OA 1-4-93

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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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 the Merits. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner readopts, realleges and incorporates by reference the Statement of the Case and Facts contained in its Initial Brief on the Merits as though fully set forth herein.

ISSUES 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 attempt by the Respondent to draw a technical distinction between the term "Latin" and the term "Hispanic" is irrelevant, where that distinction was specifically rejected by the district court and where this court relied on opinions which reached the same result using the "Hispanic" term. It is, therefore, 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 an 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 an 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]

The Respondent has spent the entire first portion of his brief arguing that Neil can properly be extended beyond race to some other groups to bar discrimination in the use of peremptory challenges on criteria other than race. (Brief of Respondent on the Merits, 3-8). The Petitioner does not disagree, although it does appear that extending Neil should more properly have been left to this court, especially where the district court chose to extend it to a group which has been specifically found by this court nat to be a cognizable group for constitutional purposes, See, State v. Valle, 474 So.2d 796, 800 (Fla. 1985).

The Respondent then advocates the position, directly in conflict with the district court opinion that he seeks to have affirmed, that Hispanics must be considered a cognizable group even though Latin Americans are not. (Brief of Respondent, 8-14). That is a particularly interesting position for two reasons. First, the district court opinion treated the terms "Spanish," "Latin," and "Hispanic" as functionally equivalent. Alen v. State, 596 So.2d 1083, 1084 n.1 (Fla. 3d DCA 1992).

[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.

Thus, the Respondent maintains that the district court opinion is incorrect and that they reached a correct result only through flawed reasoning. Thus, both sides agree, at least to the extent that this court must reject the reasoning of the district court. The second reason that the Respondent's position is of interest is that he never claimed before the trial court that the State was improperly excluding Hispanic persons from the jury. (ST1, 80-85). The defense claimed that the State had challenged Spanish and Latin jurors, but did not use the term "Hispanic." (ST1, 80-85). Therefore, the Respondent has now admitted, for all practical purposes, that his only complaint before the trial court was that non-cognizable groups were being excluded from the jury, but that the trial court was required to be reversed because the State was actually challenging jurors of a constitutionally cognizable group, even though the defense never mentioned it. Therefore, if the defense is limiting their complaint to whether Hispanics were improperly excluded, it appears that the issue was not properly preserved. See, State v. Castillo, 486 So.2d 565 (Fla. 1986); State v. Neil, 457 So.2d 481 (1984).

Additionally, however, the Respondent has chosen to ignore the fact that this court, in Valle, supported its opinion that Latin Americans did not constitute a cognizable class for equal protection purposes by citing United States v. Duran de Amesquita, 582 F.Supp. 1326 (S.D.Fla. 1984) and United States v.

Rodriquez, 588 F.2d 1003 (5th Cir. 1979) for the proposition that "'hispanics' do not constitute a recognizable class . . . ." Valle at 800. Indeed, not only did Duran de Amesquita find that Hispanics did not constitute a cognizable group for Sixth Amendment cross-section purposes, but the court in Rodriquez specifically noted 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 . . . ," Id. at 1007. Each of these would appear to be a group which could be defined as "Hispanic." Further, the Rodriquez court made a point of distinguishing that case from Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed.2d 866 (1954) on which the Respondent so heavily relies (Brief of Respondent, 6, 9), stating:

> 15. We are not examining a situation like that in ***Hernandez,*** *supra,* in which the defendant defined his class only as Mexican-Americans, and presented testimony showing that some separate facilities existed for Mexicans and that few persons of Mexican descent participated in business and community groups. . . .
>
> United States v. Rodriquez, 588 F.2d 1003, 1007 n.15 (5th Cir. 1979).

The Respondent, however, appears to advance the proposition that, if a group has been the subject of bias and discrimination based on group membership (which is certainly the

case with Hispanic persons, as it is with many other groups), then the group must be considered a cognizable one for jury selection purposes whether there is any similarity of ideas and attitudes between the members or not. (Respondent's Brief, 9-13). Thus, he urges that the traditional requirement that, in order to be considered cognizable the group must be shown to have a cohesiveness of attitudes or ideas which other segments of society cannot adequately represent, must be abandoned. **See** Duren v. Missauri, 439 U.S. 357, **363-364,** 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Willis v. Kemp, **838** F.2d 1510, 1516 (11th Cir. 1988); United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977). While such a position is understandable from an emotional basis, it would lead to the immediate destruction of the peremptory challenge system and to a slowdown in the administration of justice since it virtually guarantees an objection to almost every peremptory challenge and would require an inquiry as to the majority of them, Not only would the peremptory challenge system be doomed, as Judge Hubbart points out in his concurring opinion (App. 11), but its death would be immediate upon the rendering of the opinion in this case as attorneys began objecting on the grounds that Polish-Americans, German-Americans, Indonesian-Americans and Danish-Americans were being improperly excluded from the jury. While not all of the myriad groups that would be the subject of objections would be found to be entitled to protection, which were and which were not would have to be decided on a case-by-case basis, Indeed, given

that Hispanics constitute 49.2 percent of the population of Dade County [See, Alen v. State, 596 So.2d 1083, 1085 (Fla. 3d DCA 1992], it is not unlikely that, in the near future, attorneys will be objecting on the basis that "Anglos" are being improperly excluded from juries. The review of those cases, of course would be based on the precedent set in this case that a movant need not present any evidence to establish that the group he contends is the subject of an improper peremptory challenge is cognizable in order for it to be determined that it is.

Therefore, it is respectfully submitted that the district court erred in deciding, without any evidence on the issue having been presented, that Latins constitute a cognizable group entitled to protection under Neil.

II

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

The Respondent bases his entire argument concerning this point on its own statement that, ". . . the state **gave** no reason for excusing Juror Arjona. . . ." (Respondent's Brief, 15). The State, although it did not state its reasons as articulately as possible, did in fact give three **(3)** reasons for challenging Ms. Arjona. The prosecutor said, ". . . . she is divorced with five children and she has never been a juror before." and also stated that they preferred Ms. Fernandez. (ST1, 82-83). The trial Court found these reasons acceptable. (ST1 83-85).

Similar reasons, such as **being a** cook who was a single mother of **four** who did not own a home, although considered marginal, have been considered acceptable to the appellate courts of this state. See, Files v. State, 586 So.2d **352**, 356-357 (Fla. 1st DCA 1991); Knight v. State, 574 So.2d **327**, 329-330 (Fla. 1st DCA 1990); rev. denied, **574** So.2d 141 **(Fla. 1990).**

Therefore, given the broad discretion that this court maintains should be granted to the trial court in this area, pursuant to Reed v. State, 560 So.2d 203, 206 (Fla. 1990), the decision of the trial court to accept the proffered reasons in this case should have been affirmed,

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER ON THE MERITS was furnished to ROBERT KALTER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 18th day of September, 1992.

Charles M. Fahlbusch

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