

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-33

**THE STATE OF FLORIDA,**

Petitioner,

-vs-

**HECTOR GARCIA,**

Respondent.

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**BRIEF OF RESPONDENT 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 decision of the Third District Court of Appeal in *Garcia v. State*, \_\_ Fla. L. Weekly \_\_ (Fla. 3d DCA October 20, 2010), on the grounds of express and direct conflict of decisions. In this brief of respondent on jurisdiction, all references are to the attached appendix paginated separately and identified as “A” followed by the page number.

## **STATEMENT OF THE CASE AND FACTS**

During jury selection defendant, an Hispanic male who had already accepted three Hispanic jurors, attempted to exercise a peremptory challenge on Juror Runno who was also an Hispanic. The state requested a race neutral reason for the strike and defense counsel responded that he wanted to strike the juror since the juror had prior jury experience. The state argued that the reason was not race neutral and the trial judge accepted this argument, over the objection of defense counsel, and denied defendant the right to strike this juror. Since the trial judge accepted the state’s argument that the reason given by defense counsel was not race neutral the court never conducted a hearing as to the genuineness of the reason. (See App A.)

The following morning, after the jury had already been sworn, the court placed on the record that she had wrongfully concluded that the reason given by

defense counsel was not race neutral. However without conducting a further inquiry the court in an attempt to justify the ruling which prohibited defense counsel from striking Juror Runno placed on the record that the court did not believe defense counsel's reason for striking the juror was genuine. This is evidenced by the following ruling by the trial court:

The Court will note at this point, while that is a race neutral reason for a strike, the Court will find, and articulate on the record, that if this case does go to appeal that the Court is finding that not to be a genuine reason.

There were four other jurors that had participated in jury service, no mention of their prior jury service was used. Specifically, I will point to Cartotto, who is now our alternate on this jury, defense accepted Mr. Cartotto, without mention of his prior jury service.

So, the Court is finding that it is not a genuine purpose for a strike, So, just so the record is clear in case this case goes to appeal. And the objections that were previously noted will remain noted, okay?

Defense counsel specifically objected to the court's ruling and proffered the juror questionnaires to show that no one who served on the jury other than Runno and the alternate juror Cartotto had prior jury selection. Defense counsel also argued that Ms. Runno was Hispanic, as were the defendant and three other jurors. No further comment or inquiry was made by the trial judge.

The Third District Court of Appeal reversed the trial judge's ruling since the court failed to follow this court's opinion in *Melbourne v. State*, 679 So.2d 759 (Fla. 1996). The court specifically found that the trial judge failed to follow the

third step in *Melbourne*, supra, which required the trial court to evaluate all relevant circumstance surrounding the strike calculated to assess the genuineness of the reason proffered. The court went on to rely upon this Court's holding in *Rodriguez v. State*, 753 So.2d 29, 40 (Fla. 2000) to conclude that the record was simply devoid of any relevant circumstance upon which to find the defense's stated reason for the strike was pretextual or other than genuine.

The state filed a notice to invoke this court's jurisdiction and a jurisdictional brief claiming that the Third District Court of Appeal decision directly conflicts with this court's decision in *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000).

### **SUMMARY OF ARGUMENT**

This court should refuse to accept jurisdiction in this case since the Third District Court of Appeal's decision which holds that there was nothing in the record to establish that the trial judge considered the relevant circumstances nor where there any relevant circumstances in the record which would have supported the conclusion that defense counsel's reason for striking Juror Runno was pretextual is not in conflict with any case from this court but instead is completely consistent with this court's holding in *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000).

## ARGUMENT

### **THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *RODRIGUEZ V. STATE*, 753 So.2D 29 (Fla. 2000) AND THEREFORE THIS COURT SHOULD NOT ACCEPT JURISDICTION IN THIS CASE.**

The state in its brief argues that the opinion of the Third District Court of Appeal's decision directly conflicts with this court holding in *Rodriguez*, 753 So.2d 29 (Fla. 2000). A review of the facts and holding in *Rodriguez* and the facts and holding in this case will clearly establish that no conflict exists between the Third District's opinion in this case and this court's opinion in *Rodriguez*.

In *Rodriguez*, during jury selection, Rodriguez tried to exercise a peremptory challenge against a venireperson. The State objected, noting that the venireperson was Hispanic. Rodriguez justified the challenge by stating that the venireperson had been charged and arrested for carrying a concealed firearm and that the charges were eventually dropped and, therefore, the venireperson may feel a debt of gratitude to the State. The trial court pursuant to this Court's opinion in *Melbourne* evaluated all of the relevant circumstances at the time the defense tried to strike the juror and the trial judge concluded that the explanation was racially motivated and pretextual because other venirepersons on the panel who had prior arrests and were similarly situated were not challenged. The trial court additionally

noted that no questions had been asked of the venireperson regarding any special feelings the venireperson had toward the State and that he did not appear to be "slow." This Court affirmed the trial judge's ruling since there was nothing in the record to refute the trial judge's conclusion that the defendant's reason for striking the jury was pretextual. This Court also rejected the defendant's contention that since he accepted other similarly situated jurors the trial judge erred in concluding that his reason was pretextual since there was nothing in the record to support defendant's claim that the similarly situated jurors were the same nationality as the challenged jurors.

In this case defendant, an Hispanic male who had already accepted three Hispanic jurors, attempted to exercise a peremptory challenge on Juror Runno who was also an Hispanic. The state requested a race neutral reason for the strike and defense counsel responded that he wanted to strike the juror since the juror had prior jury experience. The state argued that the reason was not race neutral and the trial judge accepted this argument over the objection of defense counsel and denied the defendant the right to strike this juror. Since the trial judge accepted the state's argument that the reason given by defense counsel was not race neutral the trial court, unlike the trial court in *Rodriguez*, never conducted a hearing as to the

genuineness of the reason nor did the court make any findings that would support a conclusion that defense counsel's reason for striking the juror was pretextual.

The following morning, after the jury had already been sworn, the court placed on the record that she had wrongfully concluded that the reason given by defense counsel was not race neutral. In an attempt to justify her reason for seating the juror, without conducted any further hearing, the court ruled for the first time that she did not believe defense counsel's reason for striking the juror was genuine.

This is evidenced by the following ruling by the trial court:

The Court will note at this point, while that is a race neutral reason for a strike, the Court will find, and articulate on the record, that if this case does go to appeal that the Court is finding that not to be a genuine reason.

There were four other jurors that had participated in jury service, no mention of their prior jury service was used. Specifically, I will point to Cartotto, who is now our alternate on this jury, defense accepted Mr. Cartotto, without mention of his prior jury service.

So, the Court is finding that it is not a genuine purpose for a strike, So, just so the record is clear in case this case goes to appeal. And the objections that were previously noted will remain noted, okay?

Defense counsel specifically objected to the court's ruling and proffered the juror questionnaires to show that no one who served on the jury other than Runno and the alternate juror Cartotto had prior jury selection. Defense counsel also argued that Ms. Runno was Hispanic, as were the defendant and three other jurors. No further comment or inquiry was made by the trial judge.

The Third District Court of Appeal reversed the trial judge's ruling since the court failed to follow this court's opinion in *Melbourne v. State*, 679 So.2d 759 (Fla. 1996). The Third District specifically found that the trial judge failed to follow the third step in *Melbourne* which required the court to evaluate all relevant circumstances surrounding the strike calculated to assess the genuineness of the reason proffered. In two footnotes the court noted that the trial court's citing to the fact that four jurors and the alternate juror had prior jury service did not support the court's conclusion that defense counsel's proffered reason was pretextual since four of the potential jurors who had prior jury service never were picked to serve on the jury and even though the alternate juror had prior jury service there was nothing in the record to establish his ethnicity.

The state in its brief tries to establish conflict by relying on footnote four in the opinion which noted that the record failed to establish the ethnicity of the alternate juror. The state wrongfully asserts that based upon this footnote the Third District reversed defendant's conviction simply because the state failed to establish the ethnicity of the alternate juror. The Third District, however, did not reverse the defendant's conviction since the state failed to establish the ethnicity of the alternate juror. Instead, the court reversed defendant's conviction since "the circumstances did not indicate that the reason offered by the strike was pretextual

or that it would have some discriminatory intent or effect and the trial court did not require the State to meet its burden to establish that the reason offered was not genuine.” Furthermore, after specifically quoting this Court’s opinion in *Rodriguez* as to what relevant circumstances a trial judge must consider in determining the genuineness of a strike the Third District concluded its opinion by holding:

This record is simply devoid of any “relevant circumstances” upon which to find defense’s stated reason for the strike pretextual or other than genuine. For these reasons why deny the state’s motion for rehearing to the extent it urges us to affirm the defendant’s conviction and sentence.

Therefore, it is clear that the reason the Third District concluded that the judge erred in concluding that defense counsel’s proffered reason for striking the juror was pretextual was not because the state failed to establish the ethnicity of the alternate juror but instead, that there was nothing in this record that would even remotely support the trial judge’s after the fact determination that defense counsel’s reason for striking Juror Runno was pretextual.

In conclusion, the record in this case which lead the Third District to reject the trial judge’s conclusion that defense counsel’s proffered reason for striking the juror was pretextual, is completely different than the record which was before this Court in *Rodriguez* which lead this Court to conclude that there was not sufficient

grounds to reverse the trial judge's conclusion that defense counsel's reason for striking the juror was pretextual and, therefore, no conflict exists between the two cases. In *Rodriguez*, unlike this case, immediately after defense counsel proffered his reason the court followed the guidelines established by *Melbourne* and cited to numerous circumstances to justify the conclusion that the proffered reason was pretextual. In this case the trial judge, the day after defense counsel proffered his reason for striking the juror, made a finding that the reason was not genuine without evaluating all of the relevant circumstances as required by this court in *Melbourne* and *Rodriguez*. Therefore because no conflict exists between the Third District's decision in this case and this Court's decision in *Rodriguez*, this Court should refuse to accept jurisdiction in this case.

## CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent respectfully requests this Court to refuse to accept jurisdiction in this case.

Respectfully submitted,

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BY: \_\_\_\_\_  
ROBERT KALTER  
Assistant Public Defender

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this \_\_\_\_ day of March, 2012.

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ROBERT KALTER  
Assistant Public Defender

## **CERTIFICATE OF FONT**

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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ROBERT KALTER  
Assistant Public Defender

# **APPENDIX**