

OA 1-4-93

^{app. reg.}
FILED

SID J. WHITE

✓ AUG 11 1992

CLERK, SUPREME COURT

By [Signature]
Chief/Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,542

THE STATE OF FLORIDA,
Petitioner/Appellant,

vs.

RAMON ALEN,
Respondent/Appellee.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

✓ CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Blvd.,
Suite 505-S
Hollywood, FL 33021
(305) 985-4788

TABLE OF CONTENTS

Table of Citations ii
Preliminary Statement. 1
Statement of the Case and Facts. 2
Issue Presented for Review 9
Summary of the Argument. 10
Argument 11

I

LATIN PERSONS DO NOT CONSTITUTE
ONE DISTINCT, COGNIZABLE GROUP
ENTITLED TO PROTECTION UNDER
State v. Neil, 547 So.2d 481
(Fla. 1984). 11

II

THE TRIAL COURT DID NOT REVERSIBLY
ERR IN DETERMINING THAT THE STATE
DID NOT PEREMPTORILY CHALLENGE A
LATIN JUROR SOLELY DUE TO RACE. . . . 21

Conclusion 25
Certificate of Service 26

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Alen v. State</u> 596 So.2d 1083, (Fla. 3d DCA 1992).	Passim
<u>Barber v. Ponte</u> 772 F.2d 982 (1st Cir. 1985).	16
<u>Dusen v. Missouri</u> 439 U.S. 357, 363-364, 99 S.Ct. 358, 58 L.Ed.2d 579 (1979)	13
<u>Fox v. State</u> 779 P.2d 562, 566 (Okla. 1989); cert. denied, ___ U.S. ___, 110 S.Ct. 1538, 108 L.Ed.2d 777 (1990).	13
<u>Files v. State</u> 586 So.2d 352, 356-357 (Fla. 1st DCA 1991).	22
<u>Government of Virgin Islands v. Forte</u> 865 F.2d 59 (3d Cir. 1989).	16
<u>Greene v. Massey</u> 384 So.2d 24 (Fla. 1980).	18,19
<u>Hernandez v. New York</u> ___ U.S. ___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).	17,18
<u>Knight v. State</u> 574 So.2d 327, 329-330 (1st DCA 1990), rev. denied, 574 So.2d 141 (Fla. 1990).	22
<u>Knight v. State</u> 559 So.2d 327 (Fla. 1st DCA 1990); rev. denied, 574 So.2d 141 (Fla. 1990).	23
<u>Murchu v. United States</u> 926 F.2d 50 (1st Cir. 1991)	15
<u>Reed v. State</u> 560 So.2d 203 (Fla. 1990)	24
<u>Reed v. State</u> 14 F.L.W. 298 (Fla. June 15, 1989).	24
<u>State Ex Rel. Stratton v. Serna</u> 780 P.2d 1148, 1151 (N.M. 1989)	14

<u>State v. Neil</u> 457 So.2d 481 (Fla. 1984)	Passim
<u>Sweet v. United States</u> 449 A.2d 315 (D.C.Ct. App. 1982)	16
<u>Taylor v. State</u> 491 So.2d 1150, 1152 (Fla. 4th DCA 1986); rev. denied, 501 So.2d 1284 (Fla. 1986)	24
<u>Thomas v. State</u> 502 So.2d 994, 995 (Fla. 4th DCA 1987); rev. denied, 509 So.2d 1119 (Fla. 1987)	24
<u>United States v. Abell</u> 552 F.Supp. 316, 322 (D.Maine 1982)	14
<u>United States v. Alvarado</u> 891 F.2d 439 (2d Cir. 1989); <u>cert</u> <u>granted and jmn't vacated</u> (on other gnnds) 110 S.Ct. 2997 (1990)	19
<u>United States v. Anguilo</u> 847 F.2d 956 (1st Cir. 1988) <u>cert. denied</u> , 488 U.S. 852, 109 S.Ct. 138, 102 L.Ed.2d 110 (1988)	15
<u>United States v. Biaggi</u> 673 F.Supp. 96 (E.D.N.Y. 1987) <u>aff'd</u> , 853 F.2d 89 (2d Cir. 1988)	16
<u>United States v. De Gross</u> 960 F.2d 1433 (9th Cir. 1992)	16
<u>United States v. Di Pasquale</u> 864 F.2d 271 (3d Cir. 1988) <u>cert. denied</u> , 492 U.S. 906 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989)	15
<u>United States v. Duran de Amesquita</u> 582 F.Supp. 1326, 1328 (S.D.Fla. 1984)	15
<u>United States v. Gelb</u> 881 F.2d 1155 (2d Cir. 1989)	16
<u>United States v. Iron Moccasin</u> 878 F.2d 226 (8th Cir. 1989)	16
<u>United States v. Potter</u> 552 F.2d 901 (9th Cir. 1977)	13,14

<u>United States v. Pulgarin</u> 955 F.2d 1 (1st Cir. 1992).	19
<u>United States v. Rodriguez</u> 588 F.2d 1003, 1007 (5th Cir. 1979)	15
<u>United States v. Romero-Reyna</u> 867 F.2d 834 (5th Cir. 1989).	16
<u>United States v. Sanchez-Lopez</u> 879 F.2d 541 (9th Cir. 1989).	19
<u>United States v. Test</u> 550 F.2d 577, 591 (10th Cir. 1976).	14
<u>United States v. Underwood</u> 617 F.Supp. 713, 718-719 (N.D.Ala. 1985).	16,17
<u>Valle v. State</u> 474 So.2d 796, (Fla. 1985).	12,20
<u>Waller v. Butkovich</u> 593 F.Supp. 942, 949 (M.D.N.C. 1984).	14
<u>Willis v. Kemp</u> 838 F.2d 1510, 1516 (11th Cir. 1988).	15
<u>Woods v. State</u> 490 So.2d 24, 26 n.4 (Fla. 1986).	21

PRELIMINARY STATEMENT

The Petitioner, THE STATE OF FLORIDA, was the appellee in the court below and the prosecution in the Circuit Court. The Respondent, RAMON ALEN, was the appellant in the District Court and the defendant in the trial court. **The** parties will be referred to, in this brief, as they stand before this court. The symbol "R" will be used, in this brief, to refer to the Record on Appeal **before** the District Court, and the symbol "T" will designate the original transcript of lower court proceedings. The symbol "ST1" will be used, in this brief, to identify the transcript of May 8, 1989 at 1:30 P.M. which was attached to the Appellant's Motion to Supplement Record on Appeal of June 25, 1990, in the Third District, and the symbol "ST2" will refer to the transcript of May 9, 1989 at 11:00 A.M. which was attached to the same motion. The symbol "App." will refer to the Appendix to the Brief of Petitioner on Jurisdiction. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Responden, was charged by I form tion, n March 16, 1989 with Robbery and Resisting Arrest Without **Violence**. The jury, after a jury trial, found the defendant guilty of the Robbery charge, but not guilty of resisting arrest. (R. 16-17). The defendant was sentenced to twenty (20) years imprisonment. (R. 21-23A).

During jury selection, prospective juror Aida **Seda** was questioned by the court as follows:

THE COURT: Thank you very much, ma'am.

Yes, ma'am,

MS. SEDA: Aida Seda. I live in Hialeah. I've lived here for 13 years.

I'm a purchasing controller. I **am** divorced. I have a 14 year old. I have never served on a jury before.

THE COURT: Have you ever been a victim of a crime?

MS. SEDA: **Yes**.

THE COURT: What was it, ma'am?

MS. SEDA: I had my house broken into and I had a car stolen.

THE COURT: Okay. Have you ever been accuse of a crime?

MS. SEDA: No, I have not.

THE COURT: Or anyone close to you?

MS: SEDA: **No**.

THE COURT: Thank you very much,
ma'am.

(ST1, 11-12).

She was also queried by the State, as follows:

MR. McGEE: Ms. Seda, you live in
Hialeah?

MS. SEDA: Yes.

MR. McGEE: **And** you're a purchasing
controller where?

MS. SEDA: A women's apparel
manufacturing company.

MR. McGEE: That is located in
Hialeah, also?

MS. SEDA: Yes.

MR. McGEE: **This crime occurred in
Hialeah.**

MS. SEDA: Uh-huh.

MR. McGEE: I don't -- I can't
recall, I could be mistaken but I
don't -- is there anybody else from the
Hialeah area?

Is there anything about the fact
that this crime actually occurred
somewhere in, well, in the city of
Hialeah and Hialeah is not that big but
would that make you feel uncomfortable
sitting in judgement of the defendant
and listening to the **evidence** as you
will hear it tomorrow?

MS. SEDA: No.

MR. McGEE: Thank you very much.

(ST1, 55-56).

The questioning of Deogracias Arjona by the court was conducted as follows:

THE COURT: Thank you, sir. Yes, ma'am.

MS. ARJONA: Deogracias Arjona, I live in South Miami for 21 years. I'm divorced.

I have five adult children, two are students, three live out of state. One -- **two** in New Jersey, one in Chicago. Some are housewives. One works for -- at an office; another one is a secretary.

And I have never served on a jury. This is my first time. **What** else?

THE COURT: Have you ever been a victim of a crime?

MS. ARJONA: Never been a victim of a crime.

THE COURT: Or anybody close?

MS. ARJONA: None of my family.

THE COURT: Have you ever been accused of a crime?

MS. ARJONA: Never been accused of a crime.

THE COURT: Or anyone close to you?

MS. ARJONA: Not anyone close to me.

(ST1, 19-20).

The State peremptorily challenged Ms. Seda, initially without objection. (ST1, 78). The following took place when Ms. Arjona was stricken:

MR. MCGEE: We will strike Ms. Arjona.

MR. GUTIERREZ: I would object to that strike.

I think she is Spanish and they have already stricken Aida Seda and there is only one, two, three Spanish people, four Spanish people on the whole panel and this is the second one that he's stricken. [sic]

I'm asking at this time that the court conduct an inquiry.

THE COURT: Okay.

State, this is the second Spanish person that you struck and the Court would also note that you had accepted this particular person before. This is done on a back-strike.

MR. MCGEE: Exactly.

THE COURT: What is the reasoning?

MR. SAUL: First, take notice that Aida Seda was sleeping throughout the entire proceeding, almost.

THE COURT: I didn't see anybody sleeping.

MR. GUTIERREZ: Sleeping? She answered the questions.

MR. MCGEE: It is **up** to you right now. Ms. Seda was very - her whole demeanor is one of disgust with this proceeding.

THE COURT: I did see that. I did see that,

MR. GUTIERREZ: That is still not a basis. Disgust with the proceeding is no basis, they have to have a legal basis.

MR. MCGEE: The State has a right to have people who are concerned and interested in their community, that criteria as to -- well, I'll leave it up to **the** Court.

Ms. Arjona, Scott my colleague, we have talked about this; he just doesn't like her but there is not a real objective --

We would like to get -- I'm going to share all of our work product for the purpose of this record,

I would -- I think I mentioned it a little while ago. At this point, he's used up all his strikes, I can get whoever I want.

I prefer Ms. Fernandez. She happens to be **Latin** and I'm going to reach Ms. Fernandez with my strikes.

Now, as far as Ms. **Arjona** is concerned, I'm not sure I can give an objective sense of why we -- **she** is **divorced** with five children and she has **never** been a **juror** before.

When you contrast that with Ms. Fernandez - this is an area of law, reasons given, which are valid or not valid and I can only say to the Court that it absolutely has nothing to do with Latin origin, ethnic origin,

I don't know who it was you mentioned, there was somebody else.

MR. GUTIERREZ: Aida.

MR. MCGEE: You **said** there were only four Latins.

MR. GUTIERREZ: Boria, Aida Fernandez --

THE COURT: Seda is the one **from** Hialeah?

MR. GUTIERREZ: Right.

MR. MCGEE: Aida is the one **from** Hialeah,

THE COURT: **She** was thoroughly not interested **in** the **proceeding**.

MR. GUTIERKEZ: Even though they have no interest, it is not a valid basis. If the Court will conduct their own inquiry, can you **be** impartial, will you follow the law.

THE COURT: We have already done the inquiry of her and this is peremptory challenges,

Since the state had made an indication that they really do want Ms. Fernandez, I don't see **any** discriminatory problems on the part of the state in terms of excluding that juror.

MR. GUTIERREZ: My basis is that they are discriminating because there were two Latin jurors that were already going to be stricken. What is that -- that there has to be a pattern of discrimination.

THE COURT: There is no pattern.

MR. GUTIERREZ: Aida **said** that --

THE COURT: She is not interested.

MR. GUTIERREZ: That is a peremptory challenge by the state. They have no reason except that she's not interested, no legal **reason**.

THE COURT: They explained it.

MR. GUTIERREZ: Deogracias **Arjona**, they have not given a legal reason or valid basis.

THE COURT: As far **as** I'm concerned, that is the first strike because the other one was clearly objectively done and that they said Ms. Seda is not interested and they have gone one step further and indicated that they want Ms. Fernandez so they don't have a pattern of excluding Hispanics off the jury.

They are trying to get the best Hispanics that they feel would be best suited for this case,

Your objection is noted and overruled. We already have conducted our inquiry and the Court is ruling that there is no discriminatory practice on the part of the state.

(ST1, 80-85).

The State did not reach Mrs. Fernandez, as a juror, although they struck Mr. White in order to reach her as an alternate (ST1, 87-89). The defense objected, on the same grounds, once again, saying, "**She** is going to be the alternate, **so** we do not have a Spanish juror on our jury." (ST1, 87-88). The Court simply said, "We have a jury and an alternate" and **the** defense responded, "Please note our objection for the record." (ST1, 89).

The Petitioner reserves the right to set forth additional facts in the argument portion of this brief, as appropriate.

ISSUE PRESENTED FOR REVIEW

I

WHETHER LATIN PERSONS DO NOT CONSTITUTE ONE DISTINCT, COGNIZABLE GROUP ENTITLED TO PROTECTION UNDER State v. Neil, 457 So.2d 481 (Fla. 1984)?

II

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINING THAT THE STATE DID NOT PEREMPTORILY CHALLENGE A LATIN JUROR SOLELY DUE TO RACE?

SUMMARY OF THE ARGUMENT

I

This Court has **held** that "Latin American" is a term which encompasses people from too many different countries and cultural backgrounds and attitudes to constitute a single cognizable **class** for constitutional protection purposes. The district court chose to ignore this court's opinion, which is supported by other substantial authority, and relied instead on inferences drawn from dicta in a plurality opinion of the United States Supreme Court. It is respectfully submitted that the district court was required to abide by the opinion of this court in the matter, and that its failure to do so requires reversal.

II

The trial court could properly find that the reasons given by the State for the challenge of the one juror **concerned herein** were race neutral, reasonable and supported by the record where they were based on characteristics not shared by any **non-Latin** juror, and where the State utilized a peremptory challenge in order to obtain a Spanish-surnamed alternate.

ARGUMENT

I

LATIN PERSONS DO NOT CONSTITUTE ONE DISTINCT, COGNIZABLE GROUP ENTITLED TO PROTECTION UNDER State v. Neil, 547 So.2d 481 (Fla. 1984).

This court, in State v. Neil, 457 So.2d 481 (Fla. 1984), specifically limited the impact of that case to discrimination due to race, as follows:

Although specifically dealing with **blacks**, both *Wheeler* and *Soares* speak generally of group bias based on racial, religious, ethnic, sexual or other grounds. *Thompson*, on the other hand, appears to be limited solely to race, specifically blacks. We choose to limit the impact of this case also and do so to peremptory challenges of distinctive racial groups solely on the basis of race. The applicability to other groups will be left open and will be determined as such cases arise.

Id. at 487.

While the district court recognized that this court **chose** to limit the impact of its holding solely to race (**App. 3**), it nevertheless chose to find that, ". . . Hispanics constitute a cognizable group within this community so as to entitle a defendant, pursuant to article I, section 16 of the Florida Constitution, to dispute the state's use of a peremptory challenge against a Hispanic juror when the challenge is alleged

to have been made solely on the basis of the juror's ethnicity.
. . ." (App. 1-2, 5).¹

This court, after State v. Neil, 457 So.2d 481 (Fla. 1984) was decided, specifically dealt with whether or not Latin Americans were a cognizable group for constitutional purposes, and had the following to say:

Appellant, by his characterization of himself as a Latin American, has failed to prove that he belongs to an identifiable group. "The first step is to establish that the group is one that is a recognizable, distinct **class**, singled out for different treatment under the laws as written or as **applied.**" *Id.* The term "Latin American" encompasses people from too many different countries and different cultural backgrounds and attitudes to constitute a single cognizable class for equal protection analysis. Accord, United States v. Rodriguez, 588 F.2d 1003 (5th Cir. 1979). See also United States v. Duran de Amesquita, 582 F.Supp. 1326 (S.D.Fla. 1984) (holding that "hispanics" do not constitute a recognizable class). (emphasis added).

Valle v. State, 474 So.2d 796, 800 (Fla. 1985)

¹ The district court used "Spanish," "Latin" and "Hispanic" without distinguishing them. Alen v. State, 596 So.2d 1083, 1084 n.1 (Fla. 3d DCA 1992). However, the term "Latin" is used in this brief because it is one of the terms used by the defense in the trial court (**ST1**, 84) ("Hispanic," as used by the district court, was not) and is the broader word.

It is respectfully submitted that it was the district court that erred in failing to follow the opinion of this court on the issue. There are substantial indications that this court was correct.

Generally, in order to **be** considered a cognizable group for Fifth and Sixth Amendment purposes, a group must **be** shown to possess three (3) characteristics. It must be sufficiently numerous within the community to **be** considered a distinct **class**, it must be perceived as distinct by the community at large and it must possess a cohesiveness of **attitudes** or **ideas** which may not be adequately represented by other segments of society. See, Duren v. Missouri, 439 U.S. 357, 363-364, 99 S.Ct. 358, 58 L.Ed.2d 579 (1979); United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977).

There is certainly no question that, if Hispanics are the class concerned, they are sufficiently numerous where, according to the 1990 Census data, the population of Dade County was 49.2 percent Hispanic. Alen v. State, 596 So.2d 1083, 1085 (Fla. 3d DCA 1992). If the concerned group was the Spanish, however, which was the original and primary objection of **the** Respondent (ST1, 80-84), then there would be some doubt if the movant had met his original burden in this regard. See, Fox v. State, 779 P.2d 562, 566 (Okla. 1989); cert. denied, ___U.S.___, 110 S.Ct. 1538, 108 L.Ed.2d 777 (1990)(finding that Asians were not a

distinct class where they constituted only 0.99% of the population).

Hispanics, or even Latins, almost certainly also meet the second characteristic required **for** cogniaability, that the group is perceived as distinct by the community at large. United States v. Abell, 552 F.Supp. 316, 322 (D.Maine 1982); See also, United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977). This is the subject of some significant discussion in the district court opinion. Alen at 1085. However, as Judge Gersten points out in his concurring opinion, perception is not always reality. Id. at 1091.

However, in order to be considered cognizable, the group must not only be perceived as distinct by the community at **large**, but must also be **perceived** as distinct by itself:

, , . , To establish cognizability, it is necessary to prove the following:

(1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu: and (3) a 'community of interest' which may not be represented by other segments of society. (emphasis added).

United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976); Waller v. Butkovich, 593 F.Supp. 942, 949 (M.D.N.C. 1984); State Ex Rel. Stratton v. Serna, 780 P.2d 1148, 1151 (N.M. 1989).

Similarly, ". . . the group must be internally cohesive, i.e., there must be a common thread or similarity of attitudes binding all members of the group. *Willis I*, 720 F.2d at 1216; *Potter*, 552 F.2d at 904. Finally, these attitudes must not be shared by the remainder of the community, such that the interests of the cognizable group will not be represented if it is excluded from jury service. . . ." (emphasis added) *Willis v. Kemp*, 838 F.2d 1510, 1516 (11th Cir. 1988). Thus, it is understandable why the United States Fifth Circuit would find that, "there is simply no evidence upon which this Court could **base** a finding that persons of such diverse national origins as Cubans, Mexicans and Puerto Ricans possess such similar interests that they constitute a cognizable group. . . ." *United States v. Rodriguez*, 588 F.2d 1003, 1007 (5th Cir. 1979); See also, United States v. Duran de Amesquita, 582 F.Supp. 1326, 1328 (S.D.Fla. 1984).

Thus, it is understandable why Italian-Americans, Young adults, Irish-Americans, attorneys, teachers, clergymen, physicians, dentists and nurses have not been considered cognizable groups for constitutional protection purposes. See, Murchu v. United States, 926 F.2d 50 (1st Cir. 1991); *United States v. Anguilo*, 847 F.2d 956 (1st Cir. 1988); cert. denied, 488 U.S. 852, 109 S.Ct. 138, 102 L.Ed.2d 110 (1988); *United States v. Di Pasquale*, 864 F.2d 271 (3d Cir. 1988); cert. denied,

492 U.S. 906, 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989); Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985); Sweet v. United States, 449 A.2d 315 (D.C.Ct. App. 1982). It is equally understandable why men, women, Jewish persons, American Indians, Mexican-Americans, white persons and Italian-Americans (same ethnic group, different district) have been considered to be distinct, cognizable groups for such purposes. See, United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992); United States v. Gelb, 881 F.2d 1155 (2d Cir. 1989); United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989); United States v. Romero-Reyna, 867 F.2d 834 (5th Cir. 1989); Government of Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989); United States v. Biaggi, 673 F.Supp. 96 (E.D.N.Y. 1987); aff'd, 853 F.2d 89 (2d Cir. 1988).

However, if the word "Latin" is used to describe the group concerned, (a perfectly acceptable word to describe it, according to the district court) as Judge Gersten pointed out, we would be lumping together **people** with such diverse cultures and attitudes as Spanish-Americans, Franco-Americans, Portugese-Americans, Italian-Americans and Romanian-Americans. See, Alen at 1094. While one or more of these groups might, by itself, be considered "cognizable," "cognizable groups cannot be added together so as to make a separate "cognizable group" for purposes of determining a proper representation in the venire. United States v. Underwood, 617 F.Supp. 713, 718-719 (N.D.Ala. 1985). As the court points out in that case, to hold otherwise could

lead to such absurd results as finding that the combined "cognizable group" of black people, females, the poor, the elderly and Catholics were unconstitutionally over represented or underrepresented. Id. at 718

However, there is, certainly, authority in support of the opinion of the district court. The district court, itself, relies primarily on Hernandez v. New York, ___U.S.___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), summarizing that case by stating, ". . . . The Court held that under the Equal Protection Clause, Hispanics cannot be peremptorily challenged on the basis of their race or ethnicity." Alen at 1085. This **appears** to be a somewhat oversimplified view of the Hernandez case, however.² It is true that, in the plurality opinion (in which four justices join), Justice Kennedy begins as follows:

Petitioner Dionisio Hernandez asks us to review the New York state courts' rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity. If true, the prosecutor's discriminatory use of peremptory strikes would violate the Equal Protection Clause as interpreted by our decision in *Batson v. Kentucky*, 476

² It should be noted that neither **side**, in Hernandez, argued that Latinos were not a cognizable group entitled to protection under the Fifth Amendment. New York simply argued, successfully, that their exercise of peremptory challenges was validly based on reasons other than the fact that the challenged persons were Latino.

U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69
(1986). . . .

Id. at 111 S.Ct. 1864.

However, subsequently, in that opinion, it appears that the court is dodging the "Latino/Hispanic" issue:

. . . . In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926) (law prohibiting **keeping** business records in other than specified languages violated equal protection rights of Chinese businessmen). . . .

Id. at 1872-1873.

There is some doubt, of course, on the precedential value of an opinion in which only four members join. See, Greene v. Massey, 384 So.2d 24 (Fla. 1980).

Justice O'Conner's concurring opinion, in which Justice Scalia joined, is somewhat confusing, but does note that, ". . . . No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the equal protection clause unless it is based on race. . . ." Id., at 1874. As the specially concurring opinion

of Judge Gersten in Alen points out, "Hispanic" encompasses all of the human races and is not a race in itself. Id., at 1092.

Indeed, Judge Gersten points out the difficulty of defining the purportedly distinct, cognizable group. He notes that religion, race, national origin, and language all appear to be insufficient to define the group. Alen at 1092-1095. Surnames, which **appears** to be the only practical defining characteristic, would seem to be grossly inadequate where, as pointed out by Judge Gersten, ". . . a study of the Bureau of the Census . . . showed that about one-third of those who claim Hispanic origin do not have a Spanish-language surname. Furthermore, one-third of those who have Spanish-language surnames do not consider themselves Hispanic." Alen at 1093. Nevertheless, it is certainly true that a number of courts have held that Hispanics do constitute a distinct, cognizable group for Fifth and Sixth Amendment purposes. United States v. Pulgarin, 955 F.2d 1 (1st Cir. 1992); United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989); United States v. Alvarado, 891 F.2d 439 (2d Cir. 1989); cert granted and jmn't vacated (on other gnds) 110 S.Ct. 2997 (1990).

The Respondent, in the trial court, never even attempted to show that Latins or Spanish were a cognizable group within the meaning of Neil. Therefore, it has not been established, as a matter of either law or fact, that the group that the Respondent

complained was being improperly excluded is a class entitled to protection under State v. Neil, 457 So.2d 481 (Fla. 1984). Indeed, if this court meant what it, said in Valle v. State, 474 So.2d 796 (Fla. 1985), it appears that it could not be such a group.

Further, as Judges Hubbart and Gersten point out in Alen, if "Latins" are found to be a cognizable group entitled to constitutional protection, then the peremptory challenge, a procedure deemed essential to a fair trial for hundreds of years, is doomed.

It is, therefore, respectfully submitted that the district court opinion should be quashed on this ground, alone.

II

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DETERMINING THAT THE STATE DID NOT PEREMPTORILY CHALLENGE A LATIN JUROR SOLELY DUE TO RACE?

There is no question that the challenge of Ms. **Aida** Seda can not reasonably be considered to have been motivated by her ethnicity. **Where**, as the trial court agreed, her whole demeanor was one of disgust with the proceeding and she was thoroughly disinterested in the proceeding. (§T1, 81-83). If, **as** we know, not wanting a reluctant juror is not evidence of discrimination, pursuant to Woods v. State, 490 So.2d 24, 26 n.4 (Fla. 1986), then not wanting a juror who is disgusted and thoroughly disinterested in the proceedings is certainly not such evidence. (§T1, 81-83). Additionally, the district court specifically found that, ". . . . the peremptory challenge of the first juror was based upon acceptably neutral grounds. . . ." Alen at 1085.

The reasons given for the challenge of the second juror were as follows:

Ms. Arjona, Scott my colleague, we have talked about this; he just doesn't like her but there is not a real objective --

We would like to get -- I'm going to share all of our work product for the purpose of this record.

I would -- I think I mentioned it a little while ago. At this point, he's

used **up** all his strikes, I can get whoever I want.

I prefer Ms. Fernandez. She happens to be Latin and I'm going to reach Ms. Fernandez with my strikes.

Now, as far as Ms. Arjona is concerned, I'm **not** sure I can give an objective sense of why we -- **she** is divorced with five children and she has never been a juror before.

When you contrast that with Ms. Fernandez - this is an area of law, reasons given, which are valid or not valid and I can only say to the Court that it absolutely has nothing to do with Latin origin, ethnic origin.

(ST1, 82-83).

It has been held that being unemployed and divorced with five children supported a finding that a peremptory challenge was not racially motivated. Files v. State, 586 So.2d 352, 356-357 (Fla. 1st DCA 1991). Similarly, that a prospective juror was a cook, a single mother of four and did not own a home, although considered marginal, was an acceptable reason to challenge under Neil. Knight v. State, 574 So.2d 327, 329-330 (1st DCA 1990), rev. denied, 574 So.2d 141 (Fla. 1990). Thus it has been **held** that reasons almost identical to those given by the prosecution in **this** case have been held to be acceptable, if so found by **the** trial **court**.

This is certainly understandable, given that this court has found:

Within the limitations imposed by *State v. Neil*, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. *State v. Slappy*. Only one who is present at trial can discern the nuances of the spoken word and the demeanor of those involved. . . .

* * *

. . . . In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

Id. at 206.

Additionally, of course, the State said that it preferred Ms. Fernandez, another "Spanish-surnamed" juror who also had five children, but was married and had worked for Barnett Bank for ten years. (ST1, 26-27, 81-83). Although, Ms. Fernandez did not serve on the jury, she **was** the alternate because the State challenged a prospective juror named Willie White in order to get to her. (ST1, 87). **Indeed**, they specifically noted that, "We like Ms. Fernandez who was able to describe not only her five kids but tell us that each and every one of them has a wonderful job, Clerk's office, vice president of Ocean Bank **and**, CPA, Secretary and a guy that installs alarms." (ST1, 88). This is also similar to *Knight v. State*, 559 So.2d 327 (Fla. 1st DCA 1990); rev. denied, 574 So.2d 141 (Fla. 1990), in which the

fact that the State challenged a white prospective juror to **add** a **black** panel member was a factor.

While the reasons for challenging Ms. Arjona may not have been as articulate as those concerning Ms. Seda, given the breadth of trial court discretion in the matter, it is respectfully submitted that they did not require reversal. That a juror demonstrated a "wishy-washy" demeanor, when found valid by the trial court, supported a challenge of a black juror (where three black prospective jurors were challenged). Thomas v. State, 502 So.2d 994, **995** (Fla. 4th DCA 1987); rev. denied, 509 So.2d 1119 (Fla. 1987). Similarly, not liking the way the jurors related to the prosecutor or their attitudes has been held to be a valid reason for challenge where so found by the trial court. Taylor v. State, 491 So.2d 1150, 1152 (Fla. 4th DCA 1986); rev. denied, 501 So.2d 1284 (Fla. 1986). Being unemployed for a year while on workmen's compensation, an "uneasy chemistry" between the potential juror and the prosecutor and having been a hospital messenger for a number of years, were not reasons which required reversal where not found invalid by the trial court. Reed v. State, 560 So.2d 203 (Fla. 1990); Reed v. State, 14 F.L.W. 298 (Fla. June 15, 1989). Given that these have been held to be acceptable reasons, it is respectfully submitted that the reasons given in this case were within the discretion of the trial court to accept.

It should also be noted that the victim and primary State witness in this case was Juan Roig, another Spanish-surnamed person (ST2, 127-144), clearly minimizing any motivation the State may have had to exclude such persons from the jury.

Therefore, even if Latins are a group entitled to protection under Neil the reasons given by the State and accepted by the trial court should not have been held to constitute reversible error.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that the decision of the district court should be vacated and this action remanded for further consideration in light of an opinion of this court which is consistent with the position of this brief.

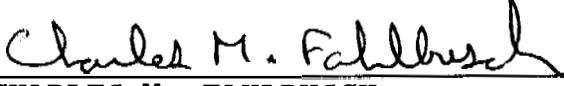
ROBERT A. BUTTERWORTH
Tallahassee, Florida



CHARLES M. FAHLBUSCH
Florida Bar No. 0191948
Assistant Attorney General
Department of Legal Affairs
4000 Hollywood Boulevard
Suite 505-South
Hollywood, Florida 33021
(305) 985-4788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER ON THE MERITS was furnished to ROBERT KALTER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 14th day of August, 1992.



CHARLES M. FAHLBUSCH
Assistant Attorney General