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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,702

PABLO SAN MARTIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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SUPPLEMENTAL POINT ON APPEAL
(Restated)

THE TRIAL COURT PROPERLY DISALLOWED THE DEFENSE'S ATTEMPTED PEREMPTORY STRIKES OF JURORS DIAZ **AND ANDANI** WHERE THE DEFENSE FAILED TO GIVE NEUTRAL, NON-PRETEXTUAL REASONS IN RESPONSE TO THE STATE'S VALID REQUEST FOR A NEIL INQUIRY.

STATEMENT OF THE CASE AND FACTS

The relevant facts relating to the voir dire will be presented in the course of the argument.

SUMMARY OF THE ARGUMENT

Neither the district court cases Defendant relies upon in asserting that the court had no authority to conduct the Neil inquiry nor their reasoning were asserted below, and may not be raised for the first time now. Moreover, the **cases** are contrary to this court's precedent and reason, and in any event, even following them the record here is sufficient to support the court's action.

Likewise, the Defendant's contention that the trial court erred in refusing to allow defense strikes of jurors Andani and

Diaz must fail. Upon Neil objection by the State, the defense was unable to proffer neutral reasons ("I don't like him" for Diaz, and Andani's "love" for the prosecutor) for striking either juror. The defense's much-later proffer of reasons regarding Diaz were clearly pretext.

ARGUMENT

THE TRIAL COURT PROPERLY DISALLOWED THE DEFENSE'S ATTEMPTED PEREMPTORY STRIKES OF JURORS DIAZ AND ANDANI WHERE THE DEFENSE FAILED TO GIVE NEUTRAL, NON-PRETEXTUAL REASONS IN RESPONSE TO THE STATE'S VALID REQUEST FOR A NEIL INQUIRY.

Defendant contends that the trial court erred in refusing to grant his peremptory challenges of jurors Diaz and Andani. The State properly challenged the attempted strikes pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984), and defense counsel was unable to proffer neutral, non-pretextual reasons for the strikes. The trial court therefore properly disallowed them.

A. The State's objections were legally sufficient to trigger Neil inquiries.

Defendant asserts that the trial court was without authority to deny the attempted strikes of jurors Andani and Diaz because the

State's Neil demand was not sufficiently precise. This claim was not raised below. On the contrary, defense counsel immediately proffered reasons for both strikes, without any objection. (T. 788-90, 792-93). The claim is therefore waived. Joiner v. State, **618** So. 2d 174, 176 (Fla. 1993); See **also,** Hernandez v. New York, **500** U.S. 352, 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (where party attempting to exercise strike gives neutral reasons without objection, and trial court rules thereon, claim that prima facie showing under Batson has not been made is waived); Stroder v. State, **622 So,** 2d **585, 586** (Fla. 1st DCA 1993) (following Hernandez); Smith v. State, **662 So.** 2d 1336, 1338 n.4 (Fla. 2d DCA 1995) (reversing because defendant gave satisfactory neutral reasons, but specifically declining to reach issue of sufficiency of State's objection, "especially since appellant never raised this claimed insufficiency to the trial court").

In any event, assuming, arguendo, that the issue were properly before the court, it would be without merit. In Johans v. State, 613 So. 2d 1319 (Fla. 1993), this court abrogated the then-existing requirement that a prima-facie showing of discriminatory purpose be shown before the trial court conduct a Neil inquiry:

> [W]e hold that from this time forward a Neil

> inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. We recede from Neil and its progeny to the extent it is inconsistent with this holding.

Id., at 1321. The Court expounded upon this holding in Windom v. State, 656 so. 2d 432 (Fla. 1995), noting that Johans still required a timely objection and a "demonstration on the record that the challenged person is a member of" a Neil-protected class. Window, 656 So. 2d at 437. See also, State v. Alen, 616 So. 2d 452, 453 n.1 (Fla. 1993) (under Johans, inquiry must be conducted if objection is raised); Tavlor v. State, 638 So. 2d 30, 33 n.3 (Fla. 1994) (Johans eliminated any requirement of prima facie showing; "a Neil inquiry must be initiated whenever such an objection is made"). These requirements were clearly met below, and the trial court therefore properly conducted a Neil inquiry.

Plainly the challenge raised by the State was a Neil challenge, Indeed, the State is unaware of any other challenge which may be directed at an opposing party's use of a peremptory.[1] Further, the objections were timely, made at the time the defense

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[1] The State's objections were clearly more explicit than the defense's assault on the State's striking of juror Pascual which consisted in its entirety of "Challenge." (T. 797).

sought to strike the jurors in question. As to Andani, the State objected:

> MS. BRILL: Judge, we would challenge. She gave no answers that I could see that would even be a basis for a peremptory challenge.
>
> * * *
>
> THE COURT: ... gender neutral. Is that your --
>
> MS. BRILL: Yes.
>
> THE COURT: Gender neutral.

(T. 788-90). Further, Ms. Andani was clearly a woman, a Neil-protected class, See, Abshire v. State, 642 So. 2d 542 (Fla. 1994). As to Diaz, the State made a similar objection, which the court plainly understood to be as to race. (T. 792). Further, the record reflects that Diaz had a Spanish surname and Cuban nativity. Any claim by Defendant that Diaz was not a member of a cognizable class is therefore specious. See, State v. Alen, 616 So. 2d 452 (Fla. 1993). As the objections were timely, and the jurors' protected status is apparent from the face of the record, the trial court properly conducted a Neil inquiry pursuant to Johans and Windom,

Defendant nevertheless maintains that the State's objections were inadequate to trigger a Neil inquiry, relying on a recent line of cases emanating from the Third District Court of Appeal, see, Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA 1995), and Portu v. Stat&, 651 U.S. 791 (Fla. 3d DCA 1995). However, these cases are in direct conflict with this court's recent (but pre-trial) holding in Johans. Additionally, even accepting their holdings, Defendant is not entitled to relief.

The district court, apparently dissatisfied with the holdings Of Johans and Windom,[2] has fashioned an additional predicate to the holding of a Neil inquiry, requiring, in addition to a timely objection and **a** record basis showing protected-class membership, that it be "rationally . . . determined that the juror's status is the reason for the challenge in the first place." Betancourt, 650 so. 2d at 1023, n.4; Portu, 651 So. 2d at 792. This requirement effectively renders meaningless the per se rule set forth in Johans, which was designed to alleviate the previous uncertainty which existed in the trial courts as to when a "strong likelihood"

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[2] See, e.q., Pride v. State, 644 So. 2d 1114, 1116 (Fla. 3d DCA 1995), where the court opines that peremptory challenges "have suffered the slings and arrows of outrageous fortune."

of improper motive, the threshold under Neil, had been established. See Johans, 613 So. 2d at 1321.

In place of Neil's "strong likelihood" predicate, the Third has substituted a "rational determination" standard for deciding whether a Neil inquiry should be held. Thus, in Cruz v. State, 660 So. 2d 792 (Fla. 3d DCA 1995), where the State pointed out that the defense had already stricken four latin women, the Neil inquiry was proper because the State had supplied "a fact-supported predicate inference of a racially discriminatorily peremptory challenge." Id., at 793.[3] Aside from being contrary to the bright-line rule enunciated in Johans, this standard is unclear of meaning, and thus suffers from the same infirmity as the "strong likelihood" standard jettisoned in Johans. Furthermore, it appears to require, as a predicate to a Neil inquiry, the resolution of the very question which the Neil inquiry itself is supposed to resolve.

The unworkability of the Third's standard is apparent from Betancourt's progeny, in which the legal analysis has degenerated

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[3] The distinction between this showing and Neil's prima facie "strong likelihood" is difficult, if not impossible to fathom.

into an exercise in semantic hairsplitting, with otherwise valid convictions being overturned where the State fails to utter the magic words Betancourt (retroactively) requires, regardless of whether the defendant objected to the holding of a Neil inquiry, regardless of whether all parties understood the basis of the objection, and regardless of whether the spirit and purpose, if not the letter of Johans was satisfied.[4] See, Pride v. State, 664 So. 2d 1114, 1115 (3d DCA 1995) (reversed, although State identified juror as member of cognizable class, because "merely requesting a Neil inquiry . . . is not sufficient"); Holiday v. Stat-e, 665 So. 2d 1089, 1091 (Fla. 3d DCA 1995)(request for gender neutral reasons,

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[4] The Third District, in recently rejecting the rationale of another district in an unrelated matter, quoted from Cardozo:

> Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

Doctor v. State, 21 Fla. L. Weekly D1856 (Fla. 3d DCA August 14, 1996) (Schwartz, C.J., specially concurring), quoting Benjamin Cardozo, The Growth of the Law, in Selected Writings of Benjamin Nathan Cardozo 214 (Margaret E. Hall ed. 1947). Despite its declining "to do the same" in Doctor, it appears the third has resolutely chosen the course Cardozo describes in Portu and its issue.

where record reflected juror was a woman, insufficient); Rivera v. State, 670 So. 2d 1163, 1166 (Fla. 4th DCA 1996) (same) . contra, Windom, 656 So. 2d at 436-37 (Johans satisfied by defense objection stating "race issue"; a similar objection was insufficient where the jurors race or ethnicity did not appear of record); Melbourne v. State, 655 So. 2d 126, 127 (Fla. 5th DCA 1995) ("I would raise a Baxter [sic] Johans challenge . . . Johans. He's a black man" sufficient to trigger inquiry); Ratliff v. State, 666 So. 2d 1008, 1011 (Fla. 1st DCA 1995) (where defendant simply "ask[ed] the court to do a Neil inquiry," and record showed juror to be an African-American, Johans sfied) .[5] Plainly, the Third District's interpretation of Johans has brought a result contrary to the underlying rationale which led to Johans's adoption of a bright line test in the first instance, i.e., the dual concerns of avoiding impermissible discrimination and unnecessary waste of judicial resources:

> The primary purpose for this rule deferring to the objector is practical -- it is far less costly in terms of time and judicial resources to conduct a brief inquiry and take curative

[5] Curiously, in a pre-Betancourt case, the Third District concluded, in a case reversed for failure to hold an inquiry, that Johans was satisfied where "there [was] no question that the trial judge understood the basis of the defendant's objection." Joseph v. State, 636 So. 2d 777, 781 (Fla. 3d DCA 1994).

> action during voir dire than to foredoom a conviction to reversal on appeal. When the vast consequences of an erroneous ruling -- i.e., an entire new trial -- are balanced against the minor inconvenience of an inquiry - i.e., a delay of several minutes -- Slappy's wisdom is clear, To give this rule effect and minimize the risk of reversal, we recently held in State v. Johans, 613 So. 2d 1319 (Fla. 1993), that once a party makes a timely objection and demonstrates on the record that the challenged persons are members of a distinct racial group, the trial court must conduct a routine inquiry.

Valentine v. State, 616 So. 2d 971, 974 (Fla. 1993).

Further, given the underpinnings of Neil and its progeny, the rationale of Betancourt is unsound. While it is well-established that a party may not assert on appeal the improper use by an opponent of a peremptory unless the issue is preserved by a timely and specific objection, see, Joiner, 618 So. 2d at 176, Windom, 656 So. 2d at 437, the converse is not true. That is, it does not follow that the failure to clearly assert a Neil challenge renders the trial court's subsequent Neil inquiry and disallowance of the strike improper. It must be recalled that Neil was crafted not merely to protect the right of defendants to a properly constituted jury. Rather, the right of the juror not to be discriminated against is also vindicated. See Abshire, 642 So. 2d at 544;

Valentine, 616 So. 2d at 974 ("broad leeway" must be used to affirm the "spirit and intent" of Neil). That being the case, the trial court would have both the right and the duty to conduct a sua sponte Neil inquiry if the circumstances called for it. e r the following example: suppose both the prosecutor and defense counsel came to the same misguided conclusion that it was in their interest to exclude group "X" from the jury, Under such circumstances, neither party would object, because its will was being done, The court, however, on perception of the pattern would surely be permitted, and perhaps obligated,[6] to inquire on behalf of the X jurors. If the court may act sua ssonte, surely no reversible error occurs where **a** request, albeit abbreviated, is made, which all parties clearly understand to be seeking a Neil inquiry, and the court grants the inquiry.[7]

Furthermore, even if the district court's ruling were to be

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[6] The State does not suggest that defendants would in any **way** be entitled to appeal the trial court's failure to act in such circumstances.

[7] This assumes, of course, that the juror's protected status appears from the record, Windom, and that the court's subsequent ruling on the merits is correct. Note that in Betancourt the court alternatively held that reversal was required because the reason given was race neutral. Such is not the case here, as will be shown, infra.

adopted, a large number of trials have been conducted since Johans was decided. In many of those cases the trial courts reasonably concluded that Johans required only a request sufficient to apprise the court of its nature to trigger the requirement of **a** hearing, where the juror's status is clear from the record, and in what was undoubtedly perceived to be an abundance of caution, many courts may have committed what Betancourt and its progeny would deem error.[8] Under these circumstances, any broadening, or actually, more narrowly tailoring, of the language in Johans should be applied prospectively only, as was the original language.[9]

B. The **trial court properly disallowed the strikes of Andani and Diaz where the defense was unable to proffer neutral, nonpretextual reasons for eliminating those jurors.**

Defendant's claims must also fail on the merits. The standard of appellate review of a trial court's finding that a defendant's exercise of a peremptory challenge would violate Neil is abuse of

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[8] Reversals have occurred, e.g., in Betancourt, Portu, Pride, Holiday, and Rivera. See also, Coulter v. State, 657 So. 2d 2 (Fla. 3d DCA 1995), and Miller v. State, 664 So. 2d 1082 (Fla. 3d DCA 1995).

[9] See Holiday, 665 So. 2d at 1090 (noting that the case presented "an issue which appears in this court with persistent regularity").

discretion. Files v. State, 613 So. 2d 1301 (Fla. 1992). where "reasonable persons could arguably agree with the trial court's action," the result will not be disturbed on appeal. Id., at 1302. The only exception is where the reason proffered for the strike is facially invalid as a matter of law. Id., at 1304. This standard applies to the determination of both the question of whether the reason is neutral, as well as whether it is non-pretextual. Id., at 1304.

When the State challenged'the peremptory strike of juror Diaz, the proffered reason was that defense counsel did not "like him." (T. 793). Such is not a valid race-neutral reason as a matter of law, and was properly the basis for the trial court to reject the strike. See, Wrisht v. State, 586 So. 2d 1024, 1028 (Fla. 1991) (counsel feeling 'uncomfortable" not neutral reason). Counsel proffered additional reasons substantially later (thirty paqes later in the transcript). (T. 823). The trial court rejected these newly discovered reasons. Plainly, the very delay in hatching the reasons strongly suggests that they were pretextual.

Furthermore, the reasons proffered were shared with jurors accepted by the defense. The defense claimed primarily that Diaz

had worked for a long time for Metro-Dade County, which also employed many of the State's witnesses. However, this was not a characteristic unique to Diaz. Of the seated jurors, Pierre-Louis's wife worked for Metro-Dade, (T. 424); Hill's 3 daughters taught for Dade County Schools and her son worked for Metro-Dade Parks, (T. 427); Jenning and his wife worked for the State D.O.T., (T. 455); and Burroughs, the alternate, worked for Metro-Dade, and his wife was a child support enforcement clerk for the county. (T. 501). Of other venire members not rejected by the defense, both Stephens's godparents were Metro-Dade police officers, (T. 462), yet the defense attacked the State's use of a peremptory strike on her, (T. 812); and Neloms's husband worked for the Dade County School Board, (T. 485), but the defense attacked that State peremptory strike also. (T. 820).

Nor was Diaz alone in having good kids. Smith's child was an engineer. (T. 418). Dowdell produced a restaurant manager, a hospital worker, a UPS man, a minister, and a U.S. Marine. (T. 447). Neloms's children worked for the county school board and AT&T. (T. 485). Bringle had an administrative assistant at the housing authority, a fireman, and a cabinet maker. (T. 500). None expressed any suggestion that their children were not as well

behaved as Diaz's allegedly were.

Likewise, the suggestion that Diaz lacked life experience, (T. 823), is puzzling. He was originally from Cuba, went to college there, lived in New York and New Jersey, then worked in Miami in both the private and public sectors. (T. 753-55). Apparently a 21-year-old from the suburbs who has been in school his whole life has "life experiences." (Juror McMulling T. 409, 749). See also jurors Alacan, (24-year-old nursing student, T. 414); Hill, (50 year resident of Dade County, retired school system employee, T. 426); Andrews, (lifetime resident and produce manager of market, T. 434); Stephens, (19 year old student, lifetime resident, T. 462); Simms, (retired consultant 41-year resident, T. 480).

Given the delay in coming up with the 'neutral" reasons, combined with the fact that several accepted jurors shared the same or similar attributes, the trial court clearly did not abuse its discretion in disallowing the strike of Diaz. Files.

Similarly, the trial court properly disallowed the attempted strike of juror Andani. The only grounds asserted below, regarding Andani's 'love" for the prosecutor and demeanor are untenable, if

not offensive.[10] The trial court specifically rejected this claim as unfounded:

> THE COURT: I, to be frank found her to be one of the brightest and most receptive jurors to all sides. According to my notes, she indicated death penalty would not affect her verdict. That every First Degree Murder should not get the death' penalty, she specifically said she understood one mitigating factor, could outweigh two or three aggravating factors, I saw no particular affinity toward [the prosecutor], and I don't find it to be I suppose gender neutral.
>
> * * *
>
> I have not observed any of these things that you have, you are mentioning, all I have in my notes is and from my recollection is that this is a very bright and apparently fair juror who can follow the law as she repeatedly asserted.

(T. 788-89). Looks or gestures are not valid neutral reasons to exercise peremptory challenges unless observed by the trial judge and confirmed by the judge on the record. Wright, 586 So. 2d at 1029. Here the judge specifically rejected the existence of the "looks."[11] The court's observations regarding Andani are supported

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[10] San Martin's counsel subsequently chimed in that she, too, was "uncomfortable" with Andani. (T. 790) . Such is clearly not an acceptable reason, Wright.

[11] One page earlier in the transcript, the judge granted a challenge for cause based upon juror Collier's "bad attitude" and

by the record. (See T. 665-67, 738-42, 758, 767-68). Note also T. 667, where attorney Diaz, who raised the strike, noted "she's got it down," after Andani stated that if the mitigation outweighed the aggravators, the sentence would be "obviously life." As such this claim must fail. Id.; Files.

"body language" toward Attorney Diaz. (T. 786-87).

CONCLUSION

For the foregoing reasons, and those set forth in the original answer brief, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,
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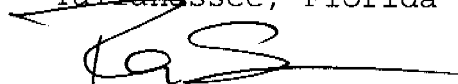

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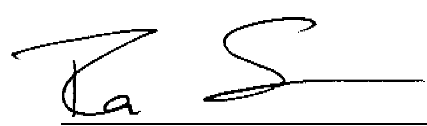
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF APPELLEE** was furnished by U.S. mail to, **LEE WEISSENBORN,** 235 Northeast 26th Street, Oldhouse, Miami, Florida **33137,** this 26th day of August, 1996.



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