IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,318

THE STATE OF FLORIDA,

Petitioner,

-vs-

STEVEN K. HOLIDAY,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Respondent, Steven K. Holiday, was the appellant in the district court of appeal and the defendant in the Circuit Court. Petitioner, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "SR" will be used to designate the supplemental record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF CASE AND FACTS

Defendant accepts the state's statement of the case and facts as being accurate. Any disagreement defendant may have with the state's interpretation of the facts will be discussed in the argument portion of defendant's brief.

SUMMARY OF ARGUMENT

This Court has continuously recognized its desire to eliminate discrimination in jury selection while preserving peremptory challenges. The Third District Court of Appeal's decision requires a party to (1) make a timely objection; (2) identify the juror as a member of a cognizable class; and (3) have some basis in the record that creates a reasonable inference that the challenge is being exercised impermissibly. Its decision effectively achieves the goal of eliminating discrimination in jury selection while preserving peremptory challenges. Therefore, this Court should affirm the Third District Court of Appeal's decision in this case.

QUESTION PRESENTED

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

ARGUMENT

THE PROCEDURES OUTLINED AND UTILIZED BY THE LOWER COURT FOR REVIEWING *NEIL* ISSUES ON APPEAL ARE CONSISTENT WITH THIS COURT'S PRONOUNCEMENTS.

The issue this court must resolve in this appeal is whether a party has the right to require an opposing party to give race neutral reasons for a peremptory challenge despite the fact that there is nothing in the record which would create even an inference that the opposing party was discriminating in jury selection. The Third District Court of Appeal in this case and numerous cases preceding this case[1] has concluded that in order to preserve this court's goal to eliminate discrimination in jury selection along with preserving peremptory challenges, a party cannot be forced to give a reason for a peremptory challenge unless there is something in the record which establishes an inference of discrimination. [2]

In its brief, the state argues that the opinions of the Third District Court of Appeal and the Fourth District Court of Appeal's decision in *Rivera v. State*, 21 Fla. L. Weekly D805 (Fla. 4th DCA 1996) directly conflict with this court's decisions in *State v Johans*, 613

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[1] See *Portu v. State,* 651 So.2d 791 (Fla. 3d DCA), review denied 658 So.2d 992 (Fla. 3d DCA 1995); *Betancourt v. State,* 650 So.2d 1021 (Fla. 3d DCA 1995) review denied 659 So.2d 272 (Fla. 1995); *Garcia v. State* 655 So.2d 194 (Fla. 3d DCA) review denied 662 So.2d 343 (Fla. 1995); *Barquin v. State*, 20 Fla. L. Weekly D1248 (Fla. 3d DCA 1995); *Pride v. State*, 664 So.2d 1114 (Fla. 3d DCA 1995) and *Miller v. State*, 664 So.2d 1082 (Fla. 3d DCA 1995).

[2] The Fourth District Court of Appeal in *Rivera v. State*, 21 Fla. L. Weekly D805 (Fla. 4th DCA April 3, 1996) has also concluded that there must be some prima facie showing of discrimination before a party can be forced to give a reason for a peremptory challenge.

So.2d 1319 (Fla. 1993) and *Valentine v. State*, 616 So.2d 971 (Fla. 1993). The state argues that these two cases stand for the proposition that a Neil inquiry is required whenever an opposing party requests one even if the moving party can not even establish a mere inference of discrimination. Therefore, the state argues that once a party has identified a juror as a member of a cognizable class and then makes a blanket allegation of discrimination without any record support, the opposing party must give reasons for its peremptory challenge.

It is defendant's position that the state in its brief hides behind the noble principle of eliminating discrimination in jury selection when in reality the state's intent is not to eliminate discrimination in jury selection, but instead to eliminate peremptory challenges in the State of Florida. Both the Third and Fourth District Courts of Appeal have recognized that since *Neil* has been extended to protect against not only racial discrimination but also ethnic and gender discrimination[3], allowing a party to obtain a *Neil* hearing by only identifying a juror as a member of a cognizable class, without making any prima facie case of discrimination, will result in the destruction of peremptory challenges. In concluding that some prima facie requirement is necessary before a party can be forced to give a reason for a peremptory challenge, both the Third and Fourth District Courts of Appeal began their analysis by examining this court's opinions in *State v. Neil*, 457 So. 2d 481 (Fla. 1984) and its progeny.

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[3] See *State v. Alen*, 616 So.2d 452 (Fla. 1993)(*Neil* protection includes ethnic discrimination) and *Abshire v. State*, 642 So.2d 542 (Fla. 1994).

State v. Neil, supra, was the initial case wherein this court decided that discrimination in jury selection will not be tolerated in the State of Florida. In *Neil, supra*, this court also recognized that while peremptory challenges are not constitutional in nature, they do have a long history in the State of Florida and are an essential part of Article 1, section 16 right to an impartial trial. The court stated that "the essential nature of the peremptory challenge is that it is one exercised without a reason, without inquiry and without being subject to the court's control." *See Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed 2d 759 (1965). The court also recognized that peremptory challenges are presumed to be valid and they are presumed to be exercised in a nondiscriminatory manner. Finally, the court concluded that even though a party has the right to exercise peremptory challenges, that right does not exist if the peremptory challenge is being used as a tool for racial discrimination.

The court then set out the following procedure which must be followed before a party can overcome the presumption that a peremptory challenge has been exercised in a nondiscriminatory manner and force a party to give a reason for his peremptory challenge: "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).

In *State v. Slappy*, 522 So.2d 18 (Fla. 1988), the court reaffirmed that the objecting party has an obligation to establish the likelihood of discrimination before the opposition has to give race neutral reasons for the peremptory challenge. In *Slappy,* this

court concluded that "Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous the burden of proof shifts to the other party to establish that the challenge was not based upon race." The court went on to emphasize that when a court is not sure whether to conduct a *Neil* inquiry, the court should err on the side of trying to eliminate discrimination in jury selection. However, in *Slappy, supra*, the court continued to recognize the importance of peremptory challenges.

Subsequent to *Neil, supra* and *Slappy, supra*, this court in *Reed v. State,* 560 So.2d 203 (Fla. 1990) held the following: "In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process." Therefore, the court continued to recognize the importance of preserving peremptory challenges and eliminating discrimination in jury selection.

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 and demonstrate on the record that the challenged person or persons are members of a distinct racial group. 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.

Subsequent to *Johans, supra*, this court issued its opinion in *Valentine v. State, supra*, wherein this court relying exclusively on its holding in *Johans*, supra, stated that whenever a moving party objects and then identifies a jury as a member of a cognizable class a *Neil* inquiry is necessary. It is based upon this language in *Valentine, supra,* that the state hopes to convince this court that any time a party requests a *Neil* hearing, whether or not there is any evidence of discrimination, a *Neil* hearing is required.[4]

However, both the Third and Fourth District Courts of Appeal have rejected this interpretation of *Valentine, supra,* since if this is a valid interpretation, parties can require opposing parties to give reasons for peremptory challenges even if there is no evidence of discrimination, with the result that there would be no more peremptory challenges in the State of Florida. The Fourth District Court of Appeal in *Rivera, supra,* properly recognized that when this court issued its opinion in *Johans* lessening the prima facie requirement to trigger a *Neil* inquiry, race was the only group that was considered a protected class.

As this court properly recognized in Reed, "we must necessarily rely on the inherent

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[4] It should be noted that in *Valentine, supra,* the party objecting to the opposing party's attempt to exercise peremptory challenges on two black jurors specifically alleged in his objection that the state's decision to strike two black jurors was racially motivated and that there was a substantial likelihood that the party exercising the peremptory challenge was discriminating against the black jurors. The facts in *Valentine, supra*, are, therefore, distinguishable from the facts in this case wherein there was no allegation of discrimination whatsoever.

fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process." The same logic applies when reviewing cases from the district courts of appeals. Both the Third and Fourth District Courts of Appeal have had the opportunity to review numerous criminal transcripts since this court's opinions in *Johans, supra* and *Valentine, supra*, and both courts have concluded that parties have begun to abuse this court's opinion in *Johans, supra*, by using *Neil* and its progeny as a tool to eliminate peremptory challenges rather than discrimination.

A review of the facts presented to the Third District Court of Appeal in this case and the facts presented to the Fourth District Court of Appeal in *Rivera v. State, supra*, will illustrate why both courts have concluded that it is necessary to require some prima facie showing before a party can be denied his right to exercise a peremptory challenge.

In this case, defendant was a black male who was charged with committing armed burglary, grand theft and grand theft of a firearm. (R. 1). The victim in this case was also black. During jury selection, defense counsel attempted to strike Juror Urrutia. The State of Florida made the following objection: " Your honor, as far as Ms. Urrutia is concerned. I ask for race and gender neutral reasons". (T. 164). Defense counsel objected to having to give a reason and when defense counsel asked whether he was being accused of discriminating against Juror Urrutia based upon her gender or her ethnicity, the prosecutor responded both. (T. 165). Therefore, the prosecutor took the position that defense counsel was discriminating against Juror Urrutia because of her gender, race and ethnic background. The Third District Court of Appeal recognized that there was nothing in this

record to even create an inference why defendant, a black male, who was charged with committing a crime against a black female would have wanted to discriminate against whites, women, and Hispanics.

In concluding that *Johans,* supra, required that there must at least be some record inference to support the state's allegation of discrimination, the Third District Court of Appeal held:

> 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 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 *Rivera v. State*, 21 Fla. L. Weekly D805 (Fla. 4th DCA 1996), the State of Florida requested a *Neil* inquiry when defense counsel attempted to strike a female juror. The state made the following objection, "Your honor, we would ask for a gender-neutral reason." Despite the fact that the state failed to allege any facts which would indicate why

defendant would want to discriminate against a female juror, the trial court concluded that the state had met the threshold burden to require a *Neil* inquiry. In concluding that the state's request for a *Neil* inquiry did not satisfy the threshold requirement, the Fourth District Court of Appeal reasoned:

> Gender as a classification comprises 100% of the population. It is thus far from remarkable that the first defense strike would be a female. In painting a total picture of jury selection in this case, it also bears noting that the first peremptory challenge from the prosecution was also a woman and that both the defense and prosecution had agreed to strike three other jurors (two women and one man) for cause. No pattern of gender-based discrimination emerges nor does there appear a rational reason to rebut the initial presumption that the peremptories were being exercised in a non-discriminatory manner. Cf. Abshire (prosecutor manifested desire to exclude women from jury); Laidler v. State, 627 So.2d 1263 (Fla. 4th DCA 1993)(prosecutor made no secret of her desire to eliminate all women from jury).

The court went on to hold:

> The fact that a party has challenged a woman or a man, standing alone, should be insufficient to trigger a Neil inquiry without the prosecution or defense objecting with some basis that the peremptory challenge is being used in a discriminatory manner. Otherwise, an opponent of the strike could always object and require the proponent to explain its use of a peremptory challenge because, with the exclusion of race, gender and ethnicity, all identifiable groups of the population are now protected from intentional invidious discrimination.

Therefore, the Fourth District Court of Appeal, similar to the Third District Court of Appeal, has recognized that in order to prevent litigants from using this court's decisions

in *Neil* and *Johans* as a way to deny the opposing party their right to a peremptory challenge, there must be some showing of discrimination before a party can be forced to give a reason for a peremptory challenge.

The state argues in its brief that the Third District's requirement that there must at least be some evidence in the record to support a reasonable inference of discrimination before a party has to give a reason for a peremptory challenge directly conflicts with this court's decision in *Johans, supra.* It is the state's position that the reasonable inference standard required by the Third District is identical to the "strong likelihood" standard that existed under *Neil* and that this court in *Johans* specifically eliminated the "strong likelihood" requirement.

Defendant would initially point out that the reasonable inference standard proposed by the Third District is not the same as the "strong likelihood" standard which was rejected in *Johans.* In *Johans* this court concluded that requiring a party to establish a "strong likelihood of discrimination" before a Neil inquiry could be required was an extremely difficult burden to place on a party seeking a *Neil* inquiry. This court also recognized that the "strong likelihood requirement' was a hard test for the trial courts to administer. Therefore, this court decided to change the burden from "a strong likelihood of discrimination" to "an allegation that the peremptory challenge is being used in a discriminatory manner."

The reasonable inference test required by the Third District is clearly a much more lenient burden than the strong likelihood standard that this court rejected in *Johans, supra.* All a party has to do in order to obtain a *Neil* inquiry is point to anything in the record which

would create a reasonable inference that an opposing party is using a peremptory challenge in a discriminatory manner. Requiring a party to meet this minimal requirement is completely consistent with this court's holding in *Johans*, supra, wherein this court concluded that in order to overcome the presumption of the validity of a peremptory challenge, a moving party must make an allegation that the peremptory challenge is being used in a discriminatory manner. Obviously this court in *Johans, supra*, did not intend to create a situation wherein a Neil inquiry could be required based merely on an unsupported allegation of discrimination. Therefore, this court should reject the state's position that a party can force an opposing party to give a reason for a peremptory challenge without making any showing whatsoever of discrimination.

In the alternative, if the court concludes that the State of Florida is correct when it argues that *Johans,* supra, and *Valentine,* supra, stand for the proposition that a party can force an opposing party to give a reason for his peremptory challenge despite the fact that the record contains absolutely nothing to indicate that the peremptory challenge is being used in a discriminatory manner, this court should accept the advice of the Fourth District Court of Appeal in *Rivera,* supra, and reconsider this issue.

Under existing law, every juror is a member of a cognizable class that is protected against discrimination in jury selection. Therefore, a party has the right to object to every single peremptory challenge made by an opposing party. In order to prevent *Neil* and its progeny from being a mockery and a tool for parties to deny opposing parties' peremptory challenges it is necessary that before a party can be forced to give a reason for a peremptory challenge, the objecting party must be required to do more than object to the

challenge and identify the juror as a member of a cognizable group.

The state argues in its brief that the Third District Court of Appeal's requirement that a party must show something in the record which creates a reasonable inference of discrimination will have "a chilling effect on trial judges deterring them from ever conducting Neil inquiries when defense counsel's peremptory challenges are objected to" and has resulted in excessive and unnecessary reversals.

A review of the Third District Court of Appeal's requirement that there be some record evidence to support an inference of discrimination establishes that this minimal prima facie showing will meet this court's desire to eliminate discrimination in jury selection and at the same time stop parties from using *Neil* and its progeny as a tool to unfairly deny opposing parties their right to peremptory challenges. The reasonable inference requirement is an extremely easy burden to meet, and, therefore, if a party believes his opposing party is discriminating against a juror he will be able to easily obtain a *Neil* inquiry. Furthermore, since the reasonable inference standard is such an easy standard to meet trial judges should have no difficultly determining when a Neil inquiry should be conducted. The Third District has made it very simple and clear: if an opposing party can point to anything in the record which raises a reasonable inference of discrimination, a *Neil* inquiry is required. Finally, by imposing this simple burden of creating a reasonable inference of discrimination, parties will no longer be able to use *Neil* and its progeny for the improper purpose of denying opposing parties their right to peremptory challenges.

If a party's real motive for requesting a *Neil* inquiry is to prevent the discriminatory use of a peremptory challenge, that party should have no difficulty with meeting the simple

requirement of pointing to something in the record which would create a reasonable inference of discrimination. However, if a party's motive for requesting a *Neil* hearing is not to stop discrimination but instead to deny his opposing party the right to a peremptory challenge, that litigant would not want there to be any requirement that there be evidence of discrimination before he could request a *Neil* hearing. Therefore, while the reasonable inference requirement may deter litigants from continuing to abuse this court's holding in *Neil* and its progeny, it should not deter trial judges from conducting *Neil* inquiries when there is some record support to justify them.

The state in its brief recognizes that by eliminating the requirement of any showing of discrimination, parties would have the right to request frivolous *Neil* hearings. Despite this concession, the state continues to argue that parties should be allowed to request *Neil* inquiries without being required to establish even an inference of discrimination.

First, the state argues that a defendant suffers no prejudice when the state demands reasons for peremptory challenges without any allegation of discrimination, since after the defendant has been forced to give his reason, the trial court must still evaluate the reason and if the court is convinced that the reason is race neutral the court will allow the peremptory challenge. This argument ignores two established principles. First, it ignores the fact that a peremptory challenge by definition is a challenge that does not require a reason; *Swain v. Alabama, supra,* and second, peremptory challenges are presumed to be exercised in a non-discriminatory fashion. *Johans, supra*. By requiring a party to explain his peremptory challenge before there is any evidence of discrimination, the presumption of the validity of the challenge has been destroyed. Furthermore, once

a party has been forced to give a reason, the challenge no longer can be considered a peremptory challenge. Therefore, the fact that a defendant has the right to convince a judge that his peremptory challenge was race neutral does not alleviate both the Third and Fourth District Courts of Appeal concerns that allowing a party to require reasons for a peremptory challenge without any showing of discrimination will result in the destruction of peremptory challenges.

Next, the state argues that the way to stop prosecutors from denying defendants their right to peremptory challenges is to discipline the prosecutors rather than grant defendants' new trials. Defendant would agree that prosecutors should be disciplined if they continue in their attempt to use *Neil* as a tool to eliminate peremptory challenges rather than eliminate discrimination. However, this disciplinary action does nothing to address the fact that when a defendant has been denied his right to a peremptory challenge, he has been denied his right to a fair trial.

Under the federal constitution and the Constitution of the State of Florida, a criminal defendant is guaranteed the right to a trial by an impartial jury. U.S. Const. amend. VI; art. I, Sec. 16, Fla. Const. Although the right to peremptory challenges is not itself of constitutional dimension, "it has deep roots in Anglo American legal history and has served a vitally important role" in securing the impartial jury guaranteed by these constitutional provisions. *Alen v. State*, 596 So. 2d 1083, 1089 (Fla. 3d DCA 1992)(Hubbart, J., concurring). It was first recognized at common law almost from the inception of the jury trial as an institution, and was later introduced in this country over 200 years ago in both federal and state jurisdictions wherever trial

by jury was guaranteed. *Batson v. Kentucky*, 476 U.S. 79, 118-20, 106 S.Ct. 1712, 1734-35, 90 L.Ed.2d 69 (1986)(Burger, C.J., dissenting). Peremptory challenges have a long history in Florida, having first been introduced in 1828. *State v. Neil*, 457 So. 2d 481, 483 n. 1 (Fla. 1984). "This long and venerable history speaks volumes for the proposition that 'the peremptory challenge occupies an important position in our trial procedures' as it represents 'one means of assuring the selection of a qualified and unbiased jury.'" *Alen v. State, supra*, 596 So. 2d at 1089 (Hubbart, J., concurring), *quoting Batson*, 476 U.S. at 91, 98, 106 S.Ct. at 1720, 1724.

Thus, the right to exercise peremptory challenges has always played an important role in securing the right to a fair trial, and it remains an important right today. The Third District Court of Appeal's decision which requires a minimal prima facie showing of discrimination before a party can be denied his right to peremptory challenges is an effective way to accomplish this court's ultimate goal of eliminating discrimination in jury selection while at the same time preserving peremptory challenges. Therefore, this court should adopt the three prong test proposed by the Third District which requires an objecting party to (1) make a timely objection; (2) identify the juror as a member of a cognizable class and (3) place on the record facts which would reasonably indicate that a peremptory challenge is being used in a discriminatory manner.

The state next argues that even if there should be some prima facie showing of discrimination before a party can be forced to give a reason for a peremptory challenge, the Third District Court of Appeal has erred in reversing the conviction in this case and

numerous other cases based upon the wrongful denial of a defendant's attempted peremptory challenge.

The state contends that the Third District Court of Appeal's decisions hold that when the state fails to make out a prima facie showing of discrimination "a trial judge effectively lacks 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." The state goes on to argue that " 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 the prima facie case was stated on the record." The state's argument is without merit since the state ignores the fact that in this case and all the other cases wherein the Third District has reversed defendants' convictions for the wrongful denial of a peremptory challenge, the court reversed the convictions because was no evidence of discrimination and not because the state merely failed to make a proper objection.

The state correctly points out in its brief that when a party volunteers a reason for a peremptory challenge, a trial judge does have jurisdiction to review the reason given for the peremptory challenge and if the court concludes that the challenge was based upon discrimination, the fact that the objecting party failed to establish a prima facie case of discrimination becomes moot. See *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed. d. 395(1995). However, before the issue of the failure to establish a prima facie case of discrimination can become moot, the trial court has to eventually make the ultimate

finding that the peremptory challenge was being exercised in a discriminatory manner.

United States v. Koon, 34 Fd. 1416 (9th Cir. 1994), the case relied upon by the state, illustrates this principle. *United States v. Koon*, supra, was the federal prosecution of the police officers who were charged with beating Rodney King. During jury selection, the government objected to defense counsel's attempt to exclude certain white jurors. After defense counsel gave his reasons for striking the juror, the trial court made the following findings:

> The Court believes and so rules that the government has made a prima facie showing and that considering the totality of the circumstances that do pertain, the explanation for the challenge is insufficient, it does not meet the test and therefore, the challenge will not be allowed.

Due to the fact that the trial court specifically ruled that the government had made out a prima facie showing of discrimination, coupled with the fact that the Rodney King case was one of the most racially tense trials in American history, the court concluded that the government's failure to allege a prima facie showing of discrimination prior to defense counsel offering his reasons for the challenges was moot.

In *Koon,* the trial judge made the ultimate finding that there was a strong likelihood of discrimination before he disallowed the peremptory challenge. In the decisions authored by the Third District, trial judges never made findings of discrimination.

Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA 1995) *review denied,* 659 So. 2d 272 (Fla. 1995), was the first case decided by the Third District Court of Appeal wherein the court indicated that a party does not have the right to request a

Neil inquiry if there is nothing on the record that would even support an inference of discrimination by the party using the peremptory challenge.[5] In *Betancourt v. State*, 650 So. 2d at 1023, Chief Judge Schwartz wrote:

> Our holding that overruling the attempted strike of Garcia was reversible error is essentially based upon the fact that there is no basis whatever for concluding that the challenge involved the evil proscribed by the Batson - Neil rule: that is, that it was based on a "constitutionally impermissible prejudice," State v. Slappy, 522 So.2d 18, 20 (Fla.1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.d. 909 (1988), or racially motivated in any way. In this case, the Hispanic defendant challenged a Hispanic prospective juror. On the face of it--and there is nothing in the record to suggest otherwise--there would seem no basis for even implying a racial reason for Betancourt's not wanting Garcia to serve on his jury. See Portu v. State, 651 So.2d 791 (Fla. d. DCA 1995). In this respect, the case is decisively unlike the overwhelming majority of cases--if not every case--in which a peremptory challenge has been disallowed under Batson and Neil. Typically--if not invariably--they involve situations in which the prospective juror belongs to a group whose general characteristics would seem to be adverse to the position of the challenger. E.g., J.E.B. v. Alabama ex rel. T.B., --- U.S. ----, 114 S.Ct. 1419, 128 L.Ed.d. 89 (1994) (defendant's challenge to female juror in paternity action); Batson v.

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5 On the same day that the court issued its opinion in *Betancourt*, it also issued an opinion in *Portu v. State, supra*, wherein the court held that the trial court erred in requiring a *Neil* inquiry when the moving party did not even allege discrimination. *Portu* is just another example of how absurd jury selection had become in Dade County. The trial judges were granting parties requests for *Neil* inquiries without even an allegation of discrimination. In *Portu*, the Third District held that pursuant to *Johans*, supra, if there is no allegation of discrimination there is no need for a i inquiry.

> Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.d. 69 (1986) (prosecution's challenge to black juror in case with black defendant); Slappy, 522 So.d. at 18 (same); State v. Neil, 457 So.d. 481 (Fla.1984) (same); Abshire v. State, 642 So.d. 542 (Fla.1994) (state's challenge to exclude women with male defendant); State v. Alen, 616 So.d. 452 (Fla.1993) (prosecution's challenge to Hispanic juror in case with Hispanic defendant); Joseph v. State, 636 So.d. 777 (Fla. d. DCA 1994) (state's challenge of Jewish venireperson in case with Jewish defendant). When, as here, there is no reason in common sense, legal intuition or the record to overcome "the presumption that peremptories will be exercised in a non-discriminatory manner," Neil, 457 So.d. at 486; State v. Johann, 613 So.d. 1319 (Fla.1993), or to justify a finding of "discriminatory intent," which is the critical, indeed the only, issue in question, see Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.d. 395, 406 (1991), no strike may be countermanded. See Johann, 613 So.d. at 1321 (Neil inquiry required when objection raised that peremptory challenge is being used "in a racially discriminatory manner") ; Portu, 651 So.d. at 791.

Therefore, in *Betancourt,* the Third District Court of Appeal concluded that the state's attempt to deny defendant the right to exercise a peremptory challenge was not designed to prevent racial discrimination but instead was an attempt to deny defendant the right to a peremptory challenge. The reversal in *Betancourt* was not based on a technically insufficient objection but instead was based upon the conclusion that there was no evidence of discrimination present in the record.

Subsequent to the court's opinion in *Betancourt*, the Third District Court of Appeal was presented with numerous cases wherein the court came to the conclusion that the

state's attempt to deny defendant the right to a peremptory challenge was not based on discrimination. *Garcia v. State* 655 So.2d 194 (Fla. 3d DCA), *review denied* 662 So. 2d 343 (Fla. 1995)(error to deny Hispanic defendant's right to strike Hispanic juror when there was no basis whatsoever in the record to even imply a racial reason for the strike.); *Barquin v. State,* 20 Fla. L. Weekly D1248 (Fla. 3d DCA 1995)(error to deny Hispanic male's right to strike Hispanic juror when the record failed to establish any reason why defendant would want to discriminate against an Hispanic male.)

Once again in these cases the court reviewed the record and came to the conclusion that there was no evidence of discrimination and, therefore, it was error to require defense counsel to give a reason for the peremptory challenge. In none of these cases did the court rely on the mere technical ground that the objection made by the state was insufficient.

The state in its brief argues that the Third District Court of Appeal erred in reversing defendant's convictions since the reasons given by defense counsel in all of the above cited cases, including this case, were "gut feeling reasons" which by themselves establish that the reasons were discriminatory in nature. The United States Supreme Court in *Purkett v. Elem*, 115 U.S. 1769 (1995) has recognized that any reason given by a party that is not based upon a party's race is a race neutral reason. The court further recognized that a race-neutral reason tendered by a proponent of a peremptory challenge need not be persuasive, or even plausible. The persuasiveness of the justification only becomes relevant when the trial court determines whether the opponent has carried his burden of proving purposeful discrimination.

In *Betancourt, supra*, the Third District correctly recognized:

> "the mere fact that a prospective juror is a member of one of the groups protected from intentional discrimination by one of the Batson-Neil decisions is not enough to allow the opposing litigant or the trial court to usurp the challenging party's discretion in exercising a peremptory challenge or even to require a "reasonable" basis for the strike. Portu v. State, 651 So.2d 792 (Fla. 3d DCA 1995); see Slappy, 522 So.2d at 22. These requirements apply only when it may rationally be determined that the juror's status is the reason for the challenge in the first place so that the proffered reason is a "pretext" or "subterfuge" to mask a forbidden motivation."

Therefore, when a party's reason for striking a juror is because the juror appears "funky" or, as in this case, the party has a "gut feeling" that the juror will not be fair to the defendant, this reason standing by itself is clearly a race neutral reason for striking a juror. The state in its brief cites numerous cases that have held that these types of reasons are pretextual and, therefore, impermissible. However what the state ignores in its analysis is the fact that before a reason can be considered pretextual, the trial court must first make a finding that there is some likelihood of discrimination.

The facts in the instant case will clearly illustrate defendant's position. The state in this case objected to defense counsel striking Juror Urrutia. The state asked that defense counsel give gender and race neutral reasons. Despite the fact that the state never alleged discrimination, coupled with the fact that the record failed to establish any inference of discrimination, the trial court without making any finding of discrimination required defense counsel to give a reason for the peremptory challenge. After objecting to being

forced to give a reason, defense counsel stated that he did not believe that this juror was the right juror for the defendant in this case. The court, without making any finding of discrimination, made the following ruling:

> 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.

It is clear in this case that the trial judge, unlike the trial judge in *Koon,* never made any finding, either prior to defendant giving his reason for the peremptory challenge or subsequent to his giving the reason, that defendant was discriminating in jury selection. Instead, all the court did was wrongfully conclude that the defendant's reason was not gender or race neutral. The fact that defendant did not think Juror Urritia would be a good juror in this case was a race neutral reason for striking the juror. If the trial judge had concluded that there was evidence in the record to support an inference of discrimination, at that point the judge would have been authorized to make a finding that the reason given by defense counsel was a pretext used to conceal his discriminatory reason for striking the juror.

The record in this case completely supports the Third District Court of Appeal's conclusion that there was no reason in common sense, legal intuition or the record to overcome the presumption that the peremptory challenge was exercised in a non-discriminatory manner. After alleging that defendant was discriminating against the juror based upon her race, gender, and ethnic background, the only thing the state was able to point to support this allegation was that defendant had used all his peremptory

challenges to strike white jurors. Defense counsel immediately informed the court that the great majority of the potential jurors were white and, therefore, it was not surprising that he was striking white jurors. (T. 166). As the First District court of Appeal in *McClain v. State*, 596 So. 2d 800 (Fla. 1st DCA 1992) and *Phillips v. State*, 591 So. 2d 987 (Fla. 1st DCA 1991) correctly recognized, "When peremptory challenges are being used to strike members of a majority race, a heavy burden to establish invidious racial motivation accompanies any attempt to deny, pursuant to *Neil*, the striking party's right to exercise its peremptory challenges." Since the record in this case fails to establish that defendant was intending to discriminate against Juror Urritia, the Third District Court of Appeal correctly concluded that it was error to deny defendant's right to exercise a peremptory challenge on this juror.

In a further attempt to convince this court that the Third District Court of Appeal has been reversing convictions based upon technical violations, the state argues that the court's "cavalier" treatment of the record resulted in the wrongful reversal of defendant's conviction in this case. In its brief, the state cites to a footnote in the Third District's opinion wherein the court concluded 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." The state then claims that the Third District reversed defendant's conviction in this case due to the state's failure to identify what cognizable group defendant was discriminating against.[6]

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[6] The state correctly points out in its brief that during the *Neil* inquiry the state indicated that all of defendant's peremptory challenges had been exercised against white jurors.

In its brief, the states argues: "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." The state asserts: "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."

The assistant attorney general's argument that the Third District Court of Appeal reversed defendant's conviction in this case based upon the mere technical ground that the state failed to allege that the juror was a member of a cognizable class could not be further from the truth. The state in its brief when citing footnote 1 of the opinion of the Third District Court of Appeal decided to delete the remainder of footnote 1 wherein the Third District Court of Appeal stated the following: "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." The "third prong" is whether there was any evidence that created a reasonable inference of discrimination. The court proceeded to evaluate the record in this case and concluded that since the record failed to create an inference of discrimination, it was error to deny defendant his right to a peremptory challenge. Nowhere in the opinion did the court hold that the fact that the state failed to identify the challenged juror as a member of a cognizable class required reversal of defendant's conviction.

Therefore, the state's argument that the Third District has concluded that once the

state has failed to make a technically correct objection, the trial judge has no jurisdiction to stop discrimination in jury selection is a misleading argument that is totally unsupported by the record. The Third District Court of Appeal reversed the conviction in this case because defendant was denied a peremptory challenge despite the fact that there was no evidence that he was discriminating against the juror based upon her race, gender and ethnic background.[7]

Next, the state tries to justify the denial of a defendant's right to a peremptory challenge by convincing this court that even when the state wrongfully denies a defendant a peremptory challenge, the harmless error doctrine should apply. In making this argument, the state asks this court to reconsider its opinion in *Gilliam v. State,* 514 So .2d 1098 (Fla. 1987) wherein this Court has held that the denial of a party's right to peremptorily challenge a juror who ends up serving on the jury is *per se* reversible error. In requesting this court to reconsider its opinion, the state relies on a non-final, Ninth Circuit Court of Appeals decision which holds that the harmless error doctrine should apply to the wrongful denial of a party's right to exercise a peremptory challenge.

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[7] The state in its brief also argues that the opinion of the Third District taken to its logical conclusion prohibits judges from stopping discrimination in their courtroom even when both parties are intent on discriminating. The state cites *Brogden v. State*, 649 A.2d 1196 (Md. App. 1994) for the proposition that a trial court on its own motion can force a party to give race neutral reasons for a peremptory challenge. There is nothing in the opinion in this case or any of the other cases that the state complains about which could even remotely lead someone to the conclusion that the Third District has concluded that a trial judge can not stop discrimination in its courtroom even when none of the parties have objected. In none of these cases, did the trial judge on its own motion request a *Neil* hearing because it felt a party was discriminating in jury selection.

In *United States v. Annigoni*, 68 F.3d 279 (9th Cir 1996) (a case that is being reviewed by the court *en banc)*, the court concluded that the United States Supreme Court's opinion in *Ross v. Oklahoma,* 108 S.Ct. 2273 (1988) supports the conclusion that the harmless error doctrine should apply when a defendant is denied a peremptory challenge and that juror remains on the jury. However, a careful review of *Ross v. Oklahoma*, supra, clearly establishes that the United States Supreme Court in *Ross* did not reverse its prior rulings that when a defendant is denied his right to a peremptory challenge the error is presumed harmful.

The United States Supreme Court, similar to this Court, has held that the denial or impairment of the right to exercise peremptory challenges is reversible error without a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965). *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), does not support the application of harmless error in a situation where a defendant is denied his right to a peremptory challenge and that juror remains on the jury. In that case, the trial court erroneously refused to excuse a juror for cause and state law required the defendant to exercise a peremptory challenge against that juror to preserve the issue for appeal. The combination of the trial court's error and state law effectively denied the defendant the use of one peremptory challenge. The Court, however, found no violation of the defendant's right to an impartial jury under the Sixth and Fourteenth Amendments, <u>because the juror who should have been dismissed for cause did not sit and there was no showing that the jurors who actually sat were partial.</u>

The issue the United States Supreme Court had to decide in *Ross* was similar to the

issue this Court had to decide in *Trotter v. State*, 576 So. 2d 691 (Fla. 1990), which was whether a new trial is warranted when a defendant is denied a challenge for cause and then has to expend a peremptory challenge to excuse that jury. Both the United States Supreme Court and this Court have recognized that unless an objectionable juror remains on the jury, there is no reversible error.

The situation in *Ross*, *supra*, and *Trotter*, *supra*, is completely different from the situation in this case. Here, the defendant has been denied a peremptory challenge and the objectionable juror remained on the jury; therefore, defendant did not have to establish prejudice. *See Gilliam v. State, supra*; *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)(denial of a defendant's right to a peremptory challenge is reversible error.); *United States v. Vargas*, 606 F.2d 341(1st. Cir. 1979)("there is little doubt that if the court or prosecution deprives a defendant of his right to the effective exercise of peremptory challenges, it would, without more, be grounds for a new trial.").

In *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993), the government argued similar to the state in this case, that *Ross v. Oklahoma*, supra, supports the proposition that the harmless error doctrine should apply when a defendant has been denied the right to exercise a peremptory challenge. In rejecting this argument, the court recognized that *Ross* deals with the effect that a denial of a challenge for cause has on peremptory challenges, and not with a situation like the one in this case where a defendant is denied a peremptory challenge and that juror serves on the jury. The court went on to hold:

> Here, we are not dealing with the impact of an

> erroneous ruling on a challenge for cause on peremptory challenges themselves. Applying the doctrine in this context would eviscerate the right to exercise peremptory challenges, because it would be virtually impossible to determine that these rulings, injurious to the perceived fairness of the petit jury, were harmless.

Broussard, 987 F.2d at 221.

Therefore, the Fifth Circuit Court of Appeals has recognized that the request to apply the harmless error doctrine to the wrongful denial of a defendant's right to exercise a peremptory challenge is a masked attempt at asking the court to eliminate peremptory challenges. Since every case other than the Ninth Circuit's opinion in *Annigoni, supra*, has concluded similar to this court in *Gilliam, supra,* that the harmless error doctrine does not apply when a defendant is denied the right to a peremptory challenge of a juror and that juror serves on the jury, this court should reject the state's request to revisit this issue.

Since defendant was denied the right to exercise a peremptory challenge on Juror Urritia, the Third District Court of Appeal correctly concluded that defendant was entitled to a new trial. Therefore, this court should affirm the well-reasoned decision of the Third District Court of Appeal.

CONCLUSION

Based upon the foregoing, this Honorable Court should affirm the well-reasoned decision of the Third Distirct Court of Appeal.

Respectfully submitted,

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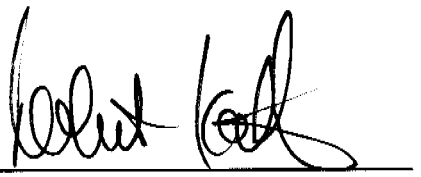
BY: 
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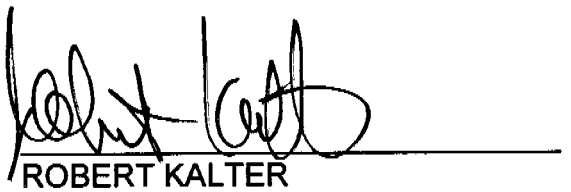
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true a true and correct copy of the foregoing was delivered by mail to Richard L. Polin, Assistant Attorney General, 401 N.W. 2nd Avenue, N-921, Miami, Florida 33101 this 24th day of June, 1996.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