**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC09-386

DCA NO. 3D05-90

**ANTHONY E. SMITH**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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# BRIEF OF PETITIONER ON JURISDICTION

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

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## INTRODUCTION

This is a petition for discretionary review of the Third District Court of Appeal's decision in *Smith v. State*, 34 Fla. L. Weekly D251 (Fla. 3d DCA Jan. 28. 2009) on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as "A." followed by the page number.

## STATEMENT OF THE CASE AND FACTS

On direct appeal, the issue presented was the trial judge's error in denying the defense the right to peremptorily challenge a juror where (1) the state made a general objection that failed to identify the prospective juror's race, ethnicity or gender as the underpinning of its charge of discriminatory intent, and (2) the sole alleged discriminatory basis that prompted the trial judge's *Neil*[1] inquiry was that the juror's last name sounded to him "like a German name." (A. 2).

As the decision reflects, during voir dire, the defense announced that it was going to peremptorily challenge a prospective juror named Buchholtz. (A. 2). The State responded only that it wanted the defense to explain the peremptory challenge. (A. 2). The State offered no basis whatsoever for its request. The State

[1] *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

did not identify Buchholz as a member of any racial, gender or ethnic group that might provoke an unlawful discriminatory intent by the defense in the exercise of the peremptory challenge, nor did the State even assert that defense counsel was acting with discriminatory intent against any protected group. In response to the State's bald request, defense counsel attempted to dispute how juror Buchholz was a member of a cognizable group. Defense counsel was cut off by the trial judge's stated assumption that this juror had a German-like sounding name:

Defense: Is he a member of a distinct minority group which would render him -

Court: Buchholz?

Defense: Yes.

Court: Sounds to me like a German name.

(A. 2).[2] The trial judge then reasoned: "I suppose there is - anybody qualifies under our present great, deeply thought out appellate decisions." (A. 3). Premised solely on the trial judge's characterization of the juror as a person with a German-

[2] The decision reflects that defense counsel thereafter attempted to make a statement but was again cut off by the trial court: "This is a recognized minority group within the law, I believe. Mr. Buchholz - - - (A. 2-3). The Third District's decision on rehearing notably omitted any discussion that petitioner may have waived the *Neil* issue.

like sounding name, the judge proceeded with a *Neil* inquiry and denied the peremptory challenge. (A. 3).

The Third District's decision affirmed the trial court's action. Its decision expressly relied on *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997) and a few related cases. (A. 4-5). The Third District interpreted this line of cases to hold that even when an opponent makes a general objection, "as long as the trial court understands the nature of the objection, an inquiry may be made." (A. 5-6) (citations omitted). From its decision, the Third District omitted any requirement that the record demonstrate the juror was a member of a particular protected group whose affiliation was the underpinning of the opponent's general objection.

As a consequence, the Third District found that a trial judge's perception that the identified juror had a German-like sounding name was sufficient legal predicate to conduct a *Neil* inquiry and subsequently deny a party the right to exercise a peremptory challenge.

The Third District rendered its original opinion on January 31, 2007. *See Smith v. State*, 32 Fla. L. Weekly D346 (Fla. 3d DCA Jan. 31, 2007). A timely motion for rehearing and rehearing en banc was filed on February 13, 2007. Almost exactly two years later, on January 28, 2009, the Third District denied the

rehearing motion, withdrew its former opinion, and entered the present decision sought to be reviewed. (A. 2).

## SUMMARY OF ARGUMENT

The Third District held below that where a party makes a general objection to a peremptory challenge, without identifying the prospective juror as a member of a protected class affiliated with its claim of discriminatory intent, the trial court is permitted to conduct a *Neil* inquiry "as long as the trial court understands the nature of the objection." (A. 5-6). The Third District expressly relied on *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997), but critically omitted *Franqui*'s requirement that the record demonstrate the juror's membership in a protected group whose affiliation is the underpinning of the opponent's general objection.

As a consequence of its express and direct misinterpretation and misapplication of *Franqui*'s requirement, the Third District approved the trial judge's denial of a peremptory challenge where the sole record basis for conducting the *Neil* inquiry was the judge's speculation that the prospective juror's last name, Buchholz, "[s]ounds to me like a German name." As the decision reflects, the state made no assertion that Buchholz belonged to any protected class, and it made no allegation of any discriminatory intent. The Third District's decision upholding the trial court's denial of the peremptory challenge necessarily

concludes that a juror belongs to a cognizable ethnic group simply because his name sounds “like a German name.” This conclusion also conflicts with the specific requirements of ethnic cognizability required by *State v. Alen,* 616 So. 2d 452 (Fla. 1993). Indeed, as reflected by the Third District’s decision, the record failed to show that the juror had any German ancestry whatsoever.

## ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT’S DECISIONS IN *FRANQUI V. STATE,* 699 So. 2d 1332 (Fla. 1997), AND *STATE V. ALEN,* 616 So. 2d 452 (Fla. 1993).

The Third District’s decision reflects that petitioner was denied the right to exercise a peremptory challenge where the sole alleged discriminatory basis that prompted the trial judge’s *Neil* inquiry was that the juror’s last name sounded to him “like a German name.” Nothing established that the juror was a member of a cognizable ethnic group. The state made only a general request that reasons be proffered for the peremptory challenge, without identifying the prospective juror’s membership in any racial, ethnic, or gender group as the underpinning for its request.

The Third District approved the trial court’s action by expressly relying on this Court’s decision in *Franqui v. State*, 699 So. 2d 1332 (Fla. 1997) and a few

related cases. The Third District interpreted these cases to hold that even when an opponent makes a general objection to the use of a peremptory challenge, "as long as the trial court understands the nature of the objection, an inquiry may be made." (A. 5-6) (citations omitted). The Third District's decision critically omits any requirement that the record demonstrate that the juror is a member of a protected group whose affiliation is the underpinning of the general objection. It is precisely this requirement that *Franqui* and the related cases mandate in order for a trial court to conduct a *Neil* inquiry in the face of a general objection.

In *Franqui*, this Court held that the trial court was authorized to conduct a *Neil* inquiry despite a general objection, because the record demonstrated that the "Dade County" juror "who was born and raised in Havana, Cuba and whose name was Aurelio Diaz," was a member of a cognizable ethnic group. *Franqui*, 699 So. 2d at 1335. Although this record requirement was recognized in the cases cited by the Third District, as it did with *Franqui*, the Third District failed to apply it here. In *Alsopp v. State*, 855 So. 2d 695, 697 (Fla. 3d DCA 2003), a *Neil* inquiry was required where "the record in this case adequately establishes that Campos is Hispanic, a cognizable ethnic group for the purposes of a *Neil* inquiry." In *Foxx v. State*, 680 So. 2d 1064, 1065 (Fla. 3d DCA 1996), a *Neil* inquiry was authorized where although the state "did not expressly state that the venireperson was a

member of a distinct racial group," it was "clear from the record" that the venireperson was "Hispanic." In *Joseph v. State*, 636 So. 2d 777, 779 (Fla. 3d DCA 1994), a *Neil* inquiry was required where the record showed that both the defendant and the prospective juror were Jewish.

As noted, in the Third District's decision below, the only alleged discriminatory basis for the *Neil* inquiry was the trial court's speculation that prospective juror Buchholz's name was German-like sounding. The Third District's decision approving the trial court's conducting a *Neil* inquiry for a juror who had a German-like sounding name conflicts expressly and directly with this Court's decision in *Franqui* and related cases.

Further, the Third District's decision upholding the *Neil* inquiry below necessarily concludes that a juror belongs to a cognizable class simply because his name sounds "like a German name." (A. 2). This is in express and direct conflict with this Court's decision in *State v. Alen,* 616 So. 2d 452 (Fla. 1993). Under *Alen*, this Court held that a cognizable ethnic class entitled to protection under Neil "demands that the group be objectively discernible from the rest of the community." *Alen*, 616 So. 2d at 454. (footnote omitted). *Alen* laid down two factors that determine if an ethnic group is objectively discernible. First, the group's population should be large enough that the general community recognizes

it as an identifiable group in the community, and second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society. *Id*. As reflected by the Third District's decision, the record failed to show that juror Buchholz had any German ancestry whatsoever, or indeed whether the name "Buchholz" is even a Germanic name; it showed only the judge's speculation that the name "[s]ounds to me like a German name." (A. 2). It certainly fails to show the juror's actual membership in an ethnic group as defined by *Alen*'s two-prong criteria. *Alen*, 616 So. 2d at 455

On its face, the Third District's decision effectively allows the trial court to deny the exercise of a peremptory challenge where there is absolutely no allegation or indicia of discriminatory intent against a protected group. If, as the Third District holds in this case, a juror's merely having a German-like sounding name authorizes a *Neil* inquiry, then a trial court is free to curtail the use of a peremptory challenge without any ground to believe a party is engaging in discrimination at all. In short, peremptory challenges no longer exist. This was precisely the understanding of the trial judge when he voiced: "[A]nybody qualifies under our present great, deeply thought out appellate decisions." (A. 3).

The trial judge and the Third District, which approved this reasoning, misapprehended that without a record that reveals the juror's membership in a cognizable group and the juror's affiliation in that group as the basis for the claim of discriminatory intent, a trial court cannot possibly ferret out discrimination in the exercise of the peremptory challenge. No evaluation of the motive for the peremptory challenge can be performed under the third step of *Melbourne v. State,* 679 So. 2d 759 (Fla. 1996), unless the evaluator first learns the juror's membership in a protected class that serves as the basis for the claim of discriminatory intent. Clearly, the factors used to judicially evaluate the credibility of the reasons given for a peremptory challenge - the protected group status of the accused and the alleged victim, the pattern of strikes against other venirepersons of the same group status, and the disparate treatment of venirepersons who do not belong to that protected group - are useless unless the record shows the challenged juror's membership in a protected group that is the underpinning of the claim of discrimination. The nature of the credibility evaluation will entirely depend on whether the juror is allegedly being discriminated against due to the juror's particular gender, race, or the nature of her ethnicity. Thus, where neither the nature of the case nor any of the participants - defendant, alleged victim, witnesses

or attorneys - bear any relation to a German-like sounding name, the claim of a discriminatory intent is baseless.

This Court has struck a careful balance between preserving the established right of a party to exercise peremptory challenges, and banning the use of peremptory challenges to discriminate against jurors solely due to their membership in a constitutionally protected class. The Third District's decision below destroys this balance. It allows the denial of the right to peremptory challenge without any record basis to draw the remotest inference of discriminatory intent.

## CONCLUSION

In light of the foregoing demonstration that the decision of the Third District Court of Appeal expressly and directly conflicts with decisions of this Court, Mr. Smith respectfully requests that this Court exercise its jurisdiction, under Article V, Section 3(b)(3), Florida Constitution, to resolve this conflict.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Attorney for the Respondent, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this day of ______ March, 2009.

BY:___________________________

BETH C. WEITZNER
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## CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

BY:___________________________

BETH C. WEITZNER
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