O/A 5-11-84

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 63,933
63,899

JACK NEIL,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON ORDER ACCEPTING DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE DISTRICT COURT OF
APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF AMICI CURIAE THE FLORIDA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) AND COMMON CAUSE OF FLORIDA

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INTRODUCTION

This case squarely presents the question of whether peremptory challenges may be used to exclude jurors because of race. The district court of appeal, relying primarily on federal authority of questionable continuing validity, has answered the question in the affirmative: in any individual case a party may purposely use peremptory challenges to exclude all members of a racial group.

The court of appeal, recognizing that "this issue is particularly troublesome and capable of repetition" certified the following question of great public importance:

> Absent the criteria established in Swain v. Alabama, may a party be required to state the basis for the exercise of a peremptory challenge.
>
> (citations omitted.)

Amici Curiae, the Florida State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and Common Cause of Florida, urge the Court, either through decision, court commission, or rulemaking, to limit the use of peremptory challenges to exclude jurors because of race.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), is an organization dedicated to abolition of discrimination based upon race. The NAACP is the nation's oldest and largest civil rights organization. The written consent of the parties to the filing of an amicus brief by the NAACP was served April 9, 1984.

Common Cause is a non-profit membership corporation organized under the laws of the District of Columbia. Its principal purpose is to promote, on a non-partisan basis, the social welfare of the citizens of the United States by seeking to make governmental

institutions on the federal, state and local levels more accessible and accountable. Common Cause's Florida chapter has approximately 11,000 members who are citizens, taxpayers, and electors of the State of Florida. From its inception, Common Cause has actively opposed discrimination based on race. Consent of the parties has been obtained to joinder in this brief by Common Cause.

The Amici do not dispute the facts set forth by the parties. Indeed, Amici do not press for any specific result within this criminal prosecution.

The issue before the Court, however, is of vital importance to all citizens of this State, including the members of the NAACP and Common Cause.

Through racially based peremptory challenges, black citizens are being excluded from jury service simply because they are black. Florida citizens of all races are equally entitled to serve on juries, and no one should be excluded solely because of his or her race. It is abhorrent to our principles to allow a party in any case to purposefully excuse Florida's black citizens on account of their race -- yet that is precisely what the decision below allows.

The repeated abuse of the peremptory challenge brings consequences to our system of justice beyond the fate of any individual defendant. For, as the Supreme Court has said in a related context:

> The injury is not limited to the defendant -- there is injury to the jury system, to the

> law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.
>
> Ballard v. United States, 329 U.S. 187, 195 (1946)

If this were the only case where this issue appeared it would still be important. Unfortunately, it is not the only case. During the recent past, a number of Florida trials have taken place in the context of powerful community forces, including racial tensions. In some of these cases, all-white juries have been empaneled and there have been continuing questions about the quality of justice on these occasions. Several of these cases are before this and other Florida courts. Others have left an indelible mark upon Florida history. In considering its decision, the Court should reflect upon the extent of the malady.

Other Cases Related to This Issue

The Florida courts are beset with problems relating to the use of peremptory challenges. The following cases are only those which are known to counsel. There may well be others.[1/]

1/ This Court may, of course, take judicial notice of its own records in a pending case as well as court records in other cases filed within the state. See, C. Ehrhardt, Florida Evidence, Secs. 202.6 and 207.1 (1977).

Oscar L. Andrews v. State ("Andrews")

This case is pending before the Court, Case No. 64,426, upon the certification of the Third District Court of Appeal that it raises the identical question of great public importance presented here. 438 So.2d 480 (Fla. 3d DCA 1983). The Third District affirmed the conviction in Andrews on the authority of Neil v. State, 433 So.2d 51 (Fla. 3d DCA 1983), the prior decision of the same court in this case.

The Andrews case involves a prosecutor's exercise of peremptory challenges to strike all black members of the venire. The prosecutor conducted no voir dire of any of the potential black jurors with the exception of two questions addressed to one regarding his familiarity with the area of the crime. The defendant appealed from denial of a motion for mistrial.

Judge Wilkie Ferguson filed a special concurring opinion with the Third District affirmance, stating that although he was bound by the rules of the court to adhere to the prior decision in Neil, he was dismayed by that result. Disagreeing with Neil, and pointing out that this Court had never addressed the issue, Judge Ferguson argued that the Court of Appeal "oblivious to the immediate social impact, has raised the peremptory challenge, a procedural tool without constitutional foundation, to a position of such jurisprudential eminence that it now transcends the right of any minority group not to be systematically

excluded from participation in the administration of criminal justice -- a right which is constitutionally guaranteed." Id. at 480 (Ferguson, J., specially concurring)(citations omitted).

Andrews has been briefed in this Court but oral argument has not yet been set. In addition to the briefs of the parties, amicus briefs have been filed by the Public Defender of the Eleventh Judicial Circuit, and the American Civil Liberties Union. The Court may wish to consider those briefs in its disposition of this case.

State v. Johnny L. Jones ("Jones I and Jones II")

Johnny L. Jones, superintendent of the Dade County Schools, was the defendant in two criminal cases in Dade Circuit Court. The first case became known as the "Gold Plumbing Case," State of Florida v. Johnny L. Jones, Dade Circuit Case No. 80-3039B ("Jones I"). The State used its allotted peremptory challenges to exclude blacks from the venire. The trial judge, Hon. Thomas E. Scott, took no action to ensure the possibility of multi-racial representation in the jury. The defendant was convicted by a panel on which no blacks were seated. The verdict is now on appeal, Johnny L. Jones v. State, District Court of Appeal of Florida, Third District, Case No. 81-2176.

Judge Scott also presided in the second Jones case, involving felony and misdemeanor charges ("Jones II"), State of Florida v. Johnny L. Jones, Dade Circuit Case No. 80-6565. The prosecutor used peremptory

challenges to exclude blacks from the jury, but Judge Scott remedied the situation in this case by allowing additional peremptory challenges to both parties until a black was seated on the panel. Jones was convicted on the misdemeanor charges. This case is also on appeal, Johnny L. Jones v. State of Florida, District Court of Appeal of Florida, Third District, Case No. 81-2175.

State v. Solomon Barnes ("Barnes")

The State used peremptory challenges to exclude blacks from the venire in State of Florida v. Solomon Barnes, Dade Circuit Case No. 80-3039A. The trial judge, Hon. Marvin U. Mounts, and the defense expressed dissatisfaction with the all-white jury chosen. Judge Mounts announced his intention to take corrective measures by declaring a mistrial. Subsequently, State Attorney Janet Reno appeared before the Court (A.1-2) stating that she recognized the need for a jury, "totally representative of the community" and stating, "it is extremely important in this case that there be no appearance" of racially motivated use of peremptory challenges (A.3). To remedy the situation, the State asked for jury selection to be started again and announced that the prosecutor would voluntarily state for the record the reasons for the use of peremptory challenges (A.3-4). The Court granted the motion with the approval of the defense. After jury selection began anew, a jury of five whites and one black was selected.

City of Miami v. Charles Cornett ("Cornett")

Unlike the previous cases, Cornett is a case where the trial court granted the relief requested, based on a claim that peremptory challenges were being used to exclude a racial minority. This civil case is pending before the Third District, Case No. 81-85. Cornett, a black man, was shot in the back by two City of Miami police officers. Totally paralyzed below the waist, he filed a civil suit for damages. During jury selection, the defendant City and its police officers utilized its four peremptory challenges to strike the only four black members of the venire.

The trial judge granted the plaintiff's motion for new trial stating, "The misuse of the peremptory challenge to eliminate identifiable groups contributes to an undermining of the integrity of the justice system . . . It then becomes the responsibility of the court to minimize that potential for abuse by imposing some reasonable limitations on the exercise of the challenge." (A.12.) The City has appealed the order granting new trial and the case has been briefed and argued in the Third District.

State v. Robert Koenig ("Koenig")

This case involves one of four instances during the past year of white Dade police officers indicted for manslaughter in separate shooting deaths of blacks. During jury selection, the trial judge, Hon. David Gersten, dismissed as unacceptable an entire thirty person jury

panel after several blacks had been challenged without explanation by defense counsel.

When selection began with a second panel, the situation did not change. Defense counsel again used peremptory challenges to remove the five black potential jurors on the second panel. An all-white jury convicted the defendant and he has appealed claiming the trial judge erred in rejecting the first panel. The case is pending in the Third District (Case No. 83-2692).

David Rollins v. State ("Rollins")

This appeal is now pending in the Third District Court of Appeal (Case Number 80-1039). The Rollins case arose from a criminal prosecution in which the prosecution challenged all prospective jurors who were black. The trial judge overruled objections and denied the motion for mistrial.

State v. Ira Diggs, et al. ("McDuffie")

This case is not now pending in any Florida court, but nonetheless it also has a bearing upon consideration of this issue. In May, 1980, four Dade County police officers were acquitted by an all-white jury of manslaughter charges arising out of the beating death of Arthur McDuffie, a 33-year-old black man. (Case No. 79-21601A, 11th Cir. Fla. 1980). During jury selection, defense attorneys used peremptory challenges to remove the eight black potential

jurors included in the venire.[2/] The use of peremptory challenges to exclude blacks from juries was identified by the Governor's Report on the 1980 Miami Riot as a cause of the so-called "McDuffie Riots" that followed (A.17-19.) The United States Commission on Civil Rights Report "Confronting Racial Isolation in Miami" concurred, recommending that the state attorney's office should adopt a written policy forbidding prosecutors from making peremptory challenges on the basis of a potential juror's race. (A.81).[3/]

State v. Luis Alvarez ("Alvarez")

Another instance of an all-white jury being selected through the use of the peremptory challenge

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2/ After the McDuffie trial, one of the defense counsel, Phil Carlton, is reported to have stated that the defense was determined not to accept a black juror (A.109).

3/ The new Policies and Procedure Manual of the State Attorney, Eleventh Judicial Circuit, provides that:

> Absolutely no decision or action of this office shall be influenced in any manner whatsoever by an inappropriate bias or prejudice based on such things as a person's race, sex, religion, ethnic background and national origin. (A.15-16.)

Additionally, the State Attorney, Janet Reno, has advised the Chief Judge of the Eleventh Circuit that, on any occasion when a trial judge believes that a prosecutor is systematically using the peremptory challenge to exclude jurors because of race, she has a two-fold policy. She will have the prosecutor announce the reasons for the exclusion, begin jury selection again and offer continuation of jury selection until the trial court is satisfied.

occurred in State v. Alvarez, (Case No. 83-3972). In that case four of the thirty prospective jurors were black. Two were dismissed by the trial court for cause. The remaining two were removed by defense counsel with peremptory challenges. Alvarez, a Hispanic police officer, was acquitted by an all-white jury of the shooting death of Nevell Johnson, Jr., a 20-year old black male.

* * *

The consequences of perceived injustice are revealed not only in the pages of legal records but in the terrible chronicles of recent history. Newspaper accounts of the trauma produced are contained within the appendix to this brief.[4/] The perceptions engendered by information which accompanies headlines such as: "State Excludes Five Blacks as Jones Jurors," (A.135.) "Jones Knocks All-White Jury for Barnes Trial," (A.117.) "Lone Black Removed From Tenative Barnes Jury," (A.116.) "Johnny Jones May Get White Jury Again," (A.137.) "Blacks Watch Jones Trial with Eyes Full of Distrust," (A.130-131.) "McDuffie Jury All-White," (A.88.) "All-White Jury Seems Likely in Cop Trial" (A.162.) are entirely predictable. Such

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4/ The appendix collects newspaper articles which were not a part of the record below but are included to remind the Court of the history produced by this series of cases. Appellate courts commonly take notice of conditions which, though not in the record, are known to everyone (A.82-170). Gibson v. Maloney, 231 So.2d 823, 826 (Fla. 1970)("What the public knows generally the courts are presumed to know. . .")

circumstances inexorably lead to the view expressed by a spectator at one trial:

> If you were [the defendant], you being white with the same credentials, you'd have your jury the same day. That's because your color is not on trial.
>
> (A.130.)

Two overriding themes stand out from this history: First, the fact or perception that peremptory challenges are being used to exclude jurors because of race is terribly destructive to democratic government and to public confidence in the judicial system. Secondly, however, the actions of several of the judges involved in these cases demonstrate that Florida trial judges, armed with appropriate authority and an applicable standard, can effectively control abuse of peremptory challenges. Review of state and federal law reveals that this Court is empowered to provide trial courts with the necessary guidance by decision or by considered system-wide action following study by a court appointed commission or a rulemaking proceeding.

ARGUMENT

THIS COURT, THROUGH DECISION OR RULE, MUST LIMIT UTILIZATION OF THE PEREMPTORY CHALLENGE TO EXCLUDE JURORS BECAUSE OF RACE

This case of first impression offers several decisional paths to the Court in order to eliminate the discriminatory use of the peremptory challenge. Interpretation of the federal Constitution appears to be evolving towards a more stringent limitation upon such use. Moreover, the Florida Constitution provides a separate and independent basis for eliminating abuse. Either through case decision or through use of its rulemaking authority, this Court should forbid exclusion of citizens from jury service because of race.

A. The Federal Courts Have Invited Examination of this Subject.

This Court is familiar with the case of Swain v. Alabama, 380 U.S. 202 (1965), which, though much criticized, has been the basis of state court decisions in this and other states. Very recently, an unusual decision was handed down which demonstrates that this issue should be fully examined. Five members of the United States Supreme Court took the extraordinary step of inviting judicial attention to abuse of the peremptory challenge.

In an order denying certiorari, Justices Marshall and Brennan dissented in an opinion written by Justice Marshall. The opinion of the two Justices, stated in part as follows:

> Accordingly, I would grant certiorari to consider whether petitioners' Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were violated by the prosecutor's use of peremptory challenges to exclude all Negroes from the juries in these two cases. Sixth Amendment principles have evolved significantly since Swain was decided, and it is time to reexamine whether the rule announced in Swain under the Equal Protection Clause can be reconciled with the Sixth Amendment right of every defendant.
>
> McCray v. New York;
> ____ U.S. ____,
> 103 S.Ct. 243,
> 77 L.Ed.2d 1322 (1983)

Significantly, three other justices concurred in the denial of certiorari, but invited state courts to experiment with solutions to the jury selection problem so that the United States Supreme Court will have a variety of innovative and tested procedures from which to choose when the day arrives for determining which procedures the United States Constitution requires in every state. Justice Stevens, in an opinion joined by Justices Blackman and Powell wrote:

> My vote to deny certiorari in these cases does not reflect disagreement with Justice

> Marshall's appraisal of the importance of the underlying issue -- whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group. I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have held that a criminal defendant's rights under state constitutional provisions are violated in some circumstances by the prosecutor's use of peremptory challenges to exclude members of particular racial, ethnic, religious, or other groups from the jury. That premise, understandably, has given rise to litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges, which had traditionally been final and unreviewable. In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.
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> 77 L.Ed.2d at 1322-1323
> (Citations omitted.)
> (Emphasis supplied.)

The Supreme Court's decision to withhold a federal constitutional ruling pending state court experimentation with innovative procedures dealing with matters crucial to the administration of justice is nothing new. Before ever determining that the First and Sixth Amendments permit television coverage of criminal trials, the Court allowed extensive state court experimentation to take place. Persuaded that this Court's rule adopted in Petition of

Post-Newsweek Stations, Florida, 370 So.2d 764 (1979), as well as experimental rules adopted by other states, were workable, the Supreme Court held that cameras-in-the-courtroom rules are constitutional in Chandler v. Florida, 449 U.S. 560 (1981), 66 L.Ed.2d 740, 101 S.Ct. 802.[5/]

The Supreme Court's previous consideration of the jury selection problem occurred twenty years ago in Swain v. Alabama, Id. at 202 (1965). There, the Court held that a prosecutor's use of peremptory challenges to strike blacks from the jury panel in a particular case did not deny the defendant equal protection of law. The Court stated that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." Id. at 222. The Court noted that circumstances might arise where "the purposes of the peremptory challenge are being perverted." Id.

5/ The need for state court experimentation with jury selection rules is perhaps even more pressing than the need was for experimentation with cameras-in-the-courtroom rules because of the probability that the federal constitution prohibits existing discriminatory jury selection rules whereas the federal constitution merely permitted cameras-in-the-courtroom rules.

at 224. But the majority stated that an equal protection claim would assume "added significance" only where "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes . . ." Id. at 223.

As Mr. Justice Marshall and Judge Ferguson point out in their respective opinions, Swain is of doubtful validity today. It has been widely criticized. Swain was decided under the equal protection clause of the United States Constitution before the Sixth Amendment was held applicable to the states in Duncan v. Louisiana, 391 U.S. 145 (1968), 20 L.Ed.2d 491, 88 S.Ct. 1444. And, it was not until Taylor v. Louisiana, 419 U.S. 522 (1975), 42 L.Ed. 680, 95 S.Ct. 692 -- ten years after Swain -- that the Supreme Court recognized the Sixth Amendment right of every criminal defendant to a jury selected from a representative cross-section of the community.

The Taylor case involved a state statute which prohibited women from being called to a venire unless they filed a written declaration of desire to be subject to jury duty. The conceded impact of this statutory scheme was the virtual exclusion of women from juries in the district where Taylor was tried. Stating that "the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly

because sharing in the administration of justice is a phase of civic responsibility,"[6/] this Court held that Taylor had been denied the "kind of factfinder to which he was constitutionally entitled." Id. at 526.

The Court regarded group representation as essential to the legitimacy of the jury system, stating that "[c]ommunity participation . . . is also critical to public confidence in the fairness of the criminal justice system . . . excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." Id. at 530.

Group representation was also held necessary to the impartiality of the jury trial. Id. As Justice Marshall stated in Peters v. Kiff, 407 U.S. 493 (1972), 33 L.Ed.2d 83, 92 S.Ct. 2163:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.
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> 407 U.S. at 503-04.

6/ Id. at 530-31 (quoting Thiel v. Southern P. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

The Sixth Amendment right delineated in Taylor is totally imperiled if abuse of the peremptory challenge is unchecked. The right to a jury drawn from a fair cross-section of the community is rendered meaningless if the peremptory challenge can be utilized to exclude all blacks from a jury. There is no point in taking elaborate steps to ensure that minorities are included on venires only to have them removed because of race through use of the peremptory challenge.

Swain is criticized, not only as being superseded by more recent holdings, but also for its empty promise of protection from circumstances where "the purposes of the peremptory challenge are being perverted." Swain v. Alabama, supra at 222. The Swain test, as noted previously, requires proof of an unvarying pattern of prosecutorial abuse: "that (1) a particular prosecutor (2) in every type of case (3) in every set of circumstances and (4) for an extended period of time has (5) peremptorily excluded black persons with the result that no black person has ever served on a petit jury in a case tried by that prosecutor." Neil v. State, supra at 51. Yet, few, if any, jurisdictions maintain records on peremptory challenges, let alone information regarding race of individuals challenged. A defendant, thus, cannot obtain information, or even anticipate the need for information, about racial discrimination in the exercise of peremptory challenges occurring in the same court. Moreover, the standard of proof is virtually impos-

sible to meet, particularly, as Judge Ferguson points out, in an urban center, with many prosecutors and rapid turnover. Defendants attempting to meet the Swain test have virtually always failed. See, J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 156, n. 83-98 (1977); Annot., 79 ALR 3d 56-73 (1977).

Another major criticism of Swain is that it offers absolutely no protection to the first defendant who suffers discrimination in any given court.[7/] As Justice Marshall points out, it is difficult to understand why several defendants must suffer discrimination because of a prosecutor's use of peremptory challenges before any defendant can object.

A simple test of Swain's validity for a modern court is a simple hypothetical: A prosecutor in court on a racially sensitive case announces to the court that he intends to keep all blacks from the jury panel because the case is the type of case which blacks cannot be trusted to try dispassionately. He demonstrates to the court that his office has never before taken such a step but that the pending case requires this step. In this hypothetical, the prosecutor does not violate Swain and those who insist on adherence to Swain will not be offended. All others,

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7/ Counsel can think of no other situation involving the rights of individual criminal defendants where the burden rests on the defendant to prove not only improper action by the state resulting in denial of his rights but also prove that the state has acted at other times to deprive other defendants of their rights.

including, hopefully everyone who has examined the course of modern constitutional law will be shocked at this possibility.

These reasons have prompted several states to depart from Swain through construction of state constitutions. (See point B). Moreover, at least one federal court has accepted the invitation, implicit in the McCray denial of certiorari opinions of five justices, to address the Swain decision directly through interpretation of the United States Constitution.

After Michael McCray's petition for certiorari was denied by the Supreme Court, a petition for habeas corpus was filed in the Eastern District of New York pursuant to 28 U.S.C. §2254, alleging that the prosecutor in the state court proceeding used peremptory challenges in a racially discriminatory way and that his conviction thereby violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y. 1983).

District Judge Nickerson conceded it was "unusual, to say the least," for a district court to reexamine a Supreme Court case and noted that "the expressed willingness of five Justices to reconsider the Swain decision was perhaps not intended to apply to a collateral attack on the very conviction the Court was addressing." Id. at 1246. "But" stated the district court, "surely there is some invitation implicit in Justice Stevens'

opinion for the lower courts to engage in such reconsideration, and that invitation was not restricted to the state courts, as is evidenced by the opinion's reference to the absence of a 'conflict of decision within the federal system' as a reason for postponing the Supreme Court's consideration of the issue." Id. In light of the opinions of the five justices and the fact that both the petitioner and the Attorney General of New York urged reconsideration of Swain and urged the conclusion that use of peremptory challenges to exclude potential jurors on the basis of race violates the Constitution,[8/] the court concluded it should address the merits.

Reviewing the case law, and recounting the deficiencies in Swain, the district court concluded that the rule of that case should be modified, stating as follows:

> The equal protection clause should be construed to prohibit a prosecutor's exercise of peremptory challenges to exclude blacks solely on the basis of race in any case. If, as petitioner here alleges, the prosecutor at his trial exercised peremptory challenges solely on the basis of race, his sixth and fourteenth amendment rights were violated. The court does not decide the application of this holding to exclusion on a basis other than race, to counsel's use of peremptory challenges in civil cases, or to other questions which the facts of this case do not present.
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> 576 F.Supp. at 1249.

8/ The Attorney General opposed granting the writ, however, on the ground that on the record the petitioner did not make a showing sufficient to warrant a mistrial or a hearing on his claim that the prosecutor's use of peremptory challenges was racially motivated.

The decision of the district court in McCray, now on appeal to the Second Circuit,[9/] is well reasoned and persuasive. The federal constitution, through the Sixth and Fourteenth Amendments, provides a basis for limiting abuse of the peremptory challenge.

B. The Florida Constitution, Coupled with Traditional Views of Trial Court Discretion, Affords a Basis to Correct Abuse.

Apart from doubt as to whether Swain is still valid, and without reference to the abundant criticism which has been directed against it, Swain provides only a federal court decision construing the federal Constitution and, as pointed out in the opinion of Justices Stevens, Blackmun, and Powell, in no way limits state court construction of a state constitution.

The recognition of state constitutions as a basis of rights is hardly a novel concept but much has been written in recent times about the ability of state courts to construe state constitutions in a manner different from federal court constructions of parallel federal constitutional provisions. See, e.g., Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977). This principle has its roots in the obvious: the state constitutions must either confer rights by their provisions or they are merely documents of redundancy. If

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9/ Briefing in the case has not been completed and no date for oral argument has yet been set.

rights are conferred, then it is the state courts which are charged with the construction of these rights.10/

The Florida Constitution provides sweeping protection for basic rights. Article I, Section 2 sets forth the right "to enjoy and defend life and liberty" and the right to "acquire, possess and protect property" which are identified as "inalienable rights." The provision further states that "[n]o person shall be deprived of any right because of race, religion or physical handicap." Article I, Section 9 protects the right to due process, Article I, Section 21 grants the right of access to the courts and Article I, Section 22 provides the right to trial by jury. These provisions, coupled with the discre-

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10/ This analysis has been confirmed by both the United States Supreme Court and this Court. In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the Supreme Court was asked to review a California Supreme Court decision which had held that the state constitution protected the reasonable exercise of speech and the right to petition in a privately owned shopping center. The shopping center owner appealed, relying upon the Supreme Court's earlier decision in Lloyd Corp. v. Tanner, 407 U.S. 552 (1972), which held that the First Amendment does not prevent a private shopping center owner from prohibiting the distribution on shopping center premises of handbills unrealted to the center's operations. In affirming the state supreme court's decision in Pruneyard, the Supreme Court stated that its decision in Lloyd did not "limit the authority of the State to exercise its police power or its sovereign right to adopt individual liberties more expansive than those conferred by the Federal Constitution." Id. at 81. Accord, Cooper v. California, 386 U.S. 58, 62 (1967) (State constitutions may expand Fourth Amendment protection against search and seizures). See also, Pomponio v. Claridge of Pompano Condominium, 378 So.2d 774, 779 (Fla. 1979)("We recognize that this Court, when construing a provision of the Florida Constitution, is not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the federal Constitution").

tion traditionally vested in trial judges by Florida law afford authority for controlling abuse of the peremptory challenge.

Before urging adoption of guidelines, grounded upon the State Constitution, it is useful to pause and consider the actions already taken by Florida trial judges -- Scott, Ferguson, Gersten, and Mounts -- in attempting to curb abuse using only traditional exercise of judicial discretion. The efforts of these judges -- in granting a new trial, expanding the jury panel, beginning jury selection anew, "jawboning" the prosecutor -- have been taken in the traditionally recognized exercise of broad discretion.

Such discretion has been approved in a wide range of other contexts -- correcting a juror's failure to be candid,[11/] remedying the trial judge's failure to give proper instructions,[12/] and addressing the problem of jurors being influenced by matters outside the record.[13/]

This deference to trial judges is founded on common sense -- the trial judge is in the best position to determine whether a proper climate for a fair trial existed. The trial judge can see the gestures, observe the expressions, sense the body language, and pick up nuances of speech that may be lost in the cold pages of the typed

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11/ Klein v. Herring, 347 So.2d 681 (Fla. 3 DCA 1977).

12/ Rittenbery v. Eddins, 272 So.2d 840 (Fla. 1st DCA 1973).

13/ Cassat Avenue Mobile Homes, Inc., v. Bobenhausen, 363 So.2d 1065 (Fla. 1978).

record. Application of the State Constitution to provide a standard to guide trial judges and litigants -- far from being unworkable as contended by the respondents -- is in keeping with traditions of judicial discretion.

The Court need not fear that it is entering uncharted constitutional waters in applying the state constitution for other state courts have acted in parallel circumstances. Review of the guidelines and procedures formulated by the high courts of other states reveal that they are in accord, and in some ways mirror, the efforts already being taken by some Florida trial judges to attempt to curb abuse. Adoption of the guidelines, however, provides the strong moral suasion of state policy and a uniform approach for the trial bar.

In People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978), the California Supreme Court, after a careful review of federal and state decisions concluded:[14/]

> [T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias[15/] violates the right to trial

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14/ Article I, Section 16 of the California Constitution states: "Trial by jury is an inviolate right and shall be secured to all . . . " It closely parallels Article I, Section 22 of the Florida Constitution.

15/ The California Supreme Court described "group bias" as "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds . . . and peremptorily strikes all such persons for that reason alone, . . . " Id. at 761. The Court contrasted that with "specific bias" -- "a bias relating to the particular case on trial or the parties or witnesses thereto." Id.

> by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias, as defined herein. Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community: we adhere to the long-settled rule that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own groups, or indeed is composed of any particular individuals. What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.
>
> 583 P.2d at 761-762. (Citations omitted.)

In order to remedy the abuse of the peremptory challenge, the California court set forth the following guidelines:

1. A presumption is established that in any given instance a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. Id. at 762.

2. If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he or she must raise the point in a timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. Id.

3. Upon presentation of such evidence, in the absence of the jury, the court must determine whether a reasonable inference arises that peremptory challenges are being used on the basis of group bias alone. Id.

4. If the trial court finds that a prima facie case has been made, the burden shifts to the other party to show if he can, that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain the burden of justification, the allegedly offending party must satisfy the court that the peremptories were exercised on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses. Id. at 765.

5. If the trial court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. The remaining venire is also quashed, since the complaining party is entitled to a random draw from an entire venire - not one that has been partially or totally stripped of members of cognizable a group. Upon such a dismissal, a different venire shall be drawn and the jury selection process begins anew. Id.

These guidelines appear to be working in California. Justice Mosk, the author of the court's opinion, recently stated that misuse of peremptory challenges has been largely eliminated within that state.[16/] Review of California decisions also indicates that the courts have encountered no difficulty in applying the standards. See, e.g., People v. Johnson, 22 Cal.3d 296, 148 Cal. Rptr. 915,

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16/ Letter from Justice Stanley Mosk dated April 13, 1984 (A.171). See also letter from Justice Mosk to Editor, New York Times, June 24, 1983 (A.172).

583 P.2d 774 (Cal. 1978); People v. Allen, 23 Cal. 3d 286, 152 Cal. Rptr. 454, 590 P.2d 30 (Cal. 1979); People v. Rosseau, 129 Cal. App.3d 526, 178 Cal. Rptr. 892 (Cal. 1982); People v. Fuller, 136 Cal. App.3d 403, 186 Cal. Rptr. 183 (Cal 1982).

The Massachusetts Supreme Court, in Com. v. Soares, 377 Mass. 461, 387 N.E.2d 499 (Mass 1978), cert. denied, 444 U.S. 881 (1979), also determined that misuse of peremptory challenges was prohibited by its state constitution:

> What we view art. 12 of the Declaration of Rights as proscribing is the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community. Were we to decline to so hold, we would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclude identifiable segments of that community. The argument sometimes made that members of specific identified groups in the community are statistically more likely than the population at large to hold a given view which bear on their deliberations in the case misapprehends the issue. It is this very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations which is envisioned when we refer to "diffused impartiality." No human being is wholly free of the interests and preferences which are the product of his cultural, family and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room.
>
> 387 N.E.2d at 515.

The guidelines established by the Massachusetts Court are closely similar to those set forth in Wheeler. Again there is a presumption of proper use of the challenge which is rebuttable, by either party: "on a showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership." Id. at 517.

Like the California court, the Massachusetts Supreme Judicial Court relies heavily upon the trial judge:

> Presented with evidence as to these two elements, the trial judges must determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation. Although decisions of this nature are always difficult, we are convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with attorneys on both sides, will address these questions with the requisite sensitivity.
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> 387 N.E.2d at 517.

As in Wheeler, once the judge has determined that the presumption of proper use has been rebutted, the burden shifts to the other party to demonstrate, if possible, that the group members disproportionately excluded were not struck on account of their group affiliation. Id. See also, State v. Crespin, 94 N.M. 486, 612 P.2d 716 (N.M. 1980).

Far from being "practicably unworkable," "an illusionary answer" and a "fundamental alteration of the jury system as we know it," as contended by the respondent, these guidelines are simple, conservative and narrowly addressed to only the most unusual cases. Indeed, the guidelines are virtually identical to the procedures followed by Judge Marvin Mounts and counsel in the Solomon Barnes case. They also closely mirror the policy voluntarily adopted by the state attorney for the eleventh judicial circuit. See note 3 supra.

Rather than being placed in an "untenable position," trial judges, as demonstrated by Judges Scott, Ferguson, Mounts and Gersten, are perfectly able to apply these standards. The shifting of the burden to the party which appears to be engaging in racial exclusion is practical because it is that party which is best able to show that it is not engaging in racial exclusion. Even if the respondent is correct in saying that pure instinct sometimes guides a trial lawyer in jury selection, that instinct can be described. The law can tolerate non-racial personality quirks -- it cannot tolerate racial motivations for exclusion of minorities in racially sensitive cases.

The Constitution of Florida should be construed to protect the rights of minority litigants who will not have effective rights to a fair jury trial if peremptory challenges may be exercised without question.

C. Rulemaking Authority Affords an Alternative Mechanism for Eliminating Discriminatory Impact.

In the event that the Court does not discern a basis in either the state or federal constitutions to curb abuse of the peremptory challenge based upon race, or if the Court, like District Judge Nickerson, confines its opinion to criminal cases or the facts in Neil and Andrews, an alternative mechanism allows a full consideration of the issue. The Court, using its authority under Article V, Section 2, to "adopt rules for the practice and procedure in all courts" should initiate proceedings to formulate a rule designed to halt use of the challenge for racial exclusion.

Rules 3.315, 3.320, 3.340 and 3.350, Rules of Criminal Procedure, and Rule 1.431, Rules of Civil Procedure, contain the rules adopted by this Court and governing the use and number of peremptory challenges.[17/] It would appear appropriate for the Court to review these

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17/ This subject is one of some constitutional significance. This court may wish to take judicial notice of pending legislation addressing the problem of peremptory challenges and exclusions of minorities (HB 91 by Rep. James Burke and SB 748 by Senators Gordon, Meek, and Girardeau)(A.173-178.) but that legislation, even if adopted as filed or amended may not reach the problem because of the possibility that it will be found to intrude into a subject matter reserved to the courts. Our constitution has not designed a "Catch 22" and, where there are doubts about the ability of the legislature to reach a problem, these doubts will chill the enthusiasm of many legislators for enactment of such a bill. The proper course on such occasions is for the Court to look carefully at the problem and consider a solution through court rules.

rules and insert provisions preventing systematic use of peremptory challenges on grounds of race.

The Court has, on other occasions, acted to require some study of impact on the judicial system from problems which arise in litigated cases. One recent example is the litigation involving Rosemary Furman where the Court acted to bring about changes to the entire judicial system.[18/]

Use of rulemaking presents several possibilities. A criticism often made against a limitation upon abuse of peremptory challenges is that lawyers will utilize the procedure as a strategic tactic to gain an issue on appeal. It is argued that the issue will thus surface in many appeals of criminal convictions, adding a burden upon the appellate courts.

This argument, is subject to several deficiencies. First, the experience in California or Massachusetts is contrary. Second, the invitation of the five justices in McCray already assures that many practitioners will view the issue as one which merits building a record for appeal. In this sense, adoption of a state law limitation may actually reduce the appellate burden.

18/ In The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979) the Court concluded that the record in that case suggested a need to examine means for providing legal services to the indigent and poor and directed the Florida Bar to immediately conduct a study and report back to the Court. This study led to a number of recommendations, several of which have been adopted. See, e.g., In re: Amendment to Florida Rules of Civil Procedure (Dissolution of Marriage) 8 FLW 491 (Dec. 16, 1983). Other examples of Court established review of aspects of the justice system include the Article V Review Commission, the Matrimonial Law Commission, and the Sentencing Guidelines Commission.

A solution for this problem, however, may be an immediate and expedited appeal procedure prior to trial. Rule 9.100, Rules of Appellate Procedure, which allows immediate review of an Order excluding the press or public from any judicial proceeding is an example of such a procedure. An opportunity for review prior to trial would eliminate any possible incentive for use of the issue as a tactic to secure a post conviction remedy.

Immediate review would also serve the purpose of preserving public confidence in the jury trial system. Like denial of the First Amendment right of a public trial, denial of the Sixth Amendment right of a representative jury produces an injury to the public and the system of justice beyond the immediate concerns of the individual litigants. The time for addressing such an issue is at the time of injury not long after a trial. This is particularly true in instances where a criminal trial ends in acquittal and there is no likelihood of review.

Other options might also be considered.[19/] What cannot be emphasized too greatly, however, is the importance of this issue to the citizens of the state. Damage already has been done to the justice system which will take some time to repair. This Court, either by decision, by rule, or both, should immediately act to address this critical problem.

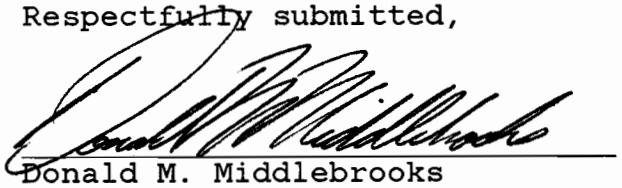
19/ One technique suggested and actually used (A.170) is that of allowing lawyers from each side to name jurors from the venire they wish to have seated. Both lawyers can then, after voir dire, use their peremptory challenges but, if more minorities are placed in the jury box, complete exclusion becomes more difficult.

CONCLUSION

In the portion of its Report concerning racially motivated peremptory challenges, the United States Civil Rights Commission concluded that "[t]he perception endures that a dual system of justice operates -- one for whites and one for blacks." (A.80) When weighed against this reality, the peremptory challenge itself, a procedure without constitutional basis, cannot be justified.

Fortunately, the Court need not resort to such a draconian measure. Armed with an appropriate standard formulated by this Court, grounded in either the state or federal constitution or in this Court's rulemaking powers, trial judges can curtail abuse of the challenge. And this Court can turn another page in the State's struggle against discrimination based upon race.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amici Curiae The Florida State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and Common Cause of Florida along with the Appendix thereto was served by mail this 30th day of April, 1984, upon: Carolyn Snurkowski, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N. W. 2nd Avenue, Miami, Florida 33128, attorney for State of Florida, Respondent, and Paul A. Louis, Esquire, Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A., 1125 Alfred I. duPont Building, Miami, Florida 33131, attorneys for petitioner.

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