IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,318

THE STATE OF FLORIDA,

Petitioner,

vs.

STEVEN K. HOLIDAY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Third District Court of Appeal reversed the convictions and sentences of Steven K. Holiday, the Respondent herein, based upon the court's conclusion that the trial court had no basis for conducting a Neil inquiry as to the reasons for defense counsel's effort to peremptorily excuse a prospective panel member from the venire. (Pet. App. 5-6).

The lower court's opinion reflects that the following exchange transpired during jury selection proceedings:

> [DEFENSE COUNSEL]: Your Honor, we strike Ms. Urrutia.
>
> THE COURT: Margaret Urrutia, right. I have no idea if that is how we pronounce it, but it is a good try. Defense has utilized five peremptory challenges.
>
> [PROSECUTOR]: Your Honor, as far as Ms. Urrutia is concerned, I ask for race and gender reason.
>
> THE COURT: What reason do we have? Sir?

(Pet. App. 2) (emphasis supplied in lower court's opinion). Defense counsel then proffered the reasons for the challenge to the juror and the judge, after finding that no race or gender neutral reason had been furnished, disallowed defense counsel's peremptory challenge, and restored Ms. Urrutia to the jury. (Pet. App. 2). In finding that the prosecutor's request for a race or gender neutral reason was insufficient to warrant a Neil inquiry by the trial judge, the lower court held:

> The foregoing demonstrates that an objector must do something more than merely objecting and requesting class, race, or gender neutral reasons. A party objecting to the other side's use of peremptory challenges must affirmatively do three things to properly trigger a Neil inquiry: (1) make a timely objection; (2) demonstrate on the record that the challenged person is a member of a distinct

> racial group, cognizable class, or gender; and (3) place on the record facts which reasonably indicate that a peremptory challenge is being used impermissibly. The deficiency in the objections that run through the cases is the failure to state "why" or "how" the peremptory challenge is being used in a discriminatory fashion. Once this has been done "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." State v. Slappy, 522 So. 2d 18 (Fla.), cert denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988). It is worth noting that although certain facts may be apparent to the court and counsel below, it is important that these facts be placed on the record so as to allow for meaningful appellate review.

(Pet. App. 4). Based upon that analysis, the lower court concluded that "the state's bare request for race and gender neutral reasons was not enough to warrant the trial court's inquiry . . . and it was reversible error to disallow the challenge on the grounds that the reasons proffered were insufficient." (Pet. App. 5-6). As the lower court's opinion was based upon the trial court's lack of authority to conduct a Neil inquiry, the lower court did not assess the validity or invalidity of the reasons proffered for the peremptory challenge.

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL IN HOLDING THAT A TRIAL COURT JUDGE LACKS AUTHORITY TO CONDUCT A NEIL INQUIRY WHEN AN OBJECTION TO A PEREMPTORY CHALLENGE IS NOT ACCOMPANIED BY A STATEMENT OF "FACTS WHICH REASONABLY INDICATE THAT A PEREMPTORY CHALLENGE IS BEING USED IMPERMISSIBLY."

SUMMARY OF ARGUMENT

In State v. Johans, 613 So. 2d 1319 (Fla. 1993), this Court eliminated the requirement that an objector demonstrate a prima facie case of a strong likelihood of discrimination before a Neil inquiry was required to be conducted by the trial judge. The lower Court's opinion in the instant case is the most recent of a series of cases in which the Third District Court of Appeal has effectively held that such a prima facie case requirement still exists. In depriving the trial judge of the jurisdiction to conduct an inquiry, the lower Court has elevated form over substance, by conditioning inquiries into potential discrimination in jury selection on the determination of whether the objecting party has dotted i's and crossed t's. Such a hypertechnical opinion is contrary to both the letter and spirit of Johans, and can have no other purpose than to deter judge's from conducting Neil inquiries, even when judges reasonably believe that facts exist which warrant such inquiries.

ARGUMENT

THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL IN HOLDING THAT A TRIAL COURT JUDGE LACKS AUTHORITY TO CONDUCT A NEIL INQUIRY WHEN AN OBJECTION TO A PEREMPTORY CHALLENGE IS NOT ACCOMPANIED BY A STATEMENT OF "FACTS WHICH REASONABLY INDICATE THAT A PEREMPTORY CHALLENGE IS BEING USED IMPERMISSIBLY."

In a lengthy series of cases, the Third District Court of Appeal has reversed numerous convictions, after finding that prosecutorial objections to defense counsels' peremptory challenges were insufficient to permit the trial judge to engage in Neil inquiries, for the purpose of ascertaining whether a race- or gender-neutral reason existed to support the challenge at issue.See, e.g., Portu v. State, 651 So. 2d 791 (Fla. 3d DCA 1995); Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA 1995); Pride v. State, 20 Fla. L. Weekly D2709 (Fla. 3d DCA 1995); Garcia v. State, 655 So. 2d 194 (Fla. 3d DCA 1995); Barquin v. State, 654 So. 2d 1069 (Fla. 3d DCA 1995)[1]; Miller v. State, 20 Fla. L. Weekly D2664 (Fla. 3d DCA 1995); Slaton v. State, 21 Fla. L. Weekly D42 (Fla. 3d DCA 1996). In consistently holding that trial judges lack jurisdiction to conduct Neil inquiries absent sufficiently specific objections, the Third District has evinced a willingness to countenance reversals of convictions even if the inquiries conducted by the trial judge, pursuant to the "defective" objections,

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[1] In Pride, the Third District stated that "[m]erely requesting a *Neil* inquiry, asking for gender- or race-neutral reasons for the peremptory, or observing for the record that the peremptory seems discriminatory is not sufficient."

confirm that the reasons were not race- or gender-neutral and that the challenges were, in fact, discriminatory. If an objection is insufficiently articulate, no inquiry is permitted, and any inquiry, followed by a disallowed challenge, results in a per se reversal, according to the Third District.

The reasoning of the lower court is inconsistent with the pronouncements of this Court in State v. Johans, 613 So. 2d 1319 (Fla. 1993) and Valentine v. State, 616 So. 2d 971 (Fla. 1993). Prior to Johans, a Neil inquiry was required only after the objecting party demonstrated a substantial likelihood that a peremptory challenge was being utilized in a discriminatory manner. State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988). The requirement of the prima facie case was eliminated in Johans: ". . . we held 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. 613 So. 2d at 1321. The reasons for eliminating the requirement of the prima facie case were elucidated in Valentine: too many trial judges were failing to conduct inquiries when they should have been conducted, resulting in too many reversals of convictions. Thus, this Court had determined to facilitate the decision of the trial judge regarding the inquiry: if there is an objection, make the inquiry. As stated by this Court:

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

616 So. 2d at 974.

The intent of Johans and Valentine is clearly to facilitate the holding of the Neil inquiries. The purpose, furthermore, was to minimize reversals arising out of erroneous failures to conduct inquiries. When trial judges adhered to the policy and intent of Johans and Valentine, the Third District effectively admonished them for holding the very same inquiries which this Court encouraged them to have. Now, instead of reversing convictions for wrongful refusals to conduct Neil inquiries, the Third District has gone full circle by setting up a regime in which convictions are now routinely reversed when the judges do conduct the inquiries.

Not only have the letter and spirit of Johans and Valentine been undermined by the Third District, but, since the Third District is holding that something more than a mere objection is required, the Third District is effectively stating that some form of a prima facie case requirement exists, even though such a requirement was eliminated, when Johans did away with the requirement that an objecting party demonstrate a "substantial likelihood" that a peremptory challenge is being used in a discriminatory manner. If the "substantial likelihood" requirement has been eliminated, what is the basis for finding that some form of a prima facie case still exists, as a predicate for any inquiry, and, more significantly, what is the nature of the prima facie case which the Third District finds to be still extant? Melbourne v. State, 655 So. 2d 126 (Fla. 5th DCA 1995), rev. granted, Florida Supreme Court case no. 86,029, presents a clear conflict on these questions, as a defense attorney, objecting to a prosecutor's peremptory challenge, simply stated that the stricken juror was a black man, and added that he, defense counsel, "would raise a *Baxter* [sic] *Johans* Challenge." 655 So. 2d at 127. Such an objection would clearly be insufficient to trigger a Neil inquiry under the Third District's line of cases, including the instant case. Nevertheless, the Fifth District, rather than

finding that an inquiry was unwarranted, reached the ultimate merits of the case , and found that the inquiry which had been conducted was an adequate inquiry.

The effect of the lower Court's rulings is to leave trial court judges with a Hobson's choice. A failure to conduct an inquiry after an objection is likely to result in a reversal under this Court's rulings, while a decision to conduct an inquiry may result in a reversal under the Third District's decisions. In the midst of such a dilemma, trial judges will operate under a chilling effect when prosecutors object to defense counsel's peremptory challenges. For fear of being reversed due to a decision to conduct a Neil inquiry, judges will likely conclude, for purposes of the Third District, that they are better off countenancing potentially discriminatory challenges on the part of defense counsel than conducting an inquiry which might root out such discrimination. After all, a refusal to conduct the inquiry into defense counsel's challenges, whether a right or wrong decision, will never result in a reversal of an ensuing conviction; it is the safe course.

In holding that a trial judge is powerless to act in the absence of a sufficiently specific and articulate prosecutorial objection, the Third District has attributed a significance to the nature of the objection which has never been held to exist in any other context. While a deficient objection may prohibit an aggrieved party from pursuing an issue on appeal, see, e.g., Clark v. State, 363 So. 2d 331 (Fla. 1978), never before has it been held, in any other context, that a deficient objection deprives a trial judge of the power to act. For example, in the context of Richardson objections, as long as an objection can reasonably be understood, even if technically flawed, a trial court is obligated to conduct a Richardson inquiry. See, e.g., Brown v. State, 640 So. 2d 106, 107 (Fla. 4th DCA 1994) ("no magic words exist to trigger the requirement that the trial court conduct a Richardson hearing"); Raffone v. State, 483 So. 2d 761, 764 (Fla. 4th DCA 1986) (same). In a

similar vein, judges often have the power to act sua sponte, absent requests or motions from attorneys. For example, when a judge deems questioning of witnesses by counsel to be insufficient, the judge has the inherent power to ask further questions, even though neither litigant has requested such action or made any form of a motion. Watson v. State, 190 So. 2d 161 (Fla. 1966). Were the reasoning of the Third District applied, the inevitable conclusion would have to have been that absent an adequate motion or objection, the judge lacked the authority to engage in any such questioning.

Finally, the effect of the Third District's decision herein presents a compelling reason for this Court to accept jurisdiction. The Third District's decision implies that absent an objection by either party, a trial judge must condone and accept blatantly obvious discriminatory peremptory challenges exercised by counsel. If both litigants, for their own independent reasons, conclude that blacks or Hispanics will not make good jurors, and both parties strike all members of the group, the Third District would condemn the judiciary to tolerate such discrimination and make the State complicit in it. After all, without an objection, the trial judge, according to the Third District, is powerless to act. Such reasoning has been soundly condemned by at least one appellate court. Brogden v. State, 649 A. 2d 1196 (Md. App. 1994). This Court should do the same.

CONCLUSION

Based on the foregoing, this Court should exercise its discretion to accept this case for review and resolve the conflicts which exist between the lower Court's decision and decisions of both this Court and other District Courts of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was mailed this 16th day of February, 1996 to ROBERT KALTER, Assistant Public Defender, and MELODEE A. SMITH, Special Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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