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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,542

THE STATE OF FLORIDA,

Petitioner,

-vs-

RAMON ALEN,

Respondent.

O/A 1/4/93

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The respondent, RAMON ALEN, was the appellant in the District Court and the defendant in the trial court. The Petitioner, the State of Florida, was the appellee in the court below and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R." and "T." will be used to refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively. The symbol "App" will be used to denote the appendix. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts.

ISSUE FOR REVIEW

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY RULED THAT IT WAS ERROR FOR THE PROSECUTION TO DISCRIMINATE AGAINST HISPANICS IN JURY SELECTION.

SUMMARY OF *ARGUMENT*

The unanimous en *banc* decision of the Third District Court of Appeal which held that Neil should be extended to prohibit ethnic discrimination and that Hispanics *are* a cognizable ethnic group is consistent with this Court's desire to eliminate discrimination in the judiciary and therefore, this Court should join hands with numerous other state and federal courts which have already held that it is improper to exclude Hispanics from jury service based upon their ethnic background.

The Third District Court of Appeal also correctly concluded that respondent was entitle to a new trial since the state failed to give an ethnic neutral reason for excluding Juror Arjona. Therefore, this Court should affirm the unanimous opinion of the Third District Court of Appeal.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY RULED THAT IT WAS ERROR FOR THE PROSECUTION TO DISCRIMINATE AGAINST HISPANICS IN JURY SELECTION.

Introduction

During jury selection, the prosecutor used two peremptory challenges to exclude Hispanic jurors with the result that no Hispanics served on the jury. (T. 80). Defendant requested that the state be required to explain why it excluded the two Hispanics from serving on the jury. (T. 81). The trial court concluded that there was a substantial likelihood of discrimination and required the state to explain its reasons for excluding the two Hispanic jurors. (T. 81). The state's reasons as to the first juror, Seda, is unsupported by the record; as to the second juror, Arjona, the state acknowledged the absence of any reason. Nevertheless, the trial court overruled defendant's objection and sanctioned the state's exclusion of the two Hispanic jurors. (T. 85).[1]

The Third District Court of Appeal in a unanimous en banc decision (two judges filed concurring opinion) ruled that Hispanics are a cognizable class and that *Neil*, should be extended to prohibit ethnic discrimination. The court also concluded that the state failed to give a valid reason for excusing juror Arjona and, therefore, ordered a new trial. The state now argues to this Court that *Neil*, should be limited only to racial discrimination and even if it were extended to ethnic discrimination, Hispanics are not a cognizable class. Finally, the state argues even if *Neil*, should apply, the Third District Court of Appeal erred in concluding that the state wrongfully excluded Juror Arjona. It is respondent's position that the Third District Court of Appeal correctly concluded that Neil should apply to ethnic discrimination;

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[1]It should be noted that at the trial when defense counsel objected to the wrongful exclusion of Hispanic people from the jury, the state never took the position that Neil did not apply to ethnic discrimination. Nor did the state take the position that Hispanics are not a cognizable group in this community.

Hispanics are a cognizable ethnic group; and the state wrongfully excluded juror Arjona.

I. *Neil* Should Be Extended To Prohibit Ethnic Discrimination In Jury Selection

In Neil, this Court, relying on opinions from the California and Massachusetts Supreme Courts, *People* v. *Wheeler, 583* P.2d 748 (Cal. 1978), and *Commonwealth* v. *Soares,* 387 N.E.2d 499 (Mass. 1978) held that it was "time in Florida to hold that jurors should be selected on the basis of their individual characteristics and that they should not be subject to being rejected solely because of the color of their skin."

In Neil, the prospective jurors whom the state sought to exclude from jury service were black. This Court recognized that neither the California Supreme Court in *Wheeler*, supra nor the Massachusetts Supreme Court in Soares, *supra* limited their opinion's to racial discrimination; however, the court decided to limit the holding in *Neil,* to racial discrimination. The court did state however, that "the applicability to other groups will be left open and will be determined as such cases arise." *State v.* Neil, 453 at 487. It is respondent's position that *Neil* should be extended *to* preclude ethnic discrimination in jury selection.

Both racial and ethnic discrimination violate Article I, Sections 2, 9, 16, 21, 22 of the Florida Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. In *State v. Slappy*, 522 So.2d 18 (Fla. 1988), the court recognized that constitutional prohibitions against discrimination restrict the scope of the peremptory-challenge exercise.

An historical analysis of numerous United States Supreme Court cases supports the proposition that ethnic discrimination, just as racial discrimination, *can* not be tolerated by the courts of this state.

In *Smith v. Texas*, 311 U.S. 128, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940). Justice Hugo Black recognized the evils of racial discrimination in jury selection when he stated the following:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

In *Thiel v. Southern Pacific* Co., 328 U.S. 217, 66 S.Ct. 984, 985-86, 90 L.Ed. 1181 (1946), the United States Supreme Court recognized that discrimination in jury selection is violative of the United States Constitution even when the discrimination is not racially motivated. In ruling that it was improper to eliminate daily wage earners from the jury pool, the United States Supreme court stated the following:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165 85 L.Ed. 84; Glasser v. United States, 315 U.S. 60, 85, 62 S.Ct. 457, 471, 86 L.Ed. 680. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

In Taylor *v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975), the issue before the United States Supreme Court was whether a male could object to the systematic exclusion of females from the jury venire. The Supreme Court once again recognized that:

> [c]ommunity participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but it is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the

> community cannot be squared with the constitutional concept of jury trial.

If our judicial system excludes identifiable groups who play a major role in our society from participation in jury duty, then it is impossible for the public to have confidence in the system. The same rationale that prohibits sex discrimination prohibits ethnic discrimination. If a large segment of a population *can* be excluded from serving on a jury based on ethnic background, it is impossible for that ethnic group, along with all the citizens in the community, to have confidence in our judicial system.

The United States Supreme Court *case* most on point as to whether discrimination other than racial discrimination is repugnant to our constitutions is Hernandez *v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 671, 98 L.Ed.2d 866 (1954). In Hernandez *v. Texas*, the issue before the court was whether a Mexican American could object to the systematic exclusion of Mexican Americans from the jury venire. In recognizing that discrimination in this country is unfortunately not only limited to racial discrimination, the United States Supreme Court stated the following:

> . . . prejudices *are* not static, and from time to time other differences from the community norm may define other groups which need the same protection [as that afforded to blacks] . . . When the existence of a distinct class of is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory" -- that is, based upon differences between "white" and Negro.

As the state properly concedes, the United States Supreme Court in *Hernandez v. New York*, __U.S.__, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) has once again recognized that it is a violation of the equal protection clause to exclude a juror based on their ethnic background.

A review of all the above cited United States Supreme Court cases establishes one theme that exists in all of the cases. It is apparent that our Supreme Court has recognized that

peremptory challenges cannot be used to exclude individuals based upon their race, ethnic background or sex.

As further support for the position that ethnic discrimination is just as improper as racial discrimination, defendant would rely on the rationale of the California Supreme Court in *Trevino v. State*, 704 P.2d 719 (Cal. 1983), a decision cited with approval in *Slappy*.[2] In *Trevino*, the California Supreme Court was presented with the same issue that is before this Court. In that case, the court held that a defendant could object to the wrongful exclusion of Hispanics from the jury. In recognizing that ethnic discrimination is just as reprehensible as racial discrimination, the California Supreme Court stated:

> The bulk of the case law analyzing representative cross-section claims involves discrimination against a cognizable class defined by race or sex. (See, *e.g.*, *Duren v. State of Missouri*, (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (women); *Taylor, supra*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (women); Wheeler, *supra*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (Blacks); *Johnson*, supra, 22 Cal.3d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (Blacks); Hall, supra, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (Blacks).) This type of discrimination, based on physical attributes, often is more easily isolated than ethnic discrimination, which may turn on some nonphysical characteristic such as a name, an accent or a style of dress. Nonetheless, these more subtle forms of ethnic discrimination are no less reprehensible than the most overt race or sex discrimination.

The most compelling evidence to establish that this Court is ready to expand the holding in *Neil* to eliminate ethnic discrimination is the report of the Racial and Ethnic Bias Study Commission. On December 11, 1989, then Chief Justice Raymond Ehrlich issued an order

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[2] In accord with *Trevino*, numerous federal and state courts have already held that ethnic discrimination is prohibited in jury selection. *See United States v. Giraldo*, 905 F.2d 38 (2d Cir. 1990; *United States v. Alvarado*, 891 F.2d 439 (2d Cir. 1989); *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989); *United States v. Alcanter*, 832 F.2d 1175 (9th Cir. 1987); *Fields v.* People, 732 P.2d 1145 (Colo. 1987); *State v. Gonzalez*, 538 A.2d 210 (Conn. 1988); State *v. Cantu*, 750 P.2d 591 (Utah 1988); *State v. Reyes*, 788 P.2d 1234 (Ariz.App. 1989); *People v. Reyes*, 542 N.Y.S. 178 (S.Ct. 1989); People *v. Trevino*, 704 P.2d 719 (Cal. 1985); *Atuesta v. Texas*, 788 S.W.2d 382 (Tex. App. 1990); *State v. Paz*, 789 P.2d 1 (Idaho 1990).

which created the Racial and Ethnic Bias Study Commission, to study the effects of racial and ethnic discrimination in our judicial system. His order recognized that Florida's judicial system is "founded upon the fundamental principle of the fair and equal application of the rule of law for all." The central recommendation made by the commission was that the judicial system must be more cognizant of racial and ethnic issues and that there must be a concerted effort to increase the number of African Americans and Hispanics in all phases of the judicial system from the police department to the Florida Supreme Court.

The Florida Commission on Racial and Ethnic Discrimination in its initial report correctly recognized the following:

> [D]iversity speaks to the very essence of justice and democracy. The tapestry of Florida's population is a colorful blend of many different cultures and racial groups, held intact by a code of both written and unwritten laws and legal principles. Inclusion of minorities in the work force of Florida's judicial system is vital to the goal of keeping the fabric of our society together. The State simply cannot expect continued acceptance of a judicial system in which minorities are virtually invisible in positions of decision-making and responsibility.

If this Court wants to ensure that African Americans and Hispanics have a greater input into our judicial system, the first place to start is the jury system which is the cornerstone of our judicial system. The majority of American citizens only come in contact with the judicial system as potential jurors. Therefore, the first and most important place to increase minority participation is the jury system.

Neil endeavored to eliminate discrimination in our judicial system by eliminating impermissible bias in jury selection, The first step in this effort was to eliminate racial bias, The next step is to eliminate, ethnic discrimination ,

II. Hispanics A Cognizable Ethnic Group

If this Court concludes that *Neil,* applies to ethnic discrimination, the next question which must be decided is whether Hispanics are a cognizable ethnic group in this community. Since

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), numerous federal and state courts have recognized that Hispanics are a cognizable ethnic group. *See Hernandez v. New York, supra; United States v. Giraldo*, 905 F.2d 38 (2d Cir. 1990); *United States v. Alvarado*, 891 F.2d 439 (2d Cir. 1989); United *States v. chinchilla*, 874 F.2d 695 (9th Cir. 1989) *United States v. Alcanter*, 832 F.2d 1175 (9th Cir. 1987); *Fields v. People*, 732 P.2d 1145 (Colo. 1987) *State v. Gonzalez*, 538 A.2d 210 (Conn. 1988); *State v. Cantu*, 750 P.2d 591 (Utah 1988); *State v. Reyes*, 788 P.2d 1234 (Ariz. App 1989); *People v. Reyes*, 542 N.Y.S. 178 (N.Y. 1989); *People v. Trevino*, 704 P.2d 719 (Cal. 1985); *Atuesta v. Texas*, 788 S.W.2d 382 (Ct. of App. Tex. 1990); *State v. Paz*, 789 P.2d 1 (Idaho 1990).

The United States Supreme Court in *Hernandez v. Texas, supra*, recognized that one way of determining whether a group is a cognizable group is by showing the attitude of the community. The Florida Legislature has recognized that Hispanics are a cognizable group in this community as evidenced by the preamble to House Bill No. 1212, Florida Session Laws 77-233, which created the Florida State Commission on Hispanic Affairs, Section 14.25(1), Florida Statutes:

> WHEREAS, although a substantial number of these persons do not speak English, or speak English only nominally, they nevertheless form a very important part of our society, earn a living and pay taxes, and are permanent residents of Florida and the United States, but presently they do not have a channel of communication to the Legislature and the Governor of Florida, because of language barriers, and
>
> WHEREAS, these peoples, who form a very important part of the social, economic and political life of the State of Florida have earned and deserve the enjoyment of opportunities to be heard and have their problems spoken to by the government of the State of Florida, and
>
> WHEREAS, by creating a mechanism to increase communication between this important segment of the population of Florida and the government and officials of Florida we would be establishing a basis for broadening a mutual understanding and appreciation between the many peoples of Florida, and encouraging many contributions to the quality of life in Florida . . .

It was therefore

> the intent of the Legislature to provide a means by which the state may obtain a comprehensive and ongoing study relating to those citizens of Florida who are of an Hispanic origin.

§14.25(1), Florida Statutes.'

The staff analysis of Florida Statute 14.25 explained:

> Of Florida's approximately 8.7 million persons, more than 1 million are of Hispanic heritage. In Dade County approximately one third of the population is primarily Spanish-speaking. Although state and local units of government theoretically treat all persons equally, there has been no state agency to specifically focus upon the unique problems of these people.

The Florida Racial and Ethnic Bias Study Commission, appointed by this Court, has also recognized that Hispanics are a cognizable class. Pursuant to Chief Justice Ehrlich's order, the commission was asked to investigate racial and ethnic discrimination in the judicial system. The commission's report is imbued with the recognition that Hispanics are a cognizable group in the State of Florida.

The fact that the legislature and the Florida Supreme Court's Racial and Ethnic Bias Study Commission have identified Hispanics as a cognizable group in this community should persuade this Court that Hispanics are a cognizable group in terms of a cross section of the community analysis.

Once the government identifies Hispanics as an ethnic group victimized by discrimination, it may not be heard to advance the argument that it is not a cognizable ethnic group for the purpose of jury selection. In *United States v. Alvarado*, *supra*, the Second Circuit of Appeal observed:

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[3] In reaching the conclusion that Hispanics are a cognizable group, the *Trevino* court, like the *Alvarado* court relied on the fact that numerous governmental agencies have made extensive use of the *category* Spanish surnamed" in compiling statistics on various aspects of American Life,

> We reject the Government's preliminary assertion that Hispanics are not a cognizable group for the purpose of assessing claims of discriminatory use of peremptory challenges as well as its subsidiary assertion that a defendant must affirmatively establish in each case that Hispanics constitute such a group. These positions are untenable after our decision in McCray. There we affirmed the District Court's ruling that the defendant had proved a prima facie case of discriminatory peremptory challenges against Black and Hispanic venire members. 750 F.2d at 1133. Implicit in our holding was the view that Hispanics constitute a cognizable group, a fact that the defendant had not been required to establish when challenging their exclusion from the jury. . . . (cites omitted).
>
> * * *
>
> [T]hough issues may arise as to whether a particular individual is properly included within the category of "Hispanics," the classification has sufficient cohesiveness to be "cognizable" for jury discrimination claims. Indeed, it is somewhat surprising that the Executive Branch, which uses the term "Hispanic" and similar categories in implementing anti-discrimination standards, see 29 C.F.R. § 1607.4 (EEOC's use of category "Hispanic" in evaluating selection procedures under Title VII); cf. 13 C.F.R. § 317.2 (1989)(using term "Spanish-speaking" for minority business enterprises "set-aside" program), should disclaim the pertinence of the category "Hispanic" in the context of jury selection.

Similarly, in this case it is hard to imagine how the executive branch of the State of Florida, whose legislature and Supreme Court have both recognized that Hispanics are a cognizable group by its creation of a commission to study the problems of Hispanic Americans, can take the position that Hispanics are not a group when it comes to eliminating them from jury service.

In the leading case of *Trevino v.* State, 704 P.2d 719 (Cal. 1983) the California Supreme Court held that Hispanics are a cognizable group that should be protected from discrimination in jury selection:

> Many ties bind Hispanics together as a cognizable group within the community. Hispanics often share an ethnic and cultural "community of interest," including language, history, music and religion. In addition, Hispanics have made notable achievements in the professions, the arts, industry and public life. On a more somber note, Hispanics, in relation to other Americans, share a host of harsh realities such as relatively high unemployment, poverty, relative lack of educational opportunity and, of import to

the present case, discrimination directed at them precisely because they are Hispanic.

Further evidence that Hispanics are a cognizable class *can* be gained from *State v. Ciba-Geigy Corp.*, 573 A.2d 944 (N.J. Sup. A.D. 1990). The court observed that when citizens are summoned for federal jury duty they are asked to fill out a questionnaire; one of the questions is whether the citizen is Hispanic.

The following explanation appears in the instructions to aid in completing the questionnaires:

> Fill in the circle completely which best describes your race. See note on reverse side to assist in ensuring that all people are represented on juries. Please indicate which of the following applies to you. Nothing disclosed will affect your selection for jury service.
>
> A) • Black • Asian • Other
> • white • American Indian
>
> B) Are you Hispanic? • Yes • No

The potential jurors are told the following as to why they need to fill out the questionnaire:

> RACE. Federal law requires you as a prospective juror to indicate your race. The answer is required solely to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service. By answering this question you help the federal court clerk check and observe the juror selection process so that discrimination cannot occur. In this way, the federal court *can* fulfill the policy of the United States which is to provide jurors who are randomly selected from a fair cross-section of the community

The Florida Legislature, the Commission appointed by the Florida Supreme Court to report on racial and ethnic discrimination, federal courts and numerous state courts have recognized the obvious: Hispanics are a cognizable ethnic group. Therefore, this Court should hold that a party may object to a peremptory challenge motivated solely by animus toward Hispanics.

In its brief the state relies upon this Court's decision in *Valle v. State*, 474 So.2d 761 (Fla. 1985) to support its position that this Court should stand alone and hold that Hispanics are not a cognizable group that *can* be protected against discrimination in jury selection. In *Valle*, the issue raised was whether Latin Americans were wrongfully excluded from grand juries. The fact that this Court held Latin American were not a cognizable class does not mean this Court would conclude that Hispanics are not a cognizable group. "Latin American" and "Hispanic American" do not mean the *same* thing: the former denotes an aggregate of national origins; the latter is a term of ethnic identification.

The term "Latin American" means a geographical area that contains numerous countries. It is does not mean a group of people that have a similar cultural and ethnic background. However, the term "Hispanic" is not a term used to define national origin but instead is a term used to define ethnic background.

The Britannica Encyclopedia recognized the distinction between Latin Americans and Hispanics:

> **LATIN AMERICA. As** the term is generally understood, Latin America comprises the entire continent of South America, Central America and Mexico (called Middle America), and the islands of the Caribbean. "Hispanic America" has often been suggested as a more suitable designation since it specifically indicates the region's Spanish and Portuguese heritage. However, the Indian and Negro heritage, as well as American, British and French cultural and colonial influence, nullify any advantages of such a change. Despite territorial contiguity and, for much of the area, ties of a similar culture, history and aspirations for the future, the physiographic, climatic, economic, political, ethnic and linguistic differences make the term Latin America as connoting a homogeneous region fall short of a true description. Only in deference to popular usage and for lack of a better term, the *area* remains Latin America. See also Central America; Middle America; South America; West Indies.

In *Trevino*, the California Supreme Court specifically recognized that there is a difference between national origin and ethnic background:

> The argument that Trevino failed to establish a "cognizable class" for fair cross-section purposes because he did not prove up the

> national origin of each excluded Spanish surnamed juror, mischaracterizes Trevino's motion and the Wheeler test itself. National origin is a relevant inquiry only where the motion is premised on that basis. Where, as here, the motion is based on ethnic identification, voir dire regarding national origin is unnecessarily intrusive upon the defendant's legitimate interests. In Wheeler, we imposed no requirement that the defendant establish that systematically excluded Black jurors were of Afro-American, Caribbean, African or Latin American descent. To graft such a requirement on to the Wheeler test in the context of exclusion of an ethnic group easily identified on the basis of surname is to place an unwarranted and impractical burden on the defendant's ability to preserve his representative cross-section rights.

All Hispanics share the same culture and language; the same is not true of all Latin Americans. Latin America is a large area that contains many countries with different cultures and languages. Therefore, this Court's conclusion in *Valle* that Latin Americans are not a cognizable class, does not address the question whether Hispanics are a cognizable class. Indeed, the Florida Supreme Court's Commission on Race and Ethnic Discrimination employs the term Hispanic not Latin Americans in describing the ethnic minority group that must be protected from further discrimination. However, if this Court concludes that Latin Americans and Hispanics are identical, then respondent would suggest that in lieu of this Court's report on Ethnic Discrimination, this Court should reconsider its opinion in *Valle, supra.*

The unanimous opinion of the Third District Court of Appeal that Hispanics are a cognizable class and discrimination against Hispanics in jury selection *can* not be tolerated is consistent with the goals set out by this Court in its recent reports on discrimination in the judiciary. Therefore, this Court should join hands with the majority of the other state and federal courts in this country and extend *Neil* to prohibit ethnic discrimination and recognize that Hispanics are a cognizable class.

III. THE THIRD DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THAT THE REASON GIVEN FOR EXCLUDING JUROR ARJONA WAS NOT RACE NEUTRAL.

The state argues in its brief that even though the state gave no reason for excusing Juror Arjona, the Third District Court of Appeal erred in concluding that a new trial is warranted in this case. The state gave the following explanation:

> 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 whole 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. Ariona 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 with Ms. Fernandez -- this is an area of law, reasons given, which are valid is 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.

(T. 82-83).

When the state concluded its explanation, the trial court entered the following ruling:

> THE COURT: We have already done the inquiry of her and this is peremptory challenges.
>
> Since the state has made an indication that they really do want Ms. Fernandez, I don't see any discriminatory problem 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 have pone 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.

(T. 84-85).

An analysis of the state's reasons for excluding Juror Arjona clearly establishes that the state did not meet its burden of establishing ethnic neutral reasons for excluding this juror. Furthermore, an analysis of the trial judge's ruling establishes that the trial judge failed to properly evaluate the reasons given by the state for excluding this Juror.

It is established Florida law that, once a *Neil* inquiry has been, as it was here, appropriately initiated, it is incumbent upon the trial judge to evaluate the credibility of the explanation for the peremptory challenges and to "determine whether the proffered reasons, if they are neutral and reasonable are supported by the record." *Tillman v. State*, 522 So.2d 14, 16-17 (Fla. 1988). Moreover, because even the exercise of a single racially motivated prosecution strike is constitutionally forbidden, *State v. Slappy*, supra, it does not matter for these purposes whether other Hispanic jurors may serve on the jury.

The state admitted during the Neil inquiry that there was no valid reason for excusing juror Arjona. (T. 82). The state did not even ask this juror a Single question. The state argued that the exclusion of this juror should be allowed since the state intended to accept another Spanish juror. The trial court concluded that since the state agreed to accept another Spanish juror in place of juror Arjona that this established that the exclusion of juror Arjona was not ethnically motivated. (T. 85).

Initially, it must be pointed out that the jury that decided this case did not have any Hispanics. More importantly, however, as previously mentioned, the Florida Supreme Court in *State v.* Slappy, *supra*, has specifically held that the mere fact that a minority remains on the jury does not alleviate the trial judge's responsibility to make sure the excusal of another juror is not racially motivated, In *Slappy, supra*, the court held the following:

> "The number of challenged peremptories alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other".

In the instant case the trial court correctly concluded that there was a substantial likelihood that the state was excluding Hispanics from the jury. Once the court reached this conclusion, the state was required to give ethnically neutral reasons for excluding the jurors. As previously mentioned, the state conceded that they had no reason for excusing juror Arjona. Despite this fact the trial judge without ruling on whether there was a valid reason for excluding juror Arjona allowed the state to excuse this juror since the state represented that they would accept another Spanish to serve on the jury. (which did not occur.)

In *Thompson v. State,* 548 So.2d 198 (Fla. 1989), the defendant requested a Neil inquiry. Initially, the trial judge refused to conduct a hearing since the defendant failed to establish that the state systematically excluded blacks from the jury. As the jury selection continued, the defendant continued to object to the state's challenges of black jurors. Eventually, the trial

judge required the state to give reasons for the challenges. Since the trial court was under the mistaken impression that the defendant had to prove systematic exclusion, the trial court never concluded the *Neil* hearing and never analyzed the reasons given by the state for excusing the black jurors. In reversing the defendant's conviction, the Florida Supreme Court held the following:

> . . . The present record reflects a grave possibility that the trial court below relied upon the state's erroneous statement that Neil only comes into play if there is a systematic exclusion of blacks. This is the only reasonable conclusion based on the record. Indeed, the trial court first began to conduct a Neil inquiry but then reversed itself after hearing the state's erroneous statement of the law. Moreover, every relevant statement by the trial court incorrectly characterized Neil as applying only to "systematic" uses of the peremptory.

See *also, Stubbs v. State*, 540 So.2d 255 (Fla. 2d DCA 1989) (fact that black person seated as juror or alternate is not dispositive of defendant's contention that prosecutor exercised peremptory challenge to strike black prospective juror solely on basis of race) and *Moriyon v. State*, 543 So.2d 379 (Fla. 3d DCA 1989).

In *Smith v. State*, 16 FLW D151 (Fla. 3d DCA 1991) the trial judge similar to the trial judge in this case decided to conduct a *Neil* inquiry. During the inquiry the court noticed that the state had agreed to accept three blackjurors. For this reason, the court refused to rule on the validity of the state's peremptory challenges of the black jurors that initially triggered the *Neil* inquiry, In reversing the defendant's conviction in that case, Chief Judge Schwartz recognized that the trial judge's failure to rule on the validity of the reasons given by the state during the Neil inquiry was clearly error.

Similarly, in this case the fact that the state represented that they intended to keep an Hispanic as an alternate juror did not alleviate the trial judge of his responsibility to evaluate the reasons given by the state for excluding the two Hispanic jurors. This error requires reversal.

Furthermore., if the trial judge had evaluated the reasons given by the state for excluding Juror Arjona he would have had no choice but to strike the jury panel. The state admitted during the *Neil* inquiry that they had no objective reason for excluding juror Arjona. (T. 82). This fact alone required the trial judge to dismiss the jury panel since *Slappy* specifically holds that the wrongful exclusion of one juror requires the jury panel be stricken. The Third District Court of Appeal correctly concluded that there was no valid reason for excluding Juror Arjona. Therefore, this Court should affirm the unanimous en *banc* opinion of the Third District Court of Appeal which granted respondent a new trial.

CONCLUSION

In Neil this Court endeavored to eliminate discrimination in our judicial system by eliminating impermissible bias in jury selection. The first step was to eliminate racial bias. This Court should take the next step which is to eliminate ethnic discrimination.

Both the Florida Legislature and this Court's Commission on Racial and Ethnic Bias have recognized what numerous other state and federal courts have already recognized; Hispanics are a cognizable ethnic group. Therefore, the defendant had the right to object to the state's attempt to wrongfully exclude Hispanics from serving on his jury.

Since the trial judge failed to evaluate the reasons given by the state during the *Neil* inquiry coupled with the fact that the state admitted that they had no valid reason for striking one of the Hispanic jurors, a new trial is warranted in this case.

Respectfully submitted,

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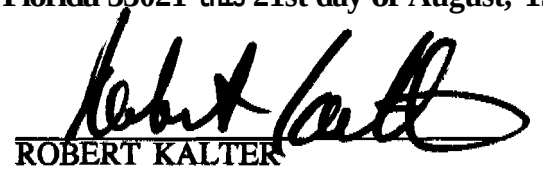
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Charles Fahlbusch, Assistant Attorney General, Department of Legal Affairs, 4000 Hollywood Boulevard, Suite #505-S, Hollywood, Florida 33021 this 21st day of August, 1992.



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