ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,318

THE STATE OF FLORIDA,

Petitioner,

-vs-

STEPHEN HOLIDAY,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

This is the Respondent's brief on jurisdiction. In this brief Petitioner will be referred to as the State of Florida and Respondent will be referred to as defendant.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as being an accurate recitation of the relevant facts in this case.

QUESTION PRESENTED

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH REQUIRES THAT AN OBJECTING PARTY ALLEGE DISCRIMINATION BEFORE A NEIL INQUIRY IS REQUIRED IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *STATE V. JOHANS*, 613 So. 2d 1319 (FLA. 1993) AND *VALENTINE V. STATE*, 616 So. 2d 971 (FLA. 1993).

SUMMARY OF ARGUMENT

The Third District Court of Appeal concluded that pursuant to *State v. Johans*, 613 So.2d 1319 (Fla. 1993), a *Neil* inquiry is not required when the objecting party fails to allege that an opposing party's peremptory challenges were being exercised in a discriminatory manner. Since the District Court applied the correct standard of law in this case and no conflict with *Johans v. State,* 613 So.2d 1319 (Fla. 1993) or *Valentine v. State,* 616 So.2d 971 (Fla. 1993) is established on the face of the District Court's decision the state's petition for discretionary review based upon conflict jurisdiction should be denied.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH REQUIRES THAT AN OBJECTING PARTY ALLEGE DISCRIMINATION BEFORE A NEIL INQUIRY IS REQUIRED IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *STATE V. JOHANS*, 613 So. 2d 1319 (FLA. 1993) AND *VALENTINE V. STATE*, 616 So. 2d 971 (FLA. 1993).

In its brief on jurisdiction, the state argues the decision of the Third District is in conflict with this court's decision in *State v. Johans*, 613 So.2d 1319 (Fla. 1993) and *Valentine v. State*, 616 So.2d 971 (Fla. 1993). The state in its petition claims that the Third District Court of Appeal has issued "a lengthy series" of cases which all conflict with this court's opinion in *State v. Johans,* supra, since the court concluded that an objecting party must make a sufficient allegation of discrimination before an opposing party can be forced to give a valid reason for attempting to exercise a peremptory challenge on a specific juror.

In *Portu v. State*, 651 So.2d 791 (Fla. 3d DCA 1995), *review denied* 658 So. 2d 992 (Fla. 1995) and *Betancourt v. State*, 651 So. 2d 1021 (Fla. 3d DCA 1995) review denied 659 So.2d 272 (Fla. 1995) the Third District held that pursuant to this court's opinion in *State v. Johans*, 613 So. 2d 1319 (Fla. 1993), a party that is seeking a Neil inquiry must make an allegation of discrimination before a *Neil* inquiry is required. The State of Florida in *Portu* and *Betancourt,* similar to this case sought review in this court on the grounds that the Third District's decision which required an objecting party to do something more than just request a Neil inquiry was in direct conflict with this court's decision in *Johans*. This court on both occasions refused to

accept jurisdiction.[1]

During jury selection in this case defense counsel attempted to strike Juror Urrutia. The state interposed the following objection: "Your Honor, as far as Ms. Urrutia is concerned, I ask for race and gender reason." The Third District Court of Appeals concluded that since the state failed to allege any discrimination it was error to force defendant to give a reason for striking Juror Urritia. In concluding that this court's opinion in *Johans* required reversal the Third District held the following:

> We reach this view based on *Johans* and the general law regarding the dispelling of a presumption as follows: *Johans* continues to recognize that there is a presumption that a peremptory challenge is being properly employed. *Johans* eliminated the requirement that an objector demonstrate a "strong likelihood" that a peremptory challenge is being used solely on account of race, gender, etc. This does not mean, however, that an objector need not show <u>any</u> likelihood that a peremptory challenge is being so used. When a presumption exists in a party's favor, normally the opposing party must participate to dispel the presumption by making some showing. Again, the *Johans*, opinion explicitly stated that a "*Neil* inquiry is required when an objection is raised that a peremptory challenge is <u>being used</u> in a racially

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[1] Subsequent to the issuance of *Portu* and *Betancourt* the Third District Court of Appeal has continued to recognize that *Johans* requires that before a party can be forced to give a reason for exercising a peremptory challenge the objecting party must make a sufficient allegation of discrimination. *Garcia v. State,* 655 So. 2d 194 (Fla. 3d DCA), *review denied* 662 So. 2d 343 (Fla. 1995) and *Cruz v. State* 660 So. 2d 792 (Fla. 3d DCA 1995), review denied (Fla. January 19, 1996). Once again the State of Florida filed petitions seeking review in this court in these cases based upon the fact that the Third District's opinions were in direct conflict with this court's decision in *State v. Johans*. And once again this court in both cases refused to accept jurisdiction.

> discriminatory manner." *Johans*, 613 So. 2d at 1321 (emphasis added). Nonetheless, some have read the Supreme Court's opinion in *Valentine v. State*, 616 So. 2d 971 (Fla. 1993), as having eliminated altogether the threshold burden an objecting party must meet to warrant an inquiry into the other's use of peremptory challenges. We do not so interpret *Valentine*. If we are incorrect, the Supreme Court, upon proper petition, will obviously correct us.

A review of this court's decision in *Johans* establishes that the Third District's opinion not only does not conflict with this court's decision in Johans but instead it is completely consistent with *Johans*. In *State v. Johans*, 613 So.2d 1319 (Fla. 1993), this court modified the standard the complaining party has to meet to make a proper *Neil* objection. In *Johans*, supra, this court reiterated its holding in *Neil* that a party concerned about the other party's use of a peremptory challenge must make a timely objection, demonstrate on the record that the challenged person or persons are members of a distinct racial group, and show that there is a strong likelihood that those individuals have been challenged solely because of their race. This court modified the "strong likelihood" standard and held that the complaining party must show "that a peremptory challenge is being used in a racially discriminatory manner. Id at 1321. This court further reiterated that "the presumption of validity of peremptory strikes established in *Neil* is still the law in Florida. Furthermore, a peremptory strike will be deemed valid unless an objection is made that the challenge is being used in a racially discriminatory manner." *Id.*, at 1322. Once such an objection is made, the judge must conduct a *Neil* inquiry. Id. At 1322.

Thus, the law from this court is quite clear that peremptory challenges are

presumed valid and nondiscriminatory until the complaining party has made a timely and proper objection that the peremptory challenge "is being used in a racially discriminatory manner." The trial judge's first job is to evaluate that claim and determine whether it is proper and not frivolous. If the judge determines the objection was not frivolous and properly shows the challenge was used in a racially discriminatory manner, the judge then conducts a Neil inquiry to evaluate the race neutral reasons.

In its brief on jurisdiction, the state argues that this court in *Johans* held that whenever a party request a *Neil* inquiry the trial judge must force an opposing party to give a race neutral reason for excluding the juror. The state's interpretation *of Johans* is incorrect. If all a party had to do to trigger a *Neil* inquiry was to request a reason why his opposing party was striking a juror the presumption that a peremptory challenge is being exercised in a proper manner would be destroyed and there would be no more peremptory challenges in Florida. In rejecting the state's argument and preserving peremptory challenges in Florida, the Third District relied exclusively on this court's holding in *Johans* wherein this court held that a party's peremptory challenge is presumed valid and there is no requirement for a Neil hearing unless there has been an allegation of racial discrimination. Therefore, the Third District's decision is not in conflict with this court's decision in *Johans v. State*, supra.

The state also claims that the Third District's decision conflicts with this court's decision in *Valentine v. State*, supra, wherein this court reaffirmed its holding in *Johans* that it was no longer necessary for an opposing party to establish a "strong

likelihood" of discrimination in order to trigger a *Neil* inquiry. A review of party's request for a *Neil* inquiry in *Valentine* as compared to the request in this case will establish that the Third District's opinion does not conflict with this court's opinion in *Valentine*. During voir dire in *Valentine* the State moved to peremptorily strike the first two African Americans from the venire. When defense counsel requested a *Neil* inquiry he made the following objection:

> Your Honor, at this time, I would like to make an objection to the fact that the State has peremptorily challenged two of the only blacks we have on the panel so far, which is Ms. Glymph and Mr. Aldridge.
>
> I think if the Court will recall the voir dire questioning of both of those, that it indicates there's a strong likelihood challenges were exercised solely on the basis of race. As far as Ms. Glymph is concerned, her testimony was the fact that she was a victim of a crime, a burglary, her nephew is on the police department in South Carolina, she's a manager of a doctor's office. There's nothing, absolutely nothing to indicate that she has any kind of a bias, that there would be any reason that she would not be favorable to the State's case.

The above objection made in *Valentine* is vastly different from the objection made in this case. In *Valentine* the objecting party initially objected and alleged that the peremptory challenges being exercised by the state appeared to be based upon racial discrimination. The objecting party then went into detail to support his allegation that the peremptory challenges were being exercised in a racially discriminatory manner. All this court concluded in *Valentine* was that under *Johans v. State*, supra, it was not necessary for the trial judge to conclude that there was a "strong likelihood" of racial discrimination before conducting a Neil inquiry. This court

in *Valentine*, never held a *Neil* inquiry is required whenever the state requests one even when there is no allegation of discrimination.

In this case the Third District correctly concluded consistent with this court's decisions in *Johans*, *supra*, and *Valentine*, *supra*, that a defendant is not required to give reasons for a peremptory challenge when the only objection made by the state is "Your honor, as far as Ms. Urritia is concerned, I ask for race and gender reasons." In sum, the District Court applied the correct standard of the law in this case. Furthermore since no conflict with *Johans* or *Valentine* is established on the face of the District Court's decision, the state's petition for discretionary review based upon conflict jurisdiction should be denied.

CONCLUSION

Based upon the foregoing, this Honorable Court is respectfully requested to deny the state's petition for discretionary review based upon conflict jurisdiction.

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 Richard Polin, Assistant Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101 this 11th day of March, 1996.

_____
ROBERT KALTER
Assistant Public Defender

APPENDIX

95-1332992

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

STEVEN K. HOLIDAY, **

Appellant, **

vs. **

THE STATE OF FLORIDA, **

Appellee. **

97-1161

CASE NO. 95-366

Opinion filed December 20, 1995.

An appeal from the Circuit Court for Dade County, Carol R. Gersten, Judge.

Bennett H. Brummer, Public Defender, and Robert Kalter, Assistant Public Defender, and Melodee Smith, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Sylvie Perez Posner, Assistant Attorney General, for appellee.

Before BARKDULL, NESBITT, and GERSTEN, JJ.

NESBITT, J.

This case presents an issue which appears in this court with persistent regularity, that is, what threshold burden a party

challenging the other party's use of peremptory challenges must meet before it is proper for the trial judge to conduct an inquiry under State v. Neil, 457 So. 2d 481 (Fla. 1984), and its progeny. The defendant, Steven K. Holiday, claims that the lower court, based on an inadequate objection by the State, erroneously conducted a Neil inquiry of his reasons for challenging a juror.

During voir dire, the following exchange took place between the parties and the court:

> [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?
>
> (Emphasis added.)

At this point defense counsel proffered to the court his reasons for challenging juror Urrutia. Ultimately, the trial judge found no race or gender neutral reason for the challenge and the juror sat on the panel that convicted the defendant.

The Florida Supreme Court's pronouncement in Neil is our starting point. There the court held: "A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong

likelihood that they have been challenged solely because of their race." Id. at 486 (footnote omitted). State v. Johans, 613 So. 2d 1319 (Fla. 1993), eliminated the requirement that an objector demonstrate a "strong likelihood" that the juror in question was being challenged solely on account of their race. Preston v. State, 641 So. 2d 169, 170 n.3 (Fla. 3d DCA 1994). The Johans court held that "a Neil inquiry is required when an objection is raised that a peremptory challenge is *being* used in a racially discriminatory manner." Johans, 613 So. 2d at 1321. (emphasis added).

Recently, this court elaborated on the prima facie burden an objecting party must meet to satisfy Johans. In Cruz v. State, 660 So. 2d 792 (Fla. 3d DCA 1995), we held that "in order to properly invoke a Neil inquiry the objecting party must make a timely objection, and create the fact-supported inference that a peremptory challenge is being used in a racially discriminatory manner." Id. (emphasis added). In that case, the state objected to the defendant's use of a peremptory challenge by stating: "Judge, at this time we would exercise--I mean we would ask the court to inquire regarding the reason for striking Ms.--, what was the last one, Garcia-Kostik. The defense has now strike (sic) four Latin women." Id. (alteration in original). A Neil inquiry was warranted because: "[T]he State in the instant case went a crucial step further in its demand for a Neil inquiry by supplying a fact-

supported predicate inference of a racially discriminatory peremptory challenge. This fact-based support was sufficient to meet the threshold Johans test for invoking a proper Neil inquiry." Id.

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.

We reach this view based on Johans and the general law

regarding the dispelling of a presumption as follows: Johans continues to recognize that there is a presumption that a peremptory challenge is being properly employed. Johans eliminated the requirement that an objector demonstrate a "strong likelihood" that a peremptory challenge is being used solely on account of race, gender, etc. This does not mean, however, that an objector need not show any likelihood that a peremptory challenge is being so used. When a presumption exists in a party's favor, normally the opposing party must participate to dispel the presumption by making some showing. Again, the Johans opinion explicitly stated that "a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." Johans, 613 So. 2d at 1321 (emphasis added). Nonetheless, some have read the supreme court's opinion in Valentine v. State, 616 So. 2d 971 (Fla. 1993), as having eliminated altogether the threshold burden an objecting party must meet to warrant an inquiry into the other's use of peremptory challenges. We do not so interpret Valentine. If we are incorrect, the Supreme Court, upon proper petition, will obviously correct us.

In the instant case, the state's bare request for race and gender neutral reasons was not enough to warrant the trial court's inquiry,[1] Portu v. State, 651 So. 2d 791 (Fla. 3d DCA), review

[1] In fact, the State's objection failed to demonstrate on the record whether juror Urrutia was a member of a distinct

denied, 658 So. 2d 992 (Fla. 1995); Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA), review denied, 659 So. 2d 272 (Fla. 1995), and it was reversible error to disallow the challenge on the grounds that the reasons proffered were insufficient.

Consequently, we reverse and remand for a new trial.

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racial group or cognizable class. However, because the stated objection did identify her as to her gender, we analyze the sufficiency of the State's objection under the third prong of the previously mentioned test.