ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,318

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JUN 5 1996
CLERK, SUPREME COURT
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Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

STEVEN K. HOLIDAY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Steve K. Holiday was charged by information with one count of armed burglary, one count of grand theft third degree, and one count of grand theft of a firearm. (R. 1).

During the course of voir dire, the trial court, during preliminary background questioning, questioned Margaret Urrutia as follows:

> THE COURT; All right, Ma'am. Thank you very much.
>
> Is it "Urrutia"?
>
> THE JUROR: "Urrutia."
>
> THE COURT: I have to make the accent in the right place. Ma'am?
>
> THE JUROR: My name is Margaret Urrutia. I am sixty-two years old. I live in Dade County for forty years. I am a telecommunications operator.
>
> I am married. My husband is retired seaman.
>
> I have three children who are self employed. I have never served in a jury.
>
> I don't have an officer in my family. I have never had been a victim of crime, a crime

victim, and twelve does not apply.[1]

THE COURT: Thank you, Ma'am.

(T. 46). The judge did not ask any further questions of Ms. Urrutia. The prosecutor's questioning of Ms. Urrutia was limited to the following:

> MR. GONZALEZ [Prosecutor]: Ms. Urrutia? Urrutia.
>
> THE JUROR: Urrutia.
>
> MR. GONZALEZ: Now, you said that you had some children. How many?
>
> THE JUROR: Three.
>
> MR. GONZALEZ: Three. What are their occupations?
>
> THE JUROR: One a chef and the other two are beauty cultures [sic]. They have their own business.

(T. 128). The prosecutor did not ask any other questions of Ms. Urrutia and she did not volunteer any further information. (T. 112-135). Defense counsel's voir dire of the panel members was extremely brief (T. 135-147) and did not ask a single question of Ms. Urrutia. Id. Ms. Urrutia did not volunteer any further

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[1] "Twelve" is an apparent reference to question number 12, from the jury questionnaire form, which was being used as the basis for the preliminary background questioning. (T. 21).

information during the course of defense counsel's questioning.

During the conference for peremptory challenges, the challenges proceeded as follows: The first three peremptory challenges were exercised by the defense on the following jurors, in order: Orlando Callejas (T. 160-61); Palmer Schatell (T. 161); Robert Vega (T. 162). The prosecution then exercised its first and only peremptory challenge on Blanca Pastrana. (T. 163). The defense's fourth peremptory challenge was then exercised on William Hoblet. (T. 163). As of that time, the following other jurors had tentatively been accepted by both parties: Abraham Lobaina, Sadie Pough, Carl La Sala, Gisela Fernandez, Margaret Urrutia and Monica Crespo. (T. 161-63). When the judge then tendered the panel for acceptance (T. 164), defense counsel then sought to backstrike Ms. Urrutia, and the following transpired:

> MR. SCALLY [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.
>
> MR. GONZALEZ [prosecutor]: Your Honor, as far

as Ms. Urrutia is concerned, I ask for race and gender neutral reason.

THE COURT: What reason do we have? Sir?

MR. HENDON [defense counsel]: Your Honor, essentially, the reason that we struck juror Urrutia is, I just do not think she can be fair to my client. It has nothing to do with her race.

She was very forceful in her answering the questions. Even corrected how we mispronounced her name, and in consideration of the other panel members we have, I do not think blending with the other panel members she would be fair to my client.

THE COURT: A gender neutral or race neutral reason for striking the juror.

MR. HENDON: Your Honor, again, it has nothing to do with her gender or her race. It is my gut feeling as defense attorney that this particular juror, who came across very forceful in her responses to the questions, would be a juror more inclined to believe everything the state's witnesses are testifying to.

THE COURT: Based on the case law I don't think that is good enough.

MR. HENDON: Well, Your Honor, is the State claiming a specific objection to us exercising a peremptory? Are they saying it is based on her gender or her ethnicity or under what basis is the state challenging our right to exercise our peremptory challenge --

MR. GONZALEZ: Both.

MR. HENDON: -- to this particular juror?

MR. GONZALEZ: Both, in response to the defense. State v. Reid 507 So. 2d. Unacceptable reasons for exclusion of a juror. Feeling about a juror.

I think his other argument was to reach a juror on the panel and ability to mix in with those jurors. That under Allen v. State 17 FLWD 622, that is a Third D.C.A. -- March of 1992 I believe that is also impermissible reason to exclude a juror.

MR. HENDON: Your Honor, we have to get to the actual reason for peremptory challenges.

In this particular case we are intending to exercise a peremptory solely because she is a juror who we believe would not be the best juror for this client in this particular trial.

I have no idea what Ms. Urrutia's ethnicity is. Yes, she is a woman. I concede that. But my desire to strike her has nothing to do with her gender. It is based strictly on the presence that she displayed in my mind when answering the questions that were posed by the Court, the state and the defense.

MR. GONZALEZ: For the record, Your Honor, the defendant in this case is black and all the strikes the defense used has been on white members of the jury.

MR. HENDON: For the record, we have a limited number of non-white jurors. Would that we would have an equal number so this would never be a question. But just because we have exercised challenges on jurors who are not black has no bearing on the defense intents in this case.

The victim in this case is black as well.

> THE COURT: I am leaving her on. I don't find any gender or race neutral reason for striking this juror. Nor have I noticed anything unusual in her mannerism towards this defendant or toward anyone that would warrant her exclusion under the case law.
>
> She is back on.

(T. 164-67). Defense counsel then tendered the jury, but renewed "the objection to the Court not allowing our peremptory challenge of juror Urrutia." (T. 167-68). Defense counsel added, "We believe in the spirit of peremptory challenges the defense has an absolute right to strike a juror that the defense feels would not be fair to the defense's client." (T. 168). The judge responded as follows:

> THE COURT: I understand your position. I am not sure that the Third District or the Supreme Court of Florida or the Supreme Court of the United States feel the same way. Although, I certainly welcome any further elucidation on the subject that they can offer.

(T. 168). After the selection of the alternate jurors, the jury was sworn. (T. 169).

The defendant was subsequently convicted as charged on all three counts, adjudicated guilty on all three counts, and sentenced to a term of seven years incarceration for the armed burglary and five years incarceration on each of the two other counts. (R. 42-

46, 49-53). All of the sentences were to run concurrently. (R> 52). For the armed burglary, a three year minimum mandatory sentence was imposed as well. (R. 51).

On appeal to the Third District Court of Appeal, the defendant asserted that "the lower court, based on an inadequate objection by the State, erroneously conducted a Neil inquiry of his reasons for challenging a juror." (R. 66; Pet. App. 2). The District Court of Appeal concluded that the trial court erred in disallowing defense counsel's peremptory challenge as to Ms. Urrutia. The Court engaged in the following analysis:

> 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 168, 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, hat 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,[footnote 1] Portu v. State, 651 So. 2d 791 (Fla. 3d DCA), review denied, 658 So.2 d 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.
>
> . . .
>
> [footnote 1]: In fact, the State's objection failed to demonstrate on the record whether juror Urrutia was a member of a distinct 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.

(R. 66-70); Holiday v. State, 665 So. 2d 1089, 1090-91 (Fla. 3d DCA 1996).

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL, AND ERRONEOUSLY CONCLUDES, 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 concluding that a Neil inquiry may not be conducted until a prima facie case has established that a peremptory challenge is discriminatory, the lower Court has misapplied this Court's decision in State v. Johans, infra, which eliminated the requirement that the Neil objection include allegations of a substantial likelihood of discrimination. In depriving the trial judge of jurisdiction to conduct an inquiry, the lower Court has interjected hypertechnial requirements into the Neil procedures. Those requirements can have no effect other than to deter judges from conducting inquiries which this Court has encouraged them to conduct. Furthermore, mandating reversal on a disallowance of a peremptory challenge, when the reason given is clearly pretextual and improper, simply because a prima facie case was not demonstrated prior to the inquiry, is inconsistent with the policies of Neil and Batson, infra, in seeking to eliminate discrimination from the jury selection process.

ARGUMENT

THE PROCEDURES OUTLINED AND UTILIZED BY THE LOWER COURT FOR REVIEWING NEIL ISSUES ON APPEAL ARE INCONSISTENT WITH THE PRONOUNCEMENTS OF THIS COURT.

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), review denied, 658 So. 2d 992 (Fla. 1995); Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA 1995), review denied, 659 So. 2d 272 (Fla. 1995); Pride v. State, 664 So. 2d 1114 (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); Miller v. State, 664 So. 2d 1082 (Fla. 3d DCA 1995); Slaton v. State, 21 Fla. L. Weekly D42 (Fla. 3d DCA 1996). In recent months, the Fourth District Court of Appeal appears to have adhered to the same reasoning. See, e.g., Rivera v. State, 21 Fla. L. Weekly D805 (Fla. 4th DCA April 3, 1996).

All of the foregoing cases, including the instant opinion in Holiday v. State, 665 So. 2d 1089 (Fla. 3d DCA 1996), arise in the context of trial court denials of defense counsel peremptory challenges, pursuant to prosecutorial efforts to either object to defense counsel peremptory challenges under Neil or to elicit race- or gender-neutral reasons from defense counsel for the peremptory challenge at issue.[2]

Several distinct problems emerge from the Third District's line of cases; all of those problems are manifested in the decision under review herein. The first problem focuses on the nature of the prima facie case which must be demonstrated, in the aftermath of State v. Johans, 613 So. 2d 1319 (Fla. 1993), before a trial judge is obligated to conduct a Neil inquiry into the reasons for the peremptory challenge. The second problem focuses on whether the prosecutor's objection to a defense counsel's peremptory

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[2] The reverse side of this issue, allegedly erroneous denials of prosecutorial peremptory challenges, is an issue which is unlikely to ever arise on appeal, since double jeopardy ramifications preclude the State from seeking review after an acquittal, and the State is generally unconcerned with an erroneous denial of a prosecutorial peremptory challenge after a conviction, and thus the State is unlikely to assert such an error by way of cross-appeal from a defendant's appellate review of a conviction.

challenge is sufficiently specific and, if not, whether the trial court thereby lacks jurisdiction to proceed with a Neil inquiry, even if the judge and defense counsel reasonably understand that the prosecutor was objecting pursuant to Neil and its progeny. The third problem, subsumed within the preceding issues, focuses on what the proper consequences should be if a trial judge does conduct a full Neil inquiry if any of the requisite predicates to such an inquiry had not been previously established.

When each of the foregoing areas is explored, it must be concluded that the Third District's line of cases is contradictory to the principles which have evolved from this Court. The Third District's reasoning, if adhered to, will only serve to have a chilling effect on trial court judges, deterring them from ever conducting Neil inquiries when defense attorneys' peremptory challenges are objected to.

A. Prima Facie Case Requirement

This Court, in State v. Neil, 457 So. 2d 481, 486 (Fla. 1984), set forth the following requirements as prerequisites to a trial court's obligation to conduct an inquiry:

> 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. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race.

457 So. 2d at 486-87 (emphasis added). When the United States Supreme Court considered the same issue, two years later, in terms of the federal Constitution,[3] the prima facie case requirement was stated in a similar manner:

> Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). The United States Supreme Court embellished upon the facts

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[3] Neil made it clear that this Court's decision was based solely on the Florida Constitution, Article I, section 16.

that would, for purposes of Batson, satisfy the requirement of a prima facie case:

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosector's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

476 U.S. at 96-97.

This Court, in State v. Slappy, 522 So. 2d 18, 21 (Fla. 1988), subsequently elaborated upon the nature of the "substantial likelihood" requirement:

> Unfortunately, deciding what constitutes a "likelihood" under *Neil* does not lend itself to precise definition. It is impossible to anticipate and articulate the many scenarios that could give rise to the inference required by *Neil* and *Batson*. . . .

While noting such difficulties, and "resisting the temptation to craft a brightline test," which "could cause more havoc than the

imprecise standard we employ today," this Court simply "affirm[ed] that the spirit and intent of *Neil* was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a 'likelihood' of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question." 522 So. 2d at 21-22. Thus, "any doubt as to whether the complaining party has met its burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination." 522 So. 2d at 22 (emphasis added). The obligation of the trial judge, at that time, was to make sure that the complaining party's objection was not "frivolous." Id. In making these observations, this Court further noted that its decisions were intended to provide protections against discrimination in the jury selection processes which "exceed[] the current federal guarantees." 522 So. 2d at 20-21. Thus, from an early date, this Court has always taken steps to facilitate the decision of the trial judge to conduct a full Neil inquiry and to actively encourage the trial judge to make such an inquiry. Any error was to be on the side that was "least likely to allow discrimination."

Notwithstanding this Court's development of a flexible standard of "substantial likelihood," and notwithstanding this Court's language which actively encouraged trial court judges to conduct Neil inquiries, the evolution of cases over the years demonstrated that trial court judges were having difficulty with the "substantial likelihood" standard and were failing to conduct Neil inquiries when they should have been conducted. As a result, many convictions were being overturned due to a failure of trial court judges to conduct Neil inquiries. As a result, this Court, in State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993), eliminated the "substantial likelihood" requirement:

> . . . However, the case law that has developed in this area does not clearly delineate what constitutes a "strong likelihood" that venire members have been challenged solely because of their race. . . .
>
> Rather than wait for the law in this area to be clarified on a case-by-case basis, we find it appropriate to establish a procedure that gives clear and certain guidance to the trial courts in dealing with peremptory challenges. Accordingly, we 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 that they are inconsistent with this holding.

613 So. 2d at 1321. Thus,

> [u]nder our decision today, 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. However, upon such objection, the trial judge must conduct a *Neil* inquiry.

613 So. 2d at 1322. The purpose of the elimination of the "substantial likelihood" requirement in Johans was further explained in Valentine v. State, 616 So. 2d 971, 974 (Fla. 1993):

> The primary purpose for this rule deferring to the objector is practical-it is far less costly in terms of time and financial 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 any 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.

Thus, once again, this Court emphasized policies which are designed to encourage trial courts to conduct the Neil inquiries and to err on the side of preventing discrimination.

Notwithstanding the clear goals set forth by this Court, the Third District has embarked upon a course of action which subverts those goals. The Third District's line of decisions effectively deters trial court judges from conducting Neil inquiries regarding defense counsel peremptory challenges. That Court's interpretation of Johans, as will be demonstrated herein, has resulted in excessive and unnecessary reversals.

When this Court, in Johans, eliminated the "substantial likelihood" requirement from the Neil test, it did not state that any form of a prima facie case requirement remained. All that remained was that a party object "that a peremptory challenge is being used in a racially discriminatory manner." Johans, 613 So. 2d at 1319. See also, Valentine, 616 So. 2d at 974 ("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."). Nevertheless, the Third District has concluded that an objecting party must still demonstrate a prima facie case of discrimination before the trial judge may conduct an inquiry. See, e.g., Holiday, 665 So. 2d at 1090 ("A party objecting to the other side's use of peremptory challenges must affirmatively do three things to properly trigger

a Neil inquiry: . . . (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.") (R. 68); Cruz v. State, 660 So. 2d 792 (Fla. 3d DCA 1995) ("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."); Miller v. State, 664 So. 2d 1082, 1083 (Fla. 1995) (same).

Through these cases, the Third District is employing the language found in Batson for the prima facie case requirement, in lieu of the now-defunct "substantial likelihood" requirement. The Third District's decisions implicitly treat the Batson standard ("facts and any other relevant circumstances [that] raise an inference" of discrimination) as a lesser form of a prima facie case requirement which must still be established before the Neil inquiry is conducted. The Third District's conclusion is erroneous for two distinct reasons. First, this Court, in abandoning the "substantial likelihood" prima facie case requirement did not

specify that any "lesser" standard for determining a prima facie case be utilized. Second, it is far from clear that the Batson definition of a prima facie case is any lesser or different from the "substantial likelihood" standard which this Court had utilized prior to Johans.

As to the first of the foregoing reasons, there is no reason to believe that trial judges will have any easier time applying the prima facie case requirement which the Third District has now embraced than they did in attempting to apply the "substantial likelihood" criteria. The Batson standard of facts creating an "inference of discrimination" is just as nebulous as the "substantial likelihood" requirement was. As evidence of this, it must be noted that the United States Supreme Court specifically refrained from defining the prima facie case requirement in Batson, leaving it to the trial court judges to work it out, just as this Court had done in Neil and Slappy. 476 U.S. at 97. Furthermore, when the United States Supreme Court, in Batson, gave examples of facts which would create the inference of discrimination, those facts were the same type of facts that courts in Florida had been utilizing in the evolution of the "substantial likelihood" criteria. The Batson Court used examples such as "patterns" of

strikes, or counsel's questions and comments during voir dire. Id. Given that the Neil and Batson formulations are equally nebulous, and equally reliant on the same considerations, replacing the "substantial likelihood" test with an "inference of discrimination" test is not a plausible way of resolving the dilemmas which this Court addressed in Johans and Valentine.[4] Indeed, since this Court clearly has expressed the desire to encourage trial courts to conduct Neil inquiries and to err on the side or preventing discrimination, the use of any prima facie case requirement is inconsistent with this Court's goals.

The Third District's fundamental premise appears to be that the "inference of discrimination" standard is one which is somehow lesser than the "substantial likelihood" test, and therefore more easily satisfied. That premise, however, appears to be belied by the pertinent case law regarding the evolution of the two concepts. Florida had adopted the "substantial likelihood" language from the

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[4] The Utah Supreme Court, which utilizes the "substantial likelihood" test, has similarly noted that neither that court nor the United States Supreme Court had articulated facts which would either "raise an inference of discrimination" under Batson nor a "strong likelihood" under Utah law. State v. Alvarez, 872 P. 2d 450, 456 at n. 3 (Utah 1994).

California Supreme Court's pre-Batson decision in People v. Wheeler, 22 Cal. 3d 258, 583 P. 2d 748, 148 Cal. Rptr. 890 (1978). See, Neil, 457 So. 2d at 484. Wheeler had spoken of "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." 583 P. 2d at 764. This Court, summarizing the Wheeler concept of "a strong likelihood," conflated that notion with that of the "reasonable inference of discrimination": "When this evidence has been presented, the court must determine if there is a reasonable inference that the challenges are being made solely on the basis of group bias. If the court determines that a prima facie case has been demonstrated . . . ." Neil, 457 So. 2d at 484. Thus, in the eyes of this Court, in 1984, "substantial likelihood" and "reasonable inference" were viewed as functional equivalents. Not only is that equivalence implied by the Batson decision's reliance on the same types of unlimited and nondescript factors for determining the prima facie case, but, California's post-Batson case law suggests that the two standards are viewed as one by a state - California - which still utilizes the "substantial likelihood" test. For example, in People v. Davenport, 906 P. 2d 1068, 1084, 47 Cal. Rptr. 2d 800 (Cal. 1995), the California Supreme Court summarized the joint requirements of both Wheeler and

Batson. Thus, according to that Court, "[u]nder Wheeler and Batson," the objecting party must, inter alia, "'from all the circumstances of the case . . . show a strong likelihood that such persons are being challenged because of their group assertion. . . .'" If, in fact, the "substantial likelihood" and "inference of discrimination" tests are functional equivalents, the Third District, in adopting the latter in the aftermath of Johans has obviously done nothing more than to revert back to the pre-Johans era. According to the Third District, the "substantial likelihood" requirement, although having received a proper burial from this Court, remains alive and well, merely proceeding under the guise of a different title.

The Third District's concerns should not be minimized, as they are legitimate. The underlying concern of that Court is that in the absence of a prima facie case requirement, trial courts need to deter trial attorneys from engaging in frivolous objections to other parties' peremptory challenges. See, e.g., Betancourt v. State, 650 So. 2d 1021, 1022 at n. 2 (Fla. 3d DCA 1995); Rivera v. State, 21 Fla. L. Weekly D805, 806 (Fla. 4th DCA April 3, 1996) (expressing concern that since Neil and Batson principles apply to wide array of race, ethnic and gender categories, any peremptory

challenge can now potentially be objected to without articulating a factual basis for the objection). The answer to these concerns, however, is not the reinstatement of a vague prima facie case requirement, whether under the name of "substantial likelihood" or "factual inference of discrimination." The concerns of the Third and Fourth Districts can very well be dealt with in other manners.

First, it must be borne in mind that the ultimate inquiry under Neil or Batson is not merely a determination of the validity of a reason given in support of a peremptory challenge. Nor is the ultimate inquiry merely whether the proffered reason is race- or gender-neutral. Rather, the ultimate inquiry is one which is designed to prevent discrimination through peremptory challenges, and the ultimate question to be addressed by the trial judge, after the inquiry, and after the proffered reasons and retorts, is whether the party exercising the challenge has engaged in a discriminatory peremptory challenge. Thus, according to Neil, a remedy is to be resorted to by the trial judge only "if the party has actually been challenging prospective jurors solely on the basis of race. . . ." 457 So. 2d at 487. Not only are proffered reasons evaluated, under factors such as those defined in Slappy, supra, to determine whether proffered reasons are a pretext for a

discriminatory challenge, but, trial courts can properly look to other factors as well: such as the fact that the attorney exercising the challenge has already accepted as jurors other members of the same race, ethnicity or gender as the stricken juror; or whether challenges to members of the particular race, gender or ethnicity are disproportionate; or the likelihood, given the respective races, genders or ethnicities of the litigants and witnesses that the attorney exercising the challenge would have any plausible reason for utilizing a discriminatory peremptory challenge. See, e.g., Valle v. State, 581 So. 2d 40, 44 at n. 4 (Fla. 1991); Reed v. State, 560 So. 2d 203 (Fla. 1990); Kibler v. State, 546 So. 2d 710, 712 (Fla. 1989). In short, so many factors can be considered by the trial court after the inquiry, and after the proffering of the reasons for the challenges, that the trial court can reasonably be expected to come to a proper decision on the basis of all of the information, at a pont in time when the court also has the benefit of the additional information elicited from the inquiry. As noted in Valentine, such a procedure requires a minimal investment of time on the part of the trial court, poses a minimal likelihood of reaching an ultimate decision which is erroneous, and places the judiciary the forefront of deterring discrimination in the course of jury selection.

The second distinct manner in which the judiciary can limit or deal with the potential problem of frivolous requests for Neil inquiries is through the judiciary's supervisory powers. The possibility of a frivolous objection is not unique to this area of law; it can arise in any context, whether it be an objection to an argument of counsel or an objection to a question to a witness. Our judicial system engages in the presumption that objections advanced are not frivolous and that they should be taken seriously. When that presumption is belied, whether by an ongoing pattern of conduct or by a flagrantly egregious single instance, the Rules Regulating the Florida Bar provide the judiciary with the means for dealing with the situation. Rule 4-3.1 of the Rules Regulating the Florida Bar precludes a lawyer from asserting "an issue" in any proceeding, "unless there is a basis for doing so that is not frivolous. . . ." Dealing with attorneys who persist with frivolous objections through the courts' supervisory powers would certainly appear to be preferable to the Third District's approach of reversing criminal convictions where those convictions are obtained by impartial jurors in fair trials.

Thus, for all of the foregoing reasons, the Third District's application of the prima facie case requirement should be deemed

improper. That, however, is not the end of the inquiry. Two other alternative situations must be considered in light of the lower Court's decisions. First, if there is a prima facie case requirement, and the trial court conducts a Neil inquiry without the prima facie case having been established, what are the consequences of the ultimate disallowance of a peremptory challenge? That question, in turn, has two distinct possibilities. The Neil inquiry, absent the establishment of a prior prima facie case, can result in the development of information, such as race-based reasons for peremptory challenges, or clear indicia of pretextual reasons under Slappy, which support the ultimate decision of the trial court to disallow the peremptory challenge. The second possibility is that the inquiry does not support an ultimate decision to disallow the peremptory challenge, but the trial court erroneously disallows the challenge. It is the State's position that such situations, especially where the inquiry ultimately supports the conclusion that the challenge was race- or gender based, should not mandate the automatic reversal of a conviction in a criminal case.

By contrast, the Third District Court of Appeal has consistently held, in cases such as the instant one, that where a

Neil inquiry conducted without the support of a previously established prima facie case, the trial judge effectively lacks the jurisdiction to conduct the inquiry and any disallowance of the peremptory challenge at issue mandates automatic reversal, even if the subsequent inquiry establishes that the challenge was discriminatory. For example, in the instant case, even if a prima facie case did not exist, and even if the judge were deemed to have erred in conducting a Neil inquiry, the subsequent reasons given by defense counsel for the peremptory challenge - nothing more than gut feelings - are the types of reasons which have routinely been deemed pretextual under Slappy and indicative of a race-based motive for the challenges. See, e.g., Suggs v. State, 624 So. 2d 833 (Fla. 5th DCA 1993); Clark v. State, 601 So. 2d 284 (Fla. 3d DCA 1992); Wright v. State, 586 So. 2d 1024 (Fla. 1991). Pride v. State, 664 So. 2d 1114 (Fla. 3d DCA 1995), provides a similar example. The Third District concluded that there was no basis for conducting a Neil inquiry due to the absence of a prima facie case. During the course of the Neil inquiry, defense counsel, as reasons for the challenge, stated that the juror appeared inattentive, unresponsive, dishonest and "funky." Once again, he foregoing are all reasons which typically support the conclusion, under Slappy, that the challenge was pretextual, and was, in reality, race-based.

See, e.g., Suggs, supra; Clark, supra; Wright, supra.

Under circumstances such as the foregoing, even if a prima facie case is still a prerequisite to the Neil inquiry, and even if a trial judge errs in conducting the inquiry absent the prima facie case, when the ensuing inquiry supports the conclusion that the challenge was race- or gender-based, the ultimate decision to disallow the challenge should be valid and should not result in a reversal on appeal. Under such circumstances, the fairness of the trial cannot be said to have been affected, as the juror who is returned to the panel, after the disallowance of the peremptory challenge, is presumptively a fair and impartial juror. Moreover, when the trial court acts in such a manner, even if erring in the decision to conduct the initial inquiry, the trial court is not engaging in any form of discrimination; the State and the judiciary are not being implicated in any form of discriminatory conduct.

Other courts have engaged in at least two distinct lines of analysis which would support the foregoing conclusion - i.e., that an erroneous decision to conduct a Neil inquiry, with the resulting disallowance of a defense peremptory challenge, need not result in a per se reversal of a criminal conviction. The first reason to

support the foregoing conclusion is that once the defense attorney proffers the reason for the challenge, even if there was no prima facie case, and even if the judge solicited the reason, the giving of the reason renders the alleged absence of a prior prima facie case moot. The clearest exposition of this theme is found in United States v. Koon, 34 F. 3d 1416, 1440-41 (9th Cir. 1994), rhg. denied, 45 F. 3d 1303 (1995), cert. granted, ___ U.S. ___, 116 S.Ct. 39, 132 L.Ed. 2d 920 (1995) (Supreme Court review limited to federal sentencing issue, see 58 Cr.L.Rptr. 3001(1995)), where the appellate court upheld the trial court's conclusion that the reasons advanced by defense counsel were insufficient and the challenges at issue were disallowed:

> Appellants contend that the district court erred by not first requiring the government to make out a prima facie case. At this stage, however, any error of this kind is irrelevant: "[o]nce [the party making the peremptory challenge] has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [party opposing the peremptory challenge] had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed. 2d 395 (1991) (plurality opinion); *United States v. Changco*, 1 F. 3d 837, 839-40 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 619, 126 L.Ed. 2d 583 (1993) (same); *United States v. Bishop*, 959 F. 2d 820, 824 (9th Cir. 1992)

(same).

(bracketed materials are as set forth in the original).

The Court's reasoning in Koon is essentially the same as the reasoning used by this Court in Reed v. State, 560 So. 2d 203, 206 (Fla. 1990), where this Court concluded that a trial court could properly disallow peremptory challenges, even where, under Neil, there was no basis for conducting an inquiry, when reasons volunteered by the prosecution reflected the discriminatory intent:

> Reed was not prejudiced by the prosecutor having given explanations for his challenges. In fact, if it appeared from the prosecutor's explanation that his challenges were racially motivated, the trial judge would have been warranted in granting a mistrial despite not yet having ruled that the defense had made a prima facie showing.

If it is proper for a trial judge to consider reasons advanced by the prosecution, for the State's peremptory challenges, absent a prior determination of the existence of a prima facie case, how can it be any less correct for a trial judge to similarly consider the reasons advanced by the defense, even if the prima facie case does not exist? See also, Stroder v. State, 622 So. 2d 585, 586 (Fla. 1st DCA 1993) ("We first note that where the state volunteers its reasons for the exercise of a peremptory challenge the question

whether the defense has satisfied its initial burden of showing a strong likelihood of racial discrimination in the exercise of such challenge becomes moot.")[5]; Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed. 2d 395, 405 (1991) (plurality opinion)("Once a prosecutor has offered a race-neutral explanation for the peremptory challenge s and the trial court has ruled on he ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot."). Thus, the first reason for precluding reversal for a disallowed peremptory challenge absent a prima facie case is that once the reason is given and supports the ultimate conclusion to disallow, the correct result is effectively being reached, and the attorney giving the reason effectively waives any claim that the court was powerless to inquire.

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[5] Indeed, if the Third District's conclusion were correct, that the trial court is powerless to consider the reasons advanced by defense counsel for the peremptory challenge absent a prima facie case, then the conclusion in Stroder would have to be deemed erroneous, as the court, on appeal, found that the prosecutor's reasons were pretextual and warranted reversal, even though no prima facie case had been established. By the Third District's reasoning, the First District should not have been able to reach the question of the propriety of the reasons, since there was no jurisdiction to conduct any inquiry.

In conjunction with the foregoing, when the reason proffered does support the trial court's decision to disallow the challenge, the Third District's rule of per se reversal based upon the fact of an unwarranted inquiry is clearly contrary to the public policies behind decisions such as Neil and Batson. One of the strongest reasons for such decisions is that the public's confidence in the judiciary and the outcome of trials should not be undermined by the potential taint of discrimination in jury selection. See, e.g., Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed. 2d 33, 45 (1992) ("Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice - our citizens' confidence in it. Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal."); Batson, 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of

justice.").

Notwithstanding the utmost importance of the public's confidence in the outcome of trials, the Third District's line of cases is willing to countenance and condone discriminatory peremptory challenges, when such discrimination is supported by the reasons advanced by the attorney, simply because the trial judge jumped the gun and conducted the inquiry before a prima facie case was stated on the record.

The second line of reasoning which would support the conclusion that an erroneous decision to conduct an inquiry should not mandate reversal when the inquiry supports the disallowance of the peremptory challenge would be a requirement that the defendant establish prejudice prior to any reversal on appeal. Errors under Neil, in failing to conduct a required inquiry or in failing to effectuate a proper remedy when discrimination is established, are properly deemed to be per se reversible, because they have implicated the State and judiciary in discriminatory conduct and have undermined the public's confidence in the fairness of the

judiciary. Neil, supra; Batson, supra.[6] However, any error in disallowing a peremptory challenge does not implicate the judiciary or State in any wrongful discrimination. Since the challenge has been disallowed, the court has engaged in an effort to prevent discrimination. In the words of this Court, "[i]f we are to err at all, it must be in the way least likely to allow discrimination." Slappy, 522 So. 2d at 22. Thus, the reasons for per se reversal for Neil/Batson violations in failing to conduct inquiries or in failing to disallow discriminatory challenges, do not exist in the context of an allegedly wrongful denial of an exercise peremptory challenge.

When a challenge is wrongfully denied, discrimination is not involved, but the court has wrongfully limited the defendant's full use of peremptory challenges. This Court, in a context unrelated to Neil, has concluded that a wrongful denial of the defendant's entitlement to peremptory challenges is per se reversible error.

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[6] All nine justices of the United States Supreme Court have joined in opinions asserting that discrimination in the context of jury selection is not subject to harmless error review. Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991).

Gilliam v. State, 514 So. 2d 1098, 1099 (Fla. 1987).[7] Compelling reasons exist, however, for either reconsidering Gilliam, or limiting Gilliam to situations not involving denials of defense peremptory challenges during Neil inquiries, when the trial court is acting in an effort to prevent perceived discrimination.

If a per se rule of reversal exists in the context of the instant case, a chilling effect will exist which will serve to deter trial court judges from ever disallowing peremptory challenges by defense attorneys. When the trial court disallows a prosecution's use of a peremptory challenge after a Neil inquiry, the trial court does not risk any form of reversal by way of appeal in the event of a conviction. Such a ruling will never be the subject of appellate review, as the State will never have the occasion to seek review of such a ruling. In effect, disallowance of a prosecutor's peremptory challenge is either subject to a harmless error rule by implication (if the State obtains a

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[7] Some federal courts have reached the same conclusion in the context of discrimination in the jury selection process as well. United States v. Bennett, 928 F. 2d 1548, 1553 (11th Cir. 1991); United States v. Mosely, 810 F. 2d 93 (6th Cir. 1987); Knox v. Collins, 928 F. 2d 657 (5th Cir. 1991); United States v. Broussard, 987 F. 2d 215 (5th Cir. 1993).

conviction in any event) or, the disallowance is subject to prejudice to the State (as when there is an acquittal and the State is barred from seeking review of the disallowance by double jeopardy principles). Thus, when the defense raises Neil issues, the trial court, if anything, is motivated to give the defendant every benefit of the doubt, and err on the side of caution by sanctioning the State.

When the tables are reversed, however, and the State challenges the defense's use of peremptory challenges, the judge imperils the outcome of the trial every time the judge disallows a defense peremptory challenges. The judge often needs to make spontaneous decisions, without the ability to review the voir dire transcripts with a fine tooth comb, in an environment which is therefore conducive to potential errors, even by the best intentioned and thorough judge. Desiring to protect the outcome of the trial from reversal, the safest course of action is to defer to defense counsel's challenges. The fear of potential reversal clearly has a potential chilling effect on judges who are attempting to strike the proper balance between the legitimate competing concerns of a judiciary free from the taint of discrimination and the defendant's right to the use of peremptory

challenges.

A second reason for reconsidering the extent to which Gilliam should be applied in the context of Neil inquiries which result in denials of defense peremptory challenges, is that, subsequent to Gilliam, the Supreme Court of the United States, in Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed. 2d 80 (1988), addressed the issue of the state court's erroneous refusal to remove a juror for cause, thereby compelling the defendant to use one of his peremptory challenges, thereby wrongfully limiting the defendant's full entitlement to the allotted peremptory challenges. Emphasizing that peremptory challenges are not of constitutional dimension, the Supreme Court "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." 487 U.S. at 88. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result" did not result in any violation of the Sixth Amendment right to an impartial jury. Id. Thus, in order to prevail on such a claim, a defendant would have had to establish that the jury which actually sat was somehow other than impartial.

At least one federal appellate court, in the aftermath of Ross, has concluded that the principles of Ross warrant the application of harmless error analysis to the situation in which a defense peremptory challenge has been wrongfully denied. United States v. Annigoni, 68 F. 3d 279 (9th Cir. 1995) (rehearing en banc granted January 10, 1996 and currently pending). After noting the non-constitutional nature of peremptory challenges, and after analyzing the significance of Ross, the Court's three-judge panel concluded:

> So in this case Annigoni has failed to show that any juror challengeable for cause sat on his case. He lost one peremptory he should have had. He did not lose an impartial jury.
>
> This case, where the defense lost a peremptory it should have had, is fundamentally different from a case where a peremptory is exercised for a racially discriminatory reason, is challenged, and is permitted by the trial court. In that kind of case governmental power has been exercised to effect racial discrimination and has gone uncorrected by the court. The structure of the trial has been impacted: the composition of the jury has been corrupted. In that kind of case the error can never be harmless.

68 F. 3d at 285. Thus, when a defense peremptory was wrongfully denied after a Batson inquiry, in the absence a demonstration of prejudice, the erroneously denied peremptory challenge was treated

as harmless error. For the reasons outline above, that conclusion is supported by compelling policy reasons, and a failure to adopt such a rule will undoubtedly cause many trial court judges to have second thoughts about denying any defense counsel peremptory challenges, even where they reasonably believe that the record clearly supports a conclusion that the challenge was improperly discriminatory.

The foregoing arguments are all fully consistent with the principle that the trial judge must have considerable discretion in dealing with Neil issues. See, e.g., Fotopoulos v. State, 608 So.2d 784, 788 (Fla. 1992); Reed, supra, 560 So. 2d at 206; Dougan v. State, 595 So. 2d 1, 3 (Fla. 1992). The existence of such discretion is inconsistent with the Third District's premise that a decision to disallow a challenge, which may be supported by what is disclosed during the Neil inquiry, is reversible error because of an erroneous decision to conduct the inquiry in the first place.

B. Sufficiency of Specificity of Objection

Another related aspect of the Third District's long line of decisions, albeit one which does not clearly emerge from the

instant case, is that an objection under Neil must be articulated in a precise, highly specific manner. The objection must specifically allege the prosecutor's belief that the challenge is being used in a discriminatory manner. Thus, a simple request for a Neil inquiry was deemed insufficient. See, e.g., Barguin v. State, 654 So. 2d 1069, 1070 (Fla. 3d DCA 1995). The Third District made it clear in Betancourt, supra, 650 So. 2d at 1022, n. 2, that a request for a race-neutral explanation for a challenge, even when acceded to by defense counsel and understood by the trial court as being based on Neil and Johans, is somehow insufficiently specific.

The purpose of articulating an objection under Neil has been noted, by this Court, to have the same purpose as any other objection. "'It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.'" Neil, 457 So. 2d at 486, quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Thus, as long as the judge and opposing counsel can reasonably be expected to understand the nature of the objection, the objection should be deemed sufficient. Compare, Melbourne v. State, 655 So. 2d 126 (Fla. 5th DCA 1995) "defense counsel's assertion that he "would

raise a *Baxter* [sic] *Johans* Challenge" was treated as sufficient to trigger a Neil inquiry. Similarly, in the context of Richardson objections to alleged discovery violations, courts have routinely held that as long as the objection can reasonably be understood, even if technically flawed, a trial court is obligated to conduct an 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).

If the lower court's premises were carried to their logically inevitable conclusion, trial courts in this State would be powerless to deal with apparently discriminatory peremptory challenges where attorneys failed or refused to make objections. Thus, if both litigants, for their own independent reasons, conclude that blacks will not make good jurors, and both parties combine to strike all blacks on the panel, the lower Court would condemn the judiciary to tolerate such discrimination and make the State complicit in it. After all, without an objection, let alone a sufficiently specific objection, the judge 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.

C. Application of Law to Facts of Instant Case

With the foregoing principles in mind, the lower Court's decision in the instant case should clearly be deemed erroneous. Not only did the lower Court improperly conclude that a prima facie case requirement still exists, but the lower Court's opinion cavalierly ignores pertinent facts established by the record. While the prosecutor initially simply asked "for race and gender reason," during the ensuing colloquy, when defense counsel sought clarification of whether the prosecutor was objecting to defense counsel's peremptory challenge, not only did the prosecutor specifically assert that he was so objecting, but the prosecutor further embellished the record by pointing out that the defendant in this case was black, and the defense had used all five of its peremptory challenges on white members of the jury. (T. 165-66). The lower Court conveniently ignores that portion of the colloquy when it states that the "State's objection failed to demonstrate on the record whether juror Urrutia was a member of a distinct racial

group or cognizable class." (R. 69-70, at n. 1).[8] Such cavalier treatment of the facts only serves to demonstrate the hypertechnical way in which the lower Court is choosing to apply Neil and its progeny. According to the lower Court, once the State's initial objection neglected to mention the race of the stricken juror, any effort by the State to clarify that objection, moments later, during the course of the ensuing Neil inquiry, is of no consequence. How such hypertechnical rulings will serve to instill confidence in the public that the judiciary is engaging in a good-faith effort to preclude discriminatory peremptory challenges from tainting the outcome of cases is utterly beyond comprehension.

Not only was the lower Court's decision remiss in both its treatment of the prima facie case requirement and the sufficiency

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[8] Several courts have held that the principles of Neil and Batson are applicable to white jurors who are stricken. See, e.g., McClain v. State, 596 So. 2d 800 (Fla. 1st DCA 1992), review dismissed, 614 So. 2d 498 (Fla. 1993); Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991), review denied, 599 So. 2d 658 (Fla. 1992); Rome v. State, 627 So. 2d 45 (Fla. 1st DCA 1993); Roman v. Abrams, 822 F. 2d 214 (2d Cir. 1987); Echlin v. LeCureux, 995 F. 2d 1344, 1350 (6th Cir. 1993). Additionally, it should be noted that the lower Court accepted that the juror had been adequately identified on the basis of gender.

of the State's identification of the race of the stricken juror, but, even more significantly, the ensuing colloquy clearly supported the trial court's conclusion that the challenge was race-based. Defense counsel's reasons amounted to nothing more than an assertion that he did not feel that this juror would be fair. As admitted by defense counsel, it was his "gut feeling." (T. 164-65). Such reasons as those advanced herein have routinely been deemed indicative of discriminatory peremptory challenges. See, e.g., Kramer v. State, 619 So. 2d 274 (Fla. 1993) (juror's bad "score" on prosecutor's personal scale was insufficient race-neutral reason); Wright v. State, 586 So. 2d 1024 (Fla. 1991) (peremptory challenge based on bare looks and gestures is not acceptable unless corroborated by observations of trial judge); Clark v. State, 601 So. 2d 284 (Fla. 3d DCA 1992) ("bad vibes" from juror's responses); Suggs v. State, 624 So. 2d 833 (Fla. 5th DCA 1993) ("bad feeling" about the juror); United States v. Horsely, 864 F. 2d 1543 (11th Cir. 1989) (prosecutor's statement that "I just got a feeling about him" was insufficient).

Furthermore, this Court's analysis in Slappy similarly supports the trial judge's ultimate conclusion. Among the factors which support a determination that the proffered reason is

pretextual, is the "failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror," Slappy, 522 So. 2d at 22. As detailed in the Statement of Case and Facts herein, defense counsel did not ask a single question of the juror, Ms. Urrutia. The judge's questioning of her was perfunctory, limited to her basic background: where she lived, where she worked, where her husband and children worked, her lack of prior jury service, the lack of any officers in her family, and her status as one who has never been a victim of a crime. (T. 46). The prosecutor's questioning was virtually non-existent, limited to establishing that her children included a chef and tw "beauty cultures [sic]" who have their own business. (T. 128). In the absence of any meaningful questioning of the juror, the reason advanced by defense counsel should clearly be deemed pretextual under the decisions cited herein.

CONCLUSION

The lower Court's decision in the instant case undermines the policies which the judiciary is charged with advancing under Neil and Batson and their progeny. If one goal is to instill confidence in the public that cases are being decided free from the taint of

discrimination, the lower Court's decisions clearly undermine that policy. While this Court has encouraged trial judges to conduct Neil inquiries, the lower Court has deterred judges from conducting such inquiries. Thus, the lower Court's decision should be disapproved.

Respectfully submitted,

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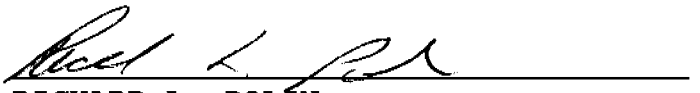

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits was mailed this 3rd day of June, 1996 to ROBERT a. KALTER, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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