997. (Vol. V-X, T1-736)

During voir dire it was brought out that a prospective juror, Ms. Anna Mulligan, was employed as a secretary for the Child Protection Center. When asked whether she could be impartial, she stated, "I mean I think I could be impartial." (Vol. V, T51-52) She would be able to return a verdict of guilty based upon the word of a child. This was based upon her experience with the Child Protection Center. (Vol. V, T80) Trial counsel for Petitioner then moved to strike Ms. Mulligan for cause based upon her employment with the Child Protection team and her connection with Dr. Keeley. (Vol. VI, T145) The trial court declined to "not do it at this

point." Petitioner could renew his objection. (Vol. VI, T147) Later Ms. Mulligan also indicated she was familiar with Detective Bang of the sheriff's department, Sara Crane and Genie O'Brien both of Department of Children and Families. She had worked closely with Sara Crane. (Vol. VI, T245-246) When asked whether she had some predisposition to believe the children because they went through her agency, Ms. Mulligan stated, "I don't think so." (Vol. VI, T247) During final jury selection counsel renewed his cause challenge toward Ms. Mulligan which was denied. (Vol. VI, T265) Counsel then used a peremptory strike on Ms. Mulligan. (T267) After exhausting his peremptory challenges, the trial court asked the Petitioner if he agreed with the selections. Counsel informed the court he would have to consult with the Petitioner. (Vol. VI, T269) Counsel did not accept the panel, but requested three additional peremptory challenges. Counsel indicated that because the Petitioner was charged with six count information, with five counts being capital offenses, the trial court had discretion to grant additional peremptories. Counsel then named three jurors who he believed had "some inclination to have already made up their minds." (Vol. VI, T270) The request was denied. (Vol. VI, T271) The jury found the Petitioner guilty as charged on all counts. (Vol. X, T740-741; Vol. IV, R491-492)

The trial court proceeded to sentencing after the jury verdict and sentenced the Petitioner to life imprisonment with no eligibility for parole on counts I, II, III, V, and VI. The trial court

sentenced the Petitioner to 15 years imprisonment on count IV. All counts were to served concurrently. (Vol. X, T747-748; Vol. IV, R494-500) On March 25, 1997, the trial court granted the Petitioner's motion to correct sentence as to count IV and ordered that the Petitioner be re-sentenced as to count IV only. On April 17, 1997, the Petitioner was sentenced to 35 months imprisonment on count IV. (Vol. IV, R532) Petitioner filed his timely notice of appeal on April 11, 1997. (Vol. IV, R529)

By order dated January 15, 1999, the Second District Court appeal affirmed the Petitioner's conviction and sentence ruling only that Petitioner had failed to preserve the issue whether the trial court had erred in failing to strike a potential juror for cause. Hammond v. State, 24 Fla. L. Weekly D204 (Fla. 2d DCA January 15, 1999); (Appendix A-1). The Second District did note this Court's requirements in Trotter v. State, 576 So. 2d 691 (Fla. 1990), for the preservation of such an issue, but added an additional requirement that a defendant must name the juror which was not struck for cause as the basis for requesting additional peremptory challenges.

The Petitioner timely filed his notice to invoke the jurisdiction of this Court to review the decision on January 22, 1999. This Court accepted jurisdiction to review the decision of the Second District on April 7, 1999.

## SUMMARY OF THE ARGUMENT

The trial court erred in denying the Petitioner's motion to strike Juror Mulligan for cause as the juror stated she only "thought" she could be fair and Ms. Mulligan was an employee of Child Protective Services. She was familiar with many of the State's witnesses against the Petitioner as those persons were employed by Child Protective Services. Trial counsel argued that the juror should be struck for cause when this was discovered and reurged that the juror be struck for cause at the conclusion of the voir dire. A peremptory challenge was used to strike Ms. Mulligan and when all Petitioner's peremptory challenges were exhausted, more peremptory challenges against specific jurors on the jury panel were requested. The challenge for cause against Ms. Mulligan was denied along with the request for additional peremptory challenges. The Petitioner followed this Court's ruling in Trotter in preserving the record. Although counsel did not renew his objection to Juror Mulligan before the jury was sworn he never accepted the jury panel.

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.

Under this Court's decision in Trotter v. State, 576 So. 2d 691 (Fla. 1990), to show reversible error in the denial of a challenge for cause, a defendant must demonstrate that (1) he used all of his peremptory challenges, (2) made a request for an additional challenge that was denied, (3) and that an objectional juror was seated. Counsel demonstrated these three elements to the Second District and the trial court's decision was affirmed on the basis of a lack of trial preservation of the issue. This Court in Singer v. State, 109 So. 2d 7 (Fla. 1959), held:

If there is a reasonable basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence admitted and the law announced at trial, he should be excused on motion of a party, or by the court on its own motion.

Trial counsel for Petitioner attempted to strike Juror Mulligan because she was employed by Child Protective Services and she worked with several witnesses that would testify against the Petitioner at trial. This was based upon the following dialogue:

Q: An I don't know if it was mentioned but Dr. Keeley<sup>1</sup> is potentially a witness in this case too. Given that piece of information, do you feel that would affect your ability to be fair and impartial?

PROSPECTIVE JUROR MULLIGAN: I mean I think I could be impartial. (Vol. V, T52)

She also thought she would not give more credibility to the children who would testify because they went through the agency she was employed by. (Vol. VI, T245-246) When counsel moved to strike the juror for cause he also noted that the juror had said, "I think I can be impartial." (Vol. VI, T146-147) The trial court declined to rule at that time. (Vol. VI, T145-146) Trial counsel later reurged his challenge for cause before the jury was selected and it was denied. (Vol. VI, T265)

In Jones v. State, 660 So. 2d 291 (Fla. 2d DCA 1995), a new trial was ordered when the trial court denied cause challenges of jurors although the jurors indicated they "thought" they could be fair. In Ortiz v. State, 543 So. 2d 377 (Fla. 3d DCA 1989), a potential juror had worked with the prosecuting attorneys, and the potential juror's husband was employed by the fire department that had investigated the arson with which appellant was charged. Upon questioning about whether she would be able to render a verdict

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<sup>1</sup> Dr. Keeley was the pediatrician who examined the two children. The doctor determined there were no physical findings of abuse or trauma on the two children. (Vol. VIII, T502) The doctor testified, "The majority of children who have been sexually abused have no physical findings." (Vol. VIII, T507) Juror Mulligan had typed the reports that came from Dr. Keeley. (Vol. V, T52)

solely on the evidence, the potential juror said, "I believe so." The district court reversed for a new trial saying that the answer was not sufficiently equivocal. Further in Street v. State, 592 So. 2d 369 (Fla. 4th DCA 1992), the district court reversed a conviction for a new trial when the trial court refused to grant the defendant's strike of a juror for cause. The potential juror was a former police officer who had driven past the scene of the murder on the date of the offense. He had seen the police crime scene, but stated he could put aside any biases against the defendant aside. The juror was sure he could follow the judge's instructions. The district court again reversed as the juror's answers were not sufficiently equivocal. In Brown v. State, 24 Fla. L. Weekly D 323 (Fla. 3d DCA February 3, 1999), the district court reversed for new trial based upon a trial court's denial of a motion to strike a juror for cause. The juror was asked whether he could follow the trial court's instructions. The juror responded, "Yeah, I think so." The court ruled that such an answer raised a reasonable doubt as to whether he could serve as a fair and impartial juror.

Petitioner would argue that trial counsel preserved the error by requesting three additional peremptory challenges and noting that he would have challenged jurors numbered seventeen, nineteen, and twenty-eight. Counsel noted that he believed each of those jurors had doubts about whether they could be fair. (Vol. VI, T270) The trial court denied the additional challenges. (Vol. VI, T271)

"The denial or impairment of the right to peremptory challenges is reversible error without a showing of prejudice...." Swain v. Alabama, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759, 772 (1965). See also Imbimbo v. State, 555 So. 2d 954, 955 (Fla. 4th DCA 1990), where it was held that a denial of a challenge for cause which results in exhaustion of peremptories to excuse challenged juror cannot be harmless error and the appellate court will reverse.

The Second District stated that it could not find that the trial court had erred in denying the motion to strike the juror for cause as the Petitioner had not stated the basis of the request for the additional peremptories was the denial of the cause challenge to juror Mulligan. Trial counsel for Petitioner had instead indicated the basis for the additional peremptories was based upon counsel's belief that the trial court had discretion to award additional challenges because five of the six charges against the Petitioner were capital crimes. The Second District analogizes this to the contemporaneous objection rule. Trial counsel for Petitioner twice attempted to strike juror Mulligan for cause as noted above in the statement of the case and facts. The basis for the objection to the juror was gone over in detail, and the trial court denied the strike for cause when it was reargued during jury selection.

The Second District now also indicates when a defendant attempts to preserve error under Trotter, he must give the basis

for requesting additional preemptory strikes as the improper denial of strike of a juror for cause. The Second District cites Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) for the assertion that the purpose of the contemporaneous objection rule is to "place the trial court on notice that it may have committed error, thereby providing an opportunity to correct it." Trial counsel attempted to strike juror Mulligan twice for cause. The basis for the strike for cause was discussed in detail and, at first, no ruling was made. The Court then denied when reurged just before the jury was sworn. Petitioner would argue that the trial court was on notice as to the nature of the ruling and there is no "gotcha" problem that the contemporaneous objection rule is supposed to prevent.

In a recent case involving a similar issue, Milstein v. State, 705 So. 2d 639 (Fla. 3d DCA 1998), the district court held that the logic of this Courts decisions in Joiner and Mitchell "requires the litigant to renew the previous objection even where, as here, the litigant has made no statement affirmatively accepting the jury." Under Joiner v. State 618 So. 2d 173 (Fla. 1993) and Mitchell v. State, 620 So. 2d 1008 (Fla. 1993), the defendant must preserve a Neil<sup>2</sup> objection by calling the error to the court before the jury is sworn. This is done by a renewed motion before the jury is sworn or by accepting the jury subject to an earlier objection. Petitioner did not explicitly accept the jury, but

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<sup>2</sup> State v. Neil, 457 So. 2d 481 (Fla. 1984).

would argue that reurging the objection would have been a futile gesture. Petitioner would also argue that Joiner and Mitchell decisions have been mis-perceived by the Third District. This Court in Joiner held that one cannot affirmatively accept a jury and then object to its selection because of a Neil error. Joiner involves the striking of an African-American juror by one party without a race-neutral reason. This Court in Joiner notes that the defendant should have renewed its objection to his earlier Neil objection. With a renewed objection, the trial court could have either recalled the challenged juror, struck the entire panel and begun anew, or stood by its earlier ruling. In Petitioner's case a renewed objection could not have brought a return to the status quo. The error of forcing the Petitioner to expend a peremptory challenge was done. The challenged juror had been peremptorily struck and a renewed objection would have been useless. In Judge Sorondo's concurring opinion in Milstein, at 643,:

In my view, to require counsel to again move for a ruling or reiterate his objection to the court's refusal to rule is to require an exercise in futility. There is absolutely nothing in this record to suggest that the plaintiff had abandoned his objection to the court's implicit and improper denial of his motion to strike Salazar for cause. Consequently, the "gotcha" tactic sought to be avoided by Joiner could not have occurred here.

Judge Sorondo then states he must affirm based upon this Court's ruling in Mitchell. Petitioner would argue that the third district's interpretation of Mitchell is wrong and there is no

"gotcha" problem here such as the "contemporaneous objection rule" is intended to prevent. Trial counsel twice made cause objections to juror Mulligan. The objection was initially taken under advisement and then the objection was denied.<sup>3</sup> As Judge Sorondo states which Petitioner would agree, any attempt to reargue the denial of the cause objection would have been futile. Petitioner would argue the same here as it had probably only been minutes since the trial court denied the second attempt to strike the juror for cause. More persuasive is the case of Nunez v. State, 604 So. 2d 1109 (Fla. 3d DCA 1995), which the district court held:

At the conclusion of the selection process and prior to the juror being sworn, the defense steadfastly refused to tender or accept the jury. In so doing, we find that Nunez sufficiently preserved for appellate review his objection to the State's peremptory challenge of Ms. Lane under Joiner v. State.

Petitioner would also argue that trial counsel refused to tender or accept the jury by requesting more peremptory challenges and by not accepting the panel. (Vol. VI, T270-271)

Petitioner would argue that Judge Griffin's dissenting opinion in Salama v. McGregor, 656 So. 2d 215 (Fla. 5th DCA 1995), is a better or fairer reading of Joiner. The opinion in part states:

A litigant waives a Neil objection when he or she accepts the jury without communicating reservation of the objection or otherwise leads the court to believe that the earlier

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<sup>3</sup> It should be noted that the second attempt to strike juror Mulligan for cause occurred on page 265 of the record and the jury was sworn on page 273.

asserted objection to the panel based upon Neil had been abandoned.

Petitioner did not waive his objection to juror Mulligan and there is no evidence to show that he led the trial court to believe that he was waiving his objection to the challenge. Petitioner would also argue that the reasoning indicated by Nunez and Judge Griffin's dissent in Salama is a more logical reading of Joiner and Mitchell than the Third District's interpretation in Milstein. For these reasons, the Petitioner prays that this Court hold that the issue was preserved in the trial court.

## CONCLUSION

In light of the foregoing arguments and authorities, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Second District Court of Appeals with instructions that the case be remanded for a new trial.

APPENDIX

PAGE NO.

1. The Second District Court of Appeal's opinion dated January 15, 1999.

A1-3

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia E. Davenport, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this \_\_\_\_\_ day of August, 1999.

Respectfully submitted,

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