IN THE SUPREME COURT OF FLORIDA

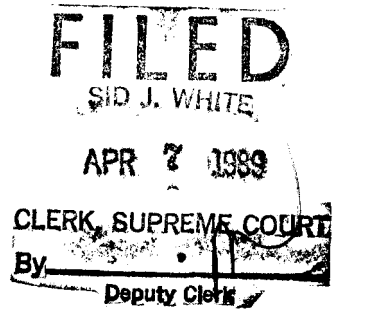
ANTONIO TORRES,

Petitioner, :

vs. : Case No. 73,699

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
FLORIDA BAR NO. **0143265**

ROBERT M. MACK
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL **33830**
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

	PAGE NO.
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
SUMMARY OF ARGUMENT	11
ARGUMENT	13
ISSUE I	
THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION FOR MISTRIAL FOLLOWING THE STATE'S COMMENT ON PETITIONER'S SILENCE DURING CLOSING ARGUMENT.	13
ISSUE II	
THE COURT ERRED BY FAILING TO REQUIRE THE STATE TO PROVIDE NON-RACIAL REASONS FOR ITS USE OF PEREMPTORY CHALLENGES IN REGARD TO FIVE BLACK JURORS; PETITIONER, WHO WAS NOT BLACK BUT HAD A BLACK ATTORNEY, HAD STANDING TO OBJECT TO THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO REMOVE BLACK VENIRE MEMBERS.	18
ISSUE III	
THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUESTED JURY INSTRUCTIONS IN REGARD TO THE LESSER INCLUDED OFFENSES OF GRAND THEFT AND THIRD DEGREE MURDER.	24
CONCLUSION	26
CERTIFICATE OF SERVICE	26

TABLE OF CITATIONS

CASES	PAGE NO.
Ballew v. Georgia, 435 U.S. 223 (1978)	20
Batson v. Kentucky, 476 U.S. 79, 39 Cr.L. 3061 (1986)	20, 22
Blackshear v. State, 521 So.2d 1083 (Fla. 1988)	23
In re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981)	24
People v. Wheeler, 583 P2d 748 (Calif.Sup.Ct. 1978)	20
Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972)	22
State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)	15
State v. Marshall, 476 So.2d 150 (Fla. 1985)	14
State v. Neil, 457 So.2d 481 (Fla. 1984)	18-21, 23
State v. Shepard, 479 So.2d 106 (Fla. 1985)	13
State v. Slappy, 522 So.2d 18 (Fla. 1988)	19
State v. Superior Court, 157 Ariz. 541, 760 P.2d 541 (1988)	20
Tillman v. State, 522 So.2d 14 (Fla. 1988)	19, 20
White v. State, 377 So.2d 1149 (Fla. 1979)	14

OTHER AUTHORITIES

Article I section 16 Florida Constitution	21
Section 782.04(4) Fla.Stat. (1985)	25
Section 812.014(2)(6) 1 Fla.Stat. (1985)	24
Fla. R. Crim. P. 3.510	24

STATEMENT OF THE CASE

On February 19, 1986, Petitioner was indicted for first degree murder and for armed robbery. (R1033-34) On September 10, 1986, a hearing was held in regard to Petitioner's Motion to Suppress admissions. (R994,1057-58) Although Petitioner's motion was denied on October 1, 1986, the State chose not to introduce the admissions into evidence.

On October 15-20, 1986, a trial by jury was held in regard to the two charges in the Circuit Court in and for Hillsborough County, before the Honorable Judge Donald C. Evans. (R1) The jury returned a verdict of guilty of first degree felony murder (count I) and armed robbery with a firearm (count 11). (R1123) On February 6, 1987, Petitioner was adjudicated guilty of both charges and sentenced. (R1193-94) In regard to count I, he was sentenced to a term of life imprisonment with a twenty-five year minimum mandatory sentence. (R1195) In reference to count 11, he was sentenced to a term of life imprisonment, to run consecutive to the imprisonment term which the court imposed as to count I. (R1197) Petitioner's motion for new trial was denied on December 10, 1986. (R1125-26)

On March 6, 1987, Petitioner filed a notice of appeal. (R1199) On May 15, 1987, the Office of the Public Defender was appointed to represent Petitioner in regard to this appeal. (R1207)

The lower appellate court affirmed Petitioner's conviction, and review was granted by this Honorable Court.

STATEMENT OF THE FACTS

During voir dire, the State exercised peremptory challenges in regard to juror numbers **16,** 22, **29, 35** and **41,** each of whom was black. **(R366-40)** Petitioner's attorney made timely objections in regard to each of those challenges, on the basis that they constituted the systematic exclusion of blacks from the jury. **(R366-70)** Petitioner's counsel asked the court to require the State to provide non-racial reasons for the exercise of its challenges in regard to each of the five black jurors. **(R366-70)** The court, which declared that the record should reflect that Petitioner was not black but that defense counsel was, overruled Petitioner's objections and refused to require the State to provide non-racial reasons for its challenges. **(R367-70)**

When the State exercised its peremptory challenge in regard to juror number 22, J.C., Petitioner's counsel objected, stating:

> She's the second strike of a black juror in this particular case and ask the Court to require the State to state a reason. . . my client is entitled to a juror of his peers. That includes the entire community. Systematic exclusion of black jurors is unconstitutional.

(R366-67) The State responded, "I don't think I'm even going to respond to that, Your Honor. That is insulting." (R367) After the court denied defense counsel's objection, the State went on to exercise peremptory challenges in regard to four more prospective black jurors. **(R367-70)**

On September 1, 1985, a gunman robbed the Matterhorn Restaurant which was owned by Hans and Jo Carol Frischknecht. (R411-14) The Frischknechts lived in an apartment upstairs from the restaurant. (R415) The gunman who wore a ski mask, pointed the gun at Jo Carol and demanded money. (R419,459) Karen Hayden, the restaurant manager, had already cleared the register and given the money to Jo Carol. (R421-512) Jo Carol placed the money (over $100.00) in a bag which was held by Jane Piening, a waitress. (R421-23,473,517) Jo Carol took the bag from Jane and handed it to the gunman. (R423,481,505) The gunman then ordered the people in the restaurant to get down on the floor, and he warned them not to follow him. **(R423,452,461,469,481-82,506-07,518)** Shortly after they complied they heard gunshots, and Hans Frischknecht fell to the floor. (R423,439,453,461,469,482,507,518)

Peter Frischknecht, Hans and Jo Carol's fourteen year old son, testified that he was in the upstairs apartment when he heard a man downstairs in the restaurant declare that he was holding up the place. The man threatened that he had a buddy outside who would blow the people in the restaurant away if they tried anything. (R529) Peter, and his sixteen year old sister, Carol, indicated that their father came running upstairs to the apartment and asked where the gunshells were. He subsequently ran downstairs with guns and bullets in his possession. (R527,532) Peter and Carol were scared, and they remained in the apartment. (R529,532) Carol testified that they heard shots, and that she looked downstairs and saw her dad lying on his side. (R532) Dan Petkus,

who called the police following the shooting, ran upstairs, asked the kids for a blanket, and he told them to hide. (R508,529-30) None of the witnesses were able to identify Petitioner as the masked gunman. Following the shooting, the gunman ran out of the restaurant. (R511)

John Scott Lehman testified that prior to the date of the crime, he discussed robbing the Matterhorn Restaurant with Petitioner. (R549) Lehman worked at the restaurant as a cook. Lehman mentioned to Petitioner the idea of a nighttime burglary. (R549) According to Lehman, Petitioner told him that he could rob the place with a gun. (R550) According to Lehman, he drew a diagram of how the inside of the restaurant would look, and he discussed with Petitioner the amount of money which would be available. (R551) Lehman stated that on the morning of the robbery, Petitioner purchased nine millimeter ammunition. (R552) He testified that prior to the robbery that day, he saw Petitioner at a car wash next to the Matterhorn Restaurant, parked under a canopy. Petitioner had on a big fluffy jacket, and he was loading his gun. (R553-54) Petitioner also had on a mask and hat prior to the robbery. (R566) Lehman asserted that when he asked Petitioner why he had all forty rounds in the clip, Petitioner replied that if he had to shoot it out, he would be able to stay all night and do it. (R554)

Shortly before the robbery, Lehman told his fellow restaurant workers that he was leaving for the night. At that point, he went to speak with Petitioner. (R555) He then returned

to the restaurant and told the people that he had forgotten his radio. (R556) Shortly afterward, according to Lehman, Petitioner, in his ski mask, pointed a gun at him and told him to empty the cash register. Jo Carol told Lehman that she would get the money. (R566) Petitioner got the money from her and began moving toward the exit. While his view was blocked by a wall, Lehman heard gunshots, and he heard Jo Carol yell that her husband had been shot. (R556) Lehman ran outside and he found Petitioner's gun laying on the ground. He took the gun apart, stuck it in his pants, and drove off on a bike. (R557) While doing so, he saw Petitioner behind a Ramada Inn wearing nothing but a pair of pants and shoes. Lehman hid the gun in the weeds, and he then returned to the restaurant. (R559) After talking to the police who had arrived, he left the restaurant, picked up Petitioner's gun from the weeds, stuck it in his pants, and rode to Petitioner's residence. Shortly thereafter, Petitioner and Pauline Lehman, Lehman's sister who was going out with Petitioner, showed up. (R560) According to Lehman, Petitioner indicated that he had dropped his gun, and he was afraid that the police had it. (R561) Petitioner indicated that he planned to catch a plane and leave the State that night. Lehman then stated that he had the gun, and Petitioner expressed relief. (R561-62)

Lehman and Petitioner agreed that Lehman would return to the restaurant, check on Petitioner's car, and look for the bag of money which Petitioner indicated he had dropped. (R562) Lehman stated that when he checked the car, he observed Petitioner's mask

and hat by the gas pumps. Lehman shoved them under some shrubbery. (R563) Lehman then returned home and discussed going target shooting the next day with Petitioner. Later that day, two homicide detectives showed up at Lehman's door. (R564) When asked at trial how he got caught, Lehman replied that he had told a fellow worker, Paul Ehrlich, that the restaurant was going to be robbed and that he (Ehrlich) shouldn't be there. (R566) The police confronted Lehman with this statement. (R568) Lehman testified that he then gave the police a fictitious story concerning a Bill Moore being the perpetrator. (R568) Police later came back and said that there was no Bill Moore. (R568) Lehman then pointed to a James Stewart as the perpetrator. (R570)

Lehman testified that Judge Coe told his brother that if he went to trial, he "could and probably very well would" get the electric chair. Following Judge Coe's statement, Lehman decided to enter a plea pursuant to the State's offer. Under the deal, Lehman was to plead guilty to second degree murder and armed robbery, and he was to be sentenced within the twelve to seventeen year guideline range. (R574) In return, Lehman was to cooperate and testify on behalf of the State. If he gave truthful testimony, he could be sentenced under twelve years. If he lied, he could be sentenced above seventeen years. (R574-75) On cross-examination, Lehman admitted being on probation when the incident occurred. (R578-80)

Antonio Duarte, the owner of Sonny's Gun-Shop, testified that he sold a Tech 9 Minnie Pistol on April 22, 1985 to

Petitioner. In addition, he stated that Petitioner bought ammunition from him on August 31, 1985. (R646-47)

Royce Kroenke, a salesman for Spendless Building Supplies, testified that he purchased a gun (State's Exhibit 6) from Petitioner for $150.00 just before Christmas, 1985. (R655-56) On January 25, 1986, Kroenke sold the gun to Kenneth Wier. (R656-57,659) The police got the gun from Wier on January 31, 1986. (R659)

Pauline Lehman, Scott Lehman's sister, was living with Petitioner in 1985. (R666) She had been in the military for two years, and she was familiar with weapons. (R666-667) Prior to the crime, she heard Petitioner ask Lehman how much money the Matterhorn Restaurant made in a night. Lehman replied that the restaurant made $1200.00 to $1500.00. She heard them discussing a drawing Lehman had made. Lehman was telling Petitioner how to get in and which way to take. (R668-69) She asserted that when she heard them talking about the robbery, and when she supplied them with pantyhose for a mask, she didn't think that they were serious. (R675,678).

On August 31, 1985, the day of the hurricane, Pauline went to a gun shop with Petitioner and Lehman. Petitioner purchased ammunition for his weapon. Although Petitioner and Scott were discussing the robbery at that time, she didn't believe them. (R694) That evening at around 11:00 or 12:00 p.m. while she was in bed, Petitioner woke her up. He was wet, and he only had on a pair of tan pants and tan shoes. He was not wearing the black

shiny jacket and gloves that he had on earlier that evening when he left the apartment. She testified that she had given Petitioner pantyhose to be used to make a nylon mask. **(R670-71)** According to Pauline, when Petitioner woke her up, he stated that he thought he had just shot a man. **(R671)**

Pauline saw her brother, Scott Lehman, later that night at around 2:00 or 3:00 a.m. **(R671)** Scott had Petitioner's weapon. **(R672)** Pauline testified that earlier that evening, Petitioner had told her that when he was running out of the restaurant, he slipped and dropped his weapon. He left the weapon behind, and began taking off his clothes as he ran home. **(R672)**

Pauline testified that her brother Scott was arrested on September **1, 1985.** She stated that he was charged with murder and robbery. Pauline also indicated that she and Petitioner were going to let Scott take the blame until they saw what it led to. **(R673)** Late in January, **1986,** Scott called and told her that he had plea bargained and that he had told the police the truth about the whole matter. **(R673)** Pauline testified that she loved Petitioner, and that the two of them were going to run and leave the State. **(R674)**

Pauline also testified that she was concerned about the trouble her brother was in, and that she was very close with her brothers. **(R689)** She indicated that she would help her brothers out anyway she could. **(R689)** In addition, it was made known to her that she could be charged with murder based upon some of the things which she had said. **(R683-84)** She agreed to testify against Petitioner. **(R684)**

Herbert Bush, a crime scene technician with the Tampa Police Department, collected nine millimeter shell casings at the crime scene on September 1, 1985, at around 12:00 a.m. (R700,704) In view of objections by defense counsel, the court excluded slides and photographs of the victim's wounds, except for two slides and three photographs (exhibits A,B,C,D,E) whichwere relevant to show the victim's multiple entry and exit wounds. (R712-723)

Peter Lardizabal, Medical Examiner, was accepted by the court as an expert in forensic pathology. (R729) He performed an autopsy on Hans Frischknecht on September 2, 1985. (R730) He testified that a bullet hit the right ventricle of the victim's heart, and that the victim bled to death. (R738) Lardizabal listed as the cause of death a gunshot wound to the left chest.

Ed Bigler, a firearms expert with FDLE, testified that the bullets which were recovered fromthe Matterhorn Restaurant and from the body of the victim, were fired by the gun in question (State's Exhibit six). Kroenke testified that he purchased this gun from Petitioner just before Christmas, 1985. (R741,748,655)

Following Bigler's testimony, the State rested. (R749) Petitioner's attorney moved for a judgment of acquittal, and the court denied the motion. (R752-53) Counsel also renewed all of his prior motions and objections, which included his objections to the State's peremptory strikes of blacks during voir dire. The court stood by its previous rulings. (R752) Petitioner then rested his case and renewed his motion for judgment of acquittal. Once again, the court denied the motion. (R753,761)

Following the charge conference regarding jury instructions, Petitioner's counsel objected to the court's denial of his proposed grand theft and third-degree murder instructions. **(R761-62)** Counsel objected to the court's denial of his requested instruction concerning his right to bear arms. **(R762-63)** The instruction read that the lawful ownership of firearms is protected by the Federal and State Constitutions, and that therefore the jury "must not draw any inference of guilt from his mere ownership of **a** firearm." (R1098) Defense counsel also objected to the court's denial of his instruction on justifiable use of deadly force, and he objected to the court's granting of the State's flight instruction. **(R762-63)**

During closing argument, the State made the following comments:

> The defendant had his day in court. I will tell you, ladies and gentlemen, our system provides for us to literally bend over backwards for defendants. He has an attorney. He has a trial. He gets to put the family on trial. We bend over backwards, but keep this in mind: You haven't heard one word of testimony to contradict what Scott and Pauline Lehman said other than Mr. Westfield's arguments.

(R813) Immediately following the comment, Mr. Westfield, Petitioner's counsel, objected to the statement as an implied comment on Petitioner's "right to remain silent, his failure not to put forth a defense." **(R814-15)** On this basis, counsel moved for a mistrial. (R815) The court denied the motion. (R815)

SUMMARY OF ARGUMENT

The trial court erred by denying Petitioner's motion for mistrial following the State's comment on Petitioner's silence during closing argument. The State's reference to the lack of testimony contradicting the State's witnesses, impermissibly highlighted Petitioner's decision not to testify.

The court erred by failing to require the State to provide non-racial reasons for its use of peremptory challenges against five black jurors. In light of the State's pattern of striking blacks, Petitioner met his initial burden of showing a strong likelihood that such challenges were based on race. Petitioner, who was not black but had a black attorney, had standing to object to the prosecutor's use of peremptory challenges to remove black venire members. He had standing under the 6th Amendment which guaranteed him the opportunity to obtain a jury composed of a fair cross-section of the community. He also had standing under the 14th Amendment Due Process and Equal Protection clauses.

The lower court also erred by denying Petitioner's requested jury instructions in regard to the lesser included offenses of grand theft and third degree murder. There was evidence of grand theft, since the victim's wife indicated that she had over $100.00 which she placed into the bag pursuant to the gunman's order. Therefore, since grand theft is an underlying felony which will support a third degree felony-murder charge, the

court erred by denying the requested third degree felony-murder instruction, as well as the grand theft instruction.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION FOR MISTRIAL FOLLOWING THE STATE'S COMMENT ON PETITIONER'S SILENCE DURING CLOSING ARGUMENT.

During closing argument, the state made the following comments:

> The defendant had his day in court. I will tell you, ladies and gentlemen, our system provides for us to literally bend over backwards for defendants. He has an attorney. He has a trial. He gets to put the family on trial. We bend over backwards, but keep this in mind: You haven't heard one word of testimony to contradict what Scott and Pauline Lehman said other than Mr. Westfield's arguments.

(R813) Immediately following the comment, Mr. Westfield, Petitioner's counsel, objected to the statement as an implied comment on Petitioner's "right to remain silent, his failure not to put forth a defense.'' (R814-15) On this basis, counsel moved for a mistrial. (R815) The trial court erroneously denied the motion. (R815)

In State v. Shepard, 479 So.2d 106 (Fla. 1985), the court stated the following:

> The proper test for reviewing alleged comments on the defendant's failure to testify is whether the comments are fairly susceptible of being interpreted by the jury as comments on the failure to testify.

The court in Shepard also stated the following:

> It is well settled that a prosecutor may comment on the uncontradicted or uncontroverted

> nature of the evidence during argument to the jury. White v. State, 377 So.2d **1149,** 1150 (Fla. **1979).**
>
> In White, we affirmed an order denying a motion for mistrial despite the fact that in referring to the testimony of the eye witness in closing argument, the prdsecutor remarked "You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument."

The State's comment in the case at bar was fairly susceptible of being interpreted by the jury as a comment on Petitioner's silence. It is true that the State's comment was basically the same as the prosecutor's comment in White, in which the court denied the defendant's motion for mistrial. Nevertheless, when one considers the context in which the State's comment was made, the comment is distinguishable from the prosecutor's comment in White. That is, the State's comment immediately followed previous remarks in which the State repeatedly referred to Petitioner. The State asserted that the defendant had his day in court, that the system bends over backward for defendants, that he had an attorney, and that he got to put the victim's family on trial. In light of these references to the defendant, the State's subsequent comment to the jury that they hadn't heard one word of testimony to contradict the State's witnesses, was fairly susceptible of being interpreted as referring to the lack of testimony from the defendant. For the same reason, the State's comment constituted more than a comment upon the uncontradicted or uncontroverted nature of the evidence, as was the case in White. Therefore, the State's reference to the lack of testimony contradicting the State's witnesses, impermissibly

highlighted Petitioner's decision not to testify. State v. Marshall, 476 So.2d 150 (Fla. 1985).

Florida case law has established that for purposes of appellate review, the harmless error doctrine applies to a comment on the defendant's right to remain silent. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In DiGuilio, the court stated the following:

> The harmless error test, . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

In the case at bar, the State's improper comment upon the defendant's right to remain silent constituted harmful as opposed to harmless error. Close analysis of the entire record indicates that there was clearly a reasonable possibility that the error contributed to the conviction. First of all, other than co-defendant John Lehman, none of the witnessses who were at the restaurant at the time of the crime, identified Petitioner as the triggerman. The only witnesses who pointed the finger at Petitioner were John Lehman and Pauline Lehman. Pursuant to the cross-examination of Petitioner's counsel, the credibility of each of these witnesses was called seriously into question. Prior to pointing the finger at Petitioner, Lehman fingered first Bill Moore and then James Stewart as the triggerman. (R568-70) In addition, Lehman testified that he knew that Judge Coe had asserted that he could "and probably very well would" get the electric chair if he

was found guilty at trial. (R572) Lehman stated that following Judge Coe's threat, he decided to enter into a plea agreement with the State. (R574) Pursuant to the deal, Lehman was to plead guilty to second degree murder and robbery, and he was to be sentenced within the 12 to 17 year guideline range; (R574-75) Also, he was told that if he cooperated with the State and gave truthful testimony, he could be sentenced under 12 years. If he lied, he could be sentenced above 17 years. (R575) Thus, the evidence indicated that Lehman was a biased witness, with a strong interest in testifying against Petitioner.

The other person who fingered Petitioner besides John Lehman was Petitioner's girlfriend at the time of the crime, Pauline Lehman. However, as John Lehman's sister, the reliability of her testimony was seriously called into question. She testified that she was concerned about the trouble her brother was in, and that she was very close with her brothers. (R689) She indicated that she would help her brothers out anyway she could. (R689) In addition it was made known to her that she could be charged with murder based upon some of the things which she had said. (R683-84) She agreed to testify against Petitioner. (R684) Thus, she had an interest in pointing the finger at Petitioner to protect not only her brother, but also herself.

In light of the biased, unreliable nature of John and Pauline Lehman's testimony, as well as the lack of testimony from bystanders at the crime scene identifying Petitioner as the gunman, the evidence against Petitioner was less than overwhelming.

Therefore, there is a strong possibility that the State's improper comment on silence contributed to the conviction. Consequently, the judgment and sentencing orders entered against Petitioner should be reversed, and the case remanded for a new trial.

~~ISSUE II~~

THE COURT ERRED BY FAILING TO REQUIRE THE STATE TO PROVIDE NON-RACIAL REASONS FOR ITS USE OF PEREMPTORY CHALLENGES IN REGARD TO FIVE BLACK JURORS; PETITIONER, WHO WAS NOT BLACK BUT HAD A BLACK ATTORNEY, HAD STANDING TO OBJECT TO THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO REMOVE BLACK VENIRE MEMBERS.

During voir dire, the State exercised peremptory challenges in regard to juror numbers 16, **22**, **29**, 35, and **41**, each of whom was black. (R366-70) Petitioner's attorney made timely objections in regard to each of those challenges, on the basis that they constituted the systematic exclusion of blacks from the jury. (R366-70) Petitioner's counsel asked the court to require the State to provide non-racial reasons for the exercise of its challenges in regard to each of the five black jurors. (R366-70) The court, which declared that the record should reflect that Petitioner was not black but that defense counsel was, overruled Petitioner's objections and refused to require the State to provide non-racial reasons for its challenges. (R367-70) The court committed reversible error in doing so.

In State v. Neil, 457 So.2d **481** (Fla. **1984)**, the court stated the following:

> A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race.

Once the objecting party makes such a showing, the burden shifts to the striking party "to show that the questioned challenges were not exercised solely because of the prospective jurors' race." Neil; see also Tillman v. State, 522 So.2d 14 (Fla. 1988), at pages 16-17.

In the case at bar, Petitioner satisfied his initial burden regarding the likelihood that the state exercised its peremptory challenges solely on the basis of race. When the State exercised its peremptory challenge in regard to juror number 22, Jean Collins, Petitioner's counsel objected, stating:

> She's the second strike of a black juror in this particular case and ask the Court to require the State to state a reason. . . my client is entitled to a juror of his peers. That includes the entire community. Systematic exclusion of black jurors is unconstitutional.

(R366-67) The State responded, "I don't think I am even going to respond to that, Your Honor. That is insulting." (R367) After the court denied defense counsel's objection, the State went on to exercise peremptory challenges in regard to four more prospective black jurors. (R367-70) This pattern of peremptory challenges exercised by the State against blacks constituted prima facie evidence that a "likelihood of discrimination exists." State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). As the court stated in Slappy, at page 22,

> Recognizing as did Batson that peremptory challenges permit "those to discriminate who are of a mind to discriminate," 476 U.S. at 96, 106 S.Ct. at 1723, we hold that any doubt as to whether the complaining party has met

> its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination. [e.s.]

Therefore, in the case at bar, the trial court erred by failing to conduct a hearing in which the State would be required to provide non-racial reasons for its use of peremptory challenges. Neil; Batson v. Kentucky, **476** U.S. **79, 39** Cr.L. **3061 (1986).**

Although this defendant was not black **(R367),** he nevertheless had standing to object to the prosecutor's use of peremptory challenges to remove black venire members. The Sixth Amendment to the United States Constitution guarantees the right to trial by an impartial jury. It is well established by case law that this right includes the opportunity to obtain a jury composed of a fair cross-section of the community. People v. Wheeler, **583** P2d **748** (Calif.Sup.Ct. **1978);** Ballew v. Georgia, **435** U.S. 223 **(1978);** Tillman v. State, 522 So.2d **14** (Fla. **1988),** at page **17.** In the recent case of State v. Superior Court, **157** Ariz. **541, 760** P.2d **541 (1988),** the court held that a white defendant had standing, pursuant to his Sixth Amendment right to an impartial jury, to object to the prosecutor's use of peremptory challenges to remove black venire members. The court asserted the following:

> We hold, therefore, that a prosecutor's racially motivated use of peremptory challenges in a particular case violates the jury guarantee clause of the sixth amendment. . .
>
> The discriminatory exclusion of jurors from any cognizable group necessarily violates the right to a chance for a fair cross-section, no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge, or any party to the action . . .

> We therefore adopt a clear, simple rule under the jury trial clause of the sixth amendment, the State may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privileges and obligations of jury service.

In light of the court's holding and reasoning in Gardner, Petitioner, who was not black, nevertheless had standing to object to the State's use of peremptory challenges to strike black venire members, as an infringement upon his opportunity to obtain a jury composed of a fair cross-section of the community.

Petitioner also had standing to challenge the State's use of peremptory challenges to strike black venire members, pursuant to Article I, section 16 of the Florida Constitution, which guarantees the right to an impartial jury. As the court stated in Neil at page 486,

> Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenge is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.

In addition to the Sixth Amendment, and Article I, section 16 of the Florida Constitution, Petitioner also had standing pursuant to the Fourteenth Amendment equal protection and due process clauses to object to the State's use of peremptory challenges to strike black venire members. First of all, it is

clear that although Petitioner was not black, he had standing to challenge the systematic exclusion of blacks from the jury as a violation of due process of law. As the court stated in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83, 94-95 (1972):

> . . . a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States . . .
>
> . . . we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service. [e.s.]

Petitioner also had standing based upon the Fourteenth Amendment equal-protection clause, to object to the State's use of peremptory challenges to exclude blacks. In Batson, the court pronounced the impropriety of racial discrimination in exercising peremptory challenges. Batson was decided under the Fourteenth Amendment equal protection clause and addresses cases where the defendant and the struck jurors are members of the same racial group. In the case at bar, although Petitioner was not black as were the jurors struck by the State, his attorney was black. **(R367)** Since his attorney served as his advocate and counsellor, they stood together as one. Therefore, because Petitioner's attorney was a member of the class being excluded by the State's peremptory challenges, Petitioner had derivative standing to object to those challenges based upon his relationship with his attorney.

Given that his attorney was black, Petitioner could have been disadvantaged by the systematic discriminatory exclusion of blacks from his jury.

It should also be noted that the black jurors who were struck by the State in Petitioner's trial, themselves had a right pursuant to the equal-protection clause, not to be discriminated against on the basis of race. Petitioner had standing to raise an objection on this basis to the State's exclusion of blacks from the jury.

Since Petitioner had standing to challenge the prosecutor's use of peremptory challenges against blacks, and since he demonstrated a strong likelihood that the state exercised peremptory challenges on the basis of race, the court erred by failing to conduct a Neil inquiry. Therefore, the defendant's judgment and sentencing orders should be reversed and the case remanded for a new trial. Simply remanding the case to the lower court for the holding of a Neil inquiry at this late date would be inadequate. A Neil hearing needs to be conducted during the voir dire process. Only then does the court "have the ability to observe and place on the record relevant matters about juror responses or behavior that may be pertinent to a Neil inquiry.'' Blackshear v. State, 521 So.2d 1083 (Fla. 1988).

ISSUE III

THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUESTED JURY INSTRUCTIONS IN REGARD TO THE LESSER INCLUDED OFFENSES OF GRAND THEFT AND THIRD DEGREE MURDER.

Following the charge conference regarding jury instructions, Petitioner's counsel objected to the court's denial of his proposed grand theft and third-degree murder instructions. (R762-63) The court's denial of those instructions was erroneous.

Grand theft is listed under the Schedule of Lesser Included Offenses (effective October 1, 1981) as a category 2 lesser included offense of the charge of robbery. Fla.R.Crim.P. 3.510 states the following:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
> . . .(b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence. [e.s.]

See In re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981). The trial court erred by failing to instruct the jury as to the lesser included offense of grand theft in the case at bar, because there was evidence of this offense. The crimes with which Petitioner was charged occurred on September 1, 1985. (R1033) At that time, theft of over $100.00 constituted a grand theft. Section 812.014(2)(6)1 Fla.Stat. (1985). Jo Carol Frischknecht, the victim's wife, testified that she had over $100.00 which she placed

into the bag pursuant to the gunman's order. (R421-23) In light of this evidence, the court erred by denying the grand theft instruction requested by Petitioner's counsel. Therefore, the court also erred by refusing to instruct the jury in regard to third degree felony murder as a lesser included offense of the first degree murder charge. That is, since grand theft is among the underlying felonies which will support a third degree felony murder charge (Section 782.04(4) Fla.Stat.), and since there was evidence of grand theft, the court erred by refusing to grant the third degree felony murder charge. In light of the court's refusal to instruct the jury as to the lesser included offenses of grand theft and third degree felony murder, the judgment and sentencing orders entered against Petitioner should be reversed, and the case be remanded for a new trial.

CONCLUSION

In light of the arguments, authorities, and cases cited herein, Petitioner respectfully requests this Honorable Court to reverse the decision of the lower appellate court and remand this case for appropriate relief.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER 0143265
TENTH JUDICIAL CIRCUIT

Robert Mack

ROBERT MACK
Assistant Public Defender

Public Defender's Office
Tenth Judicial Circuit
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, by mail on this 8th day of April, 1989.

Robert Mack

ROBERT MACK

RM:ksw