IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,933
63,899

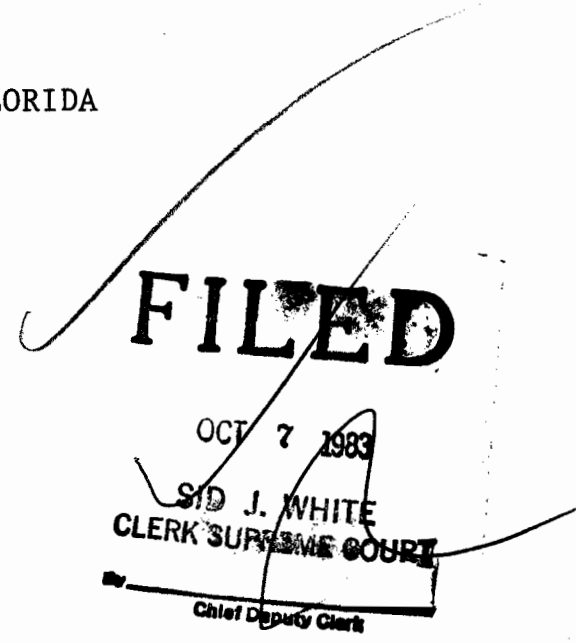
JACK NEIL,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner was the defendant in the trial court. The Respondent, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal. The symbol "T" will be used to designate the transcript of proceedings. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Defendant was charged with second degree murder and the unlawful possession of a firearm while engaged in a criminal offense. (Exhibit A). During jury selection four peremptory challenges were exercised by the State, three against blacks (T. 124). There was, however, absolutely no reason for the State to intentionally exclude prospective black jurors solely based upon their race. All the State's witnesses were black, the victim was black and the issue itself was not a black issue where defendant was claiming discrimination because of his race. (T. 79, 85, 110, 122-123, 130).

As defense counsel had raised this systematic exclusion issue prematurely, upon the State's challenging its first black venire person, defendant's motivation for

raising this issue was questioned by the court. (T. 76-77, 87, 123). However, to protect itself in this previously unlitigated area of the law, the State called one of the State Attorney's Chief Assistants to testify. Abe Laesar testified under oath that "it is clearly the policy of the office of the State Attorney that no group, no cognizable group, will be excluded from any particular jury for the basis of racial reasons". He went on to state that in the instant case the court is presented with pure conjecture on the part of defense counsel. (T. 108). Even defense counsel stated on the record that he knew it was not the policy of the State Attorney's Office to be discriminatory. He stated that Ms. Reno announced in the press "that no prosecutor working for me is ever to exclude a juror, a prospective juror for the purposes of racially making that panel satisfactory to that prosecutor based upon the defendant that is to be tried". (T. 89). Defense counsel also had personal knowledge of Janet Reno's policies as he had known her ever since she had graduated from law school. Counsel believed "from the bottom of his heart" that there is no one who would discriminate less than her. (T. 119-120).

Defense counsel also had no problem with the integrity of the instant prosecutor and stated on the record that he was a "fine representative of the State of Florida". (T.120)

In fact in the last jury trial conducted the instant prosecutor had selected 4 or 5 black jurors. (T. 110).

The record proves it was defense counsel's over zealousness which resulted in this intentional discrimination charge being pursued. In fact defense counsel reversely discriminated against prospective white jurors in order to pick an alternate juror who was black. Counsel stated on the record that he wanted additional peremptory challenges as "I want that black man who was with the military police. (T. 195). The court noted that the request was made because "(W)ell, of course, you're moving on the premise that you were deprived of having a black man on the jury". (T. 195). The State immediately vehemently objected:

> "I would like on the record that defense counsel stated the reason he wants an extra strike is because he wants to pick specifically a black juror."
>
> (T. 195).
>
> * * *
>
> "I would like to put on the record the fact that defense counsel, that --he is picking jurors based upon the fact that they are white to get down to the black juror. He has struck every juror that he can get to, Judge and I would like to say that if anybody is striking jurors

based upon improper motive, I
believe it is the defense counsel."

(T. 196)

The facts of the instant case lucidly depict the chaos and inequities involved should an intentional, systematic, exclusion of any group via use of a parties peremptory challenges become a viable trial issue.

QUESTIONS PRESENTED

I

WHETHER, ABSENT THE CRITERIA ESTABLISHED IN SWAIN V. ALABAMA, 380 U.S. 202, 85 S.CT. 824, 13 L.ED.2D 759 (1965), A PARTY MAY NOT BE REQUIRED TO STATE THE BASIS FOR ITS EXERCISE OF A PEREMPTORY CHALLENGE?

II

WHETHER PETITIONER MAY PROPERLY RAISE AN ISSUE NOT ANCILLARY TO THE CERTIFIED QUESTION AND, ASSUMING ARGUENDO THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, WHETHER THE LOWER COURT DID NOT ERR IN LIMITING CROSS-EXAMINATION OF A STATE WITNESS WHERE HIS TESTIMONY WOULD NOT HAVE SHOWN BIAS?

ARGUMENT

I

ABSENT THE CRITERIA ESTABLISHED IN SWAIN V. ALABAMA, 380 U.S. 202, 85 S.CT. 824, 13 L.ED.2D 759 (1965), A PARTY MAY NOT BE REQUIRED TO STATE THE BASIS FOR ITS EXERCISE OF A PEREMPTORY CHALLENGE?

This concept of a peremptory challenge has been codified within the Florida Statutes since 1868[1] and was part of the English common law prior to the Florida enactment.[2] See, Swain v. Alabama, 380 U.S. 202, 212-214, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

In Swain it was noted that:

> "The persistence of peremptories and their extensive use demonstrate the long and widely held belief

[1]See, Laws of Florida 1868, Chapter 1628, Sections 24 and 32; Laws of Florida 1877, Chapter 3010, Section 7; Revised Statutes of Florida 1892, Section 1086; General Statutes of Florida 1906, Section 1492; Laws of Florida 1909, Chapter 5902, Section 1; Laws of Florida 1919, Chapter 7851, Section 1; Revised General Statutes of Florida, 1920, Section 2692; Comprehensive General Laws of Florida, 1927, Section 4359; Laws of Florida 1949, Chapter 25042 Section 1; Florida Statutes 1965, Section 5411; Laws of Florida 1967, Chapter 67-254, Secton 8.

[2]This court has guaranteed this crucial right to both parties in a criminal suit for years via Florida Rules of Criminal Procedure, See Florida Rules of Criminal Procedure, 3.350 (1983).

> that peremptory challenge is a necessary part of trial by jury. See Lewis v. United States, 146 U.S. 370, 376 13 S.Ct. 136, 138, 36 L.Ed. 1011, * * *[T]he challenge is 'one of the most important of the rights secured to the accused,' Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208.
>
> Id. 219-220.

The right itself has always been defined[3] and used to accomplish the same purpose. As far back as 1887, in Hayes v. State of Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 S.Ct. 350 (1887), Justice Field commented that:

> "Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of the juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted."

[3]Black's Law Dictionary as far back as 1968 defined "peremptory" to mean:

> "Imperative; absolute; conclusive; positive; not admitting of question, delay, or reconsideration. Positive; final; decisive; not admitting of any alternative. Self-determined; arbitrary; not requiring any cause to be shown. Wolfe v. State, 147 Tex. Cr.R.62, 178 S.W.2d 274, 279."

Similarly, Justice Thomas explained in Sham v. Saportas, 10 So.2d 715 (Fla. 1942) that:

> "The very purpose of peremptory challenges is to give the litigant this opportunity to have excused jurors who are not shown to be sufficiently biased to justify a challenge for cause but who, the litigant suspects, may not be free to base judgment entirely upon the facts developed in the trial wholly uninfluenced by any attitude held by them because of interest or experiences foreign to the issues."[4]

See also Meade v. State, 85 So.2d 613 (Fla. 1956); Carrol v. State, 139 Fla. 233, 190 So. 432 (1939).

More recently in the landmark decision of Swain, supra Justice White reasoned:

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. (citations omitted). It is often exercised upon the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of

[4]There are safeguards built into the peremptory challenge system which inherently prevent their use to intentionally skew a petit jury. The number of peremptories alloted each party are controlled by statute §913.08, Florida Statutes (1981). Should a party use all of its challenges to intentionally exclude any one class of jurors, that party will be forced to accept unacceptable, biased, jurors which are non-members of the class. See People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441 at 445 (1982), cert.denied, McCray v. New York, __U.S.__, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983).

another.' Lewis, supra, 146 U.S. 376, 13 S.Ct. 138, upon a juror's habits and associations, Hayes v. State of Missouri, 120 U.S. 70, 7 S.Ct. 351, or upon the feeling that 'the bare questioning [a juror] indifference may sometimes provoke a resentment', Lewis, supra, 146 U.S. 376, 13 S.Ct. 138. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliation of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be . . .Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of a case to be tried."

Id. at 220.

* * *

"[T]hat its system of peremptory strikes challenges without cause, without judicial scrutiny-affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system, and its actual use and operation in this country, we think there is merit in this position."

Id. at 212.

This court has since adopted the Swain rationale in Francis v. State, 413 So.2d 1175 (Fla. 1982) and Dobbert v. State, 409 So.2d 1053 (Fla. 1982). In Francis Justice Alderman, speaking for the court regarding peremptory challenges quoted from Swain stating:

> "It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty."

Id. at 1179.

These basic legal considerations which define the purpose and scope of the peremptory challenge led the court, in Swain, to hold that:

> "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and White, Protestant and Catholic are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the equal protection clause would entail a radical change in the nature and operation of the challenge. The challenge pro tanto would no longer be peremptory, each and every challenge being open to examination or

> at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.
>
> In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenge in any given case. The 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 subject 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. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it."
>
> Id. 222-223.

The Court went on to state that in order to establish that the prosecutor had systematically used its peremptory challenges to prevent minorities from serving on juries, a defendant must "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." Id. 380 U.S. at 237, 85 S.Ct. at 839.

The Swain rationale was more recently reiterated in City of Mobile Alabama v. Bolden, 100 S.Ct. 1490, 1505 (1980) in footnote 24:

> "[T]he fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition. Likewise, the fact that the equal protection clause confers a right to participate in elections on an equal basis with other qualified voters does not entail a right to have one's candidates prevail."

Clearly, the rule of law announced in Swain is still controlling as a matter of federal constitutional law and is the prevailing rule in the majority of State jurisdictions which have had an opportunity to consider the issue. Just this year the highest courts in Illinois and New York have followed Swain, See People v. Davis, 447 N.E.2d 353 (Ill. 1983) and People v. McCray, 57 N.Y.2d 542, 457 NYS.2d 441 (1983), as well as Florida's Third District Court of Appeal in the instant case. Previously two other Florida District Courts of Appeal have followed Swain, See Pitts v. State, 307 So.2d 473 (Fla. 1st DCA 1975) and State v. Simpson, 326 So.2d 54 (Fla. 4th DCA 1976) which remains as the prevailing rule of law in the majority of other jurisdictions, See e.g. State v. Robinson, 386 So.2d 1374 (La. 1980); Pippin v. State, 151 Ga.App. 225, 259 S.E. 2d 488 (1979); State v. Grady, 93 Wis. 1, 286 N.W.2d 607 (1979); State v. Stewart, 225 Kan. 410, 591 P.2d 166 (1979); State v. Eaton, 568 S.W. 2d 541 (Mo. 1978); State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980); Commonwealth v. Henderson, 438 A.2d 951 (Pa. 1981); Drew v. State, 589 S.W. 562 (1979); Jason v. State,

589 S.W.2d 447 (Texas 1979); Lawrence v. State, 444 A.2d 478 (Md. 1982); Commonwealth v. Boykin, 419 A.2d 92 (Pa. 1980); United States v. Brooks, 670 F.2d 148 (11th Cir. 1982); United States v. Boyd, 610 F.2d 521 (8th Cir. 1979); Cunningham v. Estelle, 536 F.2d 82 (5th Cir. 1976). See also annot. Use of peremptory challenge to exclude from jury persons belonging to a class or race, James O. Pearson Jr., 79 A.L.R. 3d 14.

In recent years, however, the rule of law announced in Swain has come under attack and although the United States Supreme Court has declined to revisit Swain, see McCray v. New York, __U.S.___, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983), a discrete minority of states have rejected Swain based upon provisions of their state constitutions.[5] The leading such case is People v. Wheeler, supra, in which the California Supreme Court held:

> that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under Article I, section 16 of the California Constitution.
>
> Id. 22 Cal.3d at 276-277, 148 Cal. Rptr. at 903.

[5]Obviously, no state court is free to construe to the federal constitution in a manner more restrictive than Swain. Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); Fare v. Michael, 442 U.S. 708, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

The Court went on to establish a new procedure for determining when the prosecution was improperly exercising its peremptory challenges:

> "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, as in the case at bar, he should make as complete a record of the circumstances as a feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.
>
> Id. 22 Cal. 3d at 280, 148 Cal.Rptr. at 905.

The court gave examples of the type of proof which could be offered to establish a prima facie showing of discrimination by a defendant:

> "We shall not attempt a compendium of all the ways in which a party may seek to make such a showing. For illustration, however, we mention certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the

> jurors in question share only this one characteristic--their membership in the group--and that in all other respects they are as hetergeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all.
>
> Id.

In the Wheeler case itself, the court concluded that a prima facie case of discrimination had been shown by the fact that the prosecutor had peremptorily struck seven prospective black jurors under circumstances which indicated to the court that they were struck on the sole ground of group bias.[6]

The Wheeler, decision was followed by the Supreme Court of Massachusetts in Commonwealth v. Soares, ___Mass.____, 387 N.E. 2d 499 (1979). In Soares, the prosecutor used 12 of the 44 challenges available to him to exclude blacks, with the result that only one black, who was unchallenged, sat on the jury. The Soares court adopted the Wheeler, "representative cross-section of the community" analysis and concluded that the defendant's rights were violated, based

[6]Among the circumstances considered by the court were the answers given by several of these prospective jurors during voir dire by defense counsel and the lack of any voir dire by the prosecutor. Id. 22 Cal. 3d at 263-265, 148 Cal.Rptr. at 894-895.

upon the showing that the prosecutor excluded ninety-two per cent of the available black jurors and only thirty-four per cent of the available white jurors. Id. 387 N.E.2d at 508. As did the California court, the Soares court based its ruling on state constitutional law.

The Wheeler/Soares approach to this problem is constitutionally invalid and this Court should adhere to the guidelines set forth in Swain, supra and Simpson, supra. The representative cross-section analysis which forms the constitutional foundation for Wheeler and Soares is illogical and inappropriate.

In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the court held that the Sixth Amendment requirement that juries be impartial includes a requirement that juries be selected from a cross section of the community. However, the court was careful to point out that defendants are not entitled to a jury of any particular composition and that the court was not imposing any requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Id. 419 U.S. at 538, 95 S.Ct. at 702.[7] The Supreme

[7]Judge Ferguson, in his concurring opinion in Andrews v. State, Case No. 81-1180 (Fla.3d DCA opinion filed Sept. 27, 1983), obviously misconstrues Taylor's holding, since it is the exclusion of women from jury venires not from juries themselves which the court held to be unconstitutional.

Court has continued to adhere to this view. See, City of Mobile Alabama v. Bolden, 100 S.Ct. 1490, 1505, n. 24 (1980).

The Wheeler/Soares rule, however, takes the right established by Taylor to have a jury selected from a representative cross-section of the community and extends it so as to create the new right to have "a petit jury that is as near an approximation of the cross-section of the community as the process of random draw permits." People v. Wheeler, supra, 22 Cal.3d at 277, 148 Cal. Rptr. at 903. In effect, this creates an illegal quota system with the prosecution being pressured to accept a requisite number of minority jurors merely because of their membership in the group, regardless of whether the prosecutor subjectively believes they can be fair. A judicial mandated "affirmative action program" is thereby established.[8] In light of the fact that this Court, in State v. Silva, 259 So.2d 153 (Fla. 1973), specifically held that Dade County's quota system for jury panel selection was violative of the Sixth Amendment, it is clear that the Wheeler/Soares approach is constitutionally invalid.

[8]The underlying premise of Wheeler/Soares, that such diversity in the jury room is necessary to ensure the integrity of the jury process, Commonwealth v. Soares, supra, 387 N.E.2d at 515, simply is not supported by sufficient empirical data or experience so as to rationally justify such a judicially legislated "affirmative action program." See. Note Peremptory Challenges and the meaning of Jury Representation, 89 Yale L.J. 1177 (1980); Note, The Defendant's right to object to prosecutorial misuse of peremptory challenge, 92 Harv.L.Rev. 1770 (1979).

That the constitutional underpinning to the Wheeler/Soares rule is fundamentally unsound becomes even more apparent when one examines the question of whether the rule promulgated in those cases may be applied to defendants as well as to the State. Because the Wheeler/Soares rule is based upon the premise that such a procedural remedy is necessary to ensure that a petit jury is fairly representative of a cross-section of the community, the California and Massachusetts courts have held that the prosecution has an equal right to object to the defendant's use of peremptory challenges to exclude all members of a cognizable group. People v. Wheeler, supra, 22 Cal.3d at 282 n. 29, 148 Cal. Rptr. at 906-907; Commonwealth v. Soares, 387 N.E.2d at 517, n. 35; Commonwealth v. Whitehead, 400 N.E.2d 821 (Mass. 1980), and that the rule is equally applicable to civil cases in which the State is not a party. Halley v. J. & S. Sweeping Co., 192 Cal. Rptr. 74 (1st Dist. 1983). Yet, as will be demonstrated, such an analysis is constitutionally deficient.

On the other hand, only a single court, the intermediate Illinois Appellate Court which decided People v. Gilliard, 445 N.E.2d 1293 (Ill. 1st Dist. 1983) and People v. Payne, 106 Ill.App.3d 1034, 436 N.E.2d 1046 (Ill. 1st Dist. 1982), has ruled that the Wheeler/Soares rule applies only to the State. Not only have different divisions of that same court refused to follow those holdings, see People

v. Teague, 108 Ill.App.3d 891, 439 N.E.2d 1066 (Ill. App. 1982); People v. Newsome, 110 Ill.App. 3d 1043, 443 N.E.2d 634 (Ill.App. 1982); but the Illinois Supreme court, in its subsequently announced decision in People v. Davis, supra; has clearly overruled these decisions.[9]

Thus, the only States to adopt the Wheeler/Soares rational have clearly chosen to apply it equally to defendants as to the State. As shown by Judge Ferguson's concurring opinion in Andrews v. State, supra, the major public policy argument expressed by supporters of the Wheeler/Soares rule--that such a rule restores credibility to the system by ensuring minority representation on juries-requires that it apply equally to the defense, for any one-sided application of the rule would not fulfill its purpose.[10] For if the point being advanced by supporters of the Wheeler/Soares rational is, as stated by Judge Ferguson, "That the peremptory challenges, especially in

[9]In fact, Illinois has completely repudiated the Wheeler/Soares, rational in favor of Swain.

[10]It is interesting to note that one of Judge Ferguson's major concerns is the use of peremptory challenges by the defense as part of an overall defense strategy to paint the prosecution as politically and racially motivated. As he elucidates in footnote 10 to his concurring opinion in Andrews, supra:

> "The quest for a fair trial, in highly publicized criminal cases with racial overtones, is regularly stymied by procedural blitzkrieg. Where the accused is white and the victim black,

racially-charged cases, is susceptible to use by the State or the defense in a way which undermines the integrity of a trial." then the remedy must apply to all parties. Moreover, any other rule would be fundamentally inequitable.

While the criminal justice system is not symmetrical, Florida law does recognize the right of the State of Florida

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> it is a predictable defense tactic to paint the prosecution as political--brought to satisfy a revenge seeking black community, and to portray the accused as a sacrificial lamb. Although of questionable relevance to the issue of guilt, this "defense", where permitted, is historically successful even in the face of overwhelming evidence. All that is needed is a philosophically receptive jury, the first requirement of which is that it be all white. If the case involves multiple defendants or multiple counts (which increases the number of peremptory challenges), the state may be powerless to prevent the defense from exercising its challenges in such fashion as to obtain the desired homogeneous (and presumptively unconstitutional) panel. More often than not there will be more peremptory challenges than blacks to be challenged. See, e.g., State v. Diggs, (Case No. 79-21601, Eleventh Judicial circuit, Dade County)(the so-called "McDuffie case"). On the other hand, where the defendant is black, the state may similarly exercise its peremptory challenges to exclude blacks, the effect of which, just the same, is to permit a setting where group biases may dominate the jury's deliberations. Commonwealth v. Soares, 387 N.E.2d at 516."

to an impartial trial, Young v. State, 283 So.2d 58, 60 (Fla. 1st DCA 1973), cert. denied 290 So.2d 61 (Fla. 1974), and the state's right to utilize its peremptory challenges in as free and untrammelled a manner as the defense is an essential aspect of that right. As pointed out in Swain, supra 380 U.S. at 220, 85 S.Ct. at 835:

> Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." Hayes v. State of Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578.

As pointed out previously, in both Wheeler and Soares, the courts held that since the state is also entitled to a trial by an impartial jury drawn from a representative cross-section of the community, the prosecution could prevent the defense from exercising its peremptory challenges so as to systematically discriminate against a cognizable group. People v. Wheeler, supra. 22 Cal.3d at 282, N. 29, 148 Cal.Rptr at 906-907; Commonwealth v. Soares, 387 N.E.2d at 517, n. 35; Commonwealth v. Whitehead, 400 N.E.2d (Mass. 1980). This is particularly relevant in the instant case as defense counsel made it clear on the record that he was intentionally striking prospective white jurors to reach the black juror whom counsel wanted to serve as an

alternate. (See Appendix Exhibit B). The problem with this rule, however, is that it runs afoul of the defendant's federally and State protected constitutional right to the free and untrammelled exercise of peremptory challenges, a right which may not be abridged. Francis v. State, supra; Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1893); Swain v. Alabama, supra at 835.

In this regard, the State must take issue with Judge Ferguson's blanket assertion in Andrews that the peremptory challenge is a procedural tool "without constitutional foundation." It is true that neither the State nor the federal constitution specifically creates a right to peremptory challenges. Nevertheless, as this Court observed in Francis v. State, supra at 1178-1179:

> "The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and have been described as one of the most important rights secured to an accused."

Certainly, the denial of a right which has been deemed "essential to the fairness of a trial by jury" would be a denial of due process and would be violative of both the Fourteenth Amendment of the United States Constitution and Article I, §9 Fla.Const. In as much as the essential nature

of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control, Francis v. State, supra; Swain v. Alabama, supra; Lewis v. United States, supra, the application of the Wheeler/Soares rule to the defense would be constitutionally unacceptable.

Moreover, in application, the Wheeler/Soares rule is practically unworkable. In his concurring opinion in Andrews, Judge Ferguson specifically refers to the trial in the so-called "McDuffie case" as an example of a case where the defense used its peremptory challenges to exclude all black prospective jurors and states "more often than not there will be more peremptory challenges than blacks to be challenged." Yet he fails to show how adoption of the Wheeler/Soares rule will cure this problem. Under Wheeler/Soares, the court, once it finds there has been systematic exclusion, may discharge the panel and begin jury selection anew. However, the defense (or the prosecution) will still almost certainly possess more challenges than there are black prospective jurors in the venire. As a result, a party intent on systematic exclusion will be able to stalemate a trial in jury selection. Thus Wheeler/Soares offers only an illusionary answer to the problem it seeks to solve and certainly is no solution to the "interesting collateral question" posed by Judge Ferguson, i.e. "What

happens where the defendant is white and the facts are such that any white is likely to be biased in favor of the accused?" For if Judge Ferguson is looking at Wheeler/Soares as the answer to this question, then he is most certainly viewing nothing more than a mirage. Far from being a panacea, Wheeler/Soares can only fundamentally jeopardize the administration of justice in such a case, since no defense attorney worth his salt will seat a black person on that jury unless directly ordered to do so by the court. Even Wheeler/Soares does not go so far as to intimate that the trial court has the authority, much less the right, to designate a particular seat on the jury as the "black seat."

Moreover, additional problems could arise in a case involving multiple defendants, such as the "McDuffie" case. If the state were allowed to object to the improper defense use of peremptory challenges, would it be necessary for the State to establish a prima facie showing of systematic exclusion of minorities on the part of all the defendants or only some of the defendants? Could some defense counsel be compelled to state reasons for their exercise of peremptory challenges if others were not? How could the court cure a violation without granting either a mistrial as to all defendants or a severance? What if one defendant objects to another's use of peremptory challenges?

Of equal concern to the State is the fact that in a racially sensitive case, defense counsel can very easily skew the facts reflected by the record through his own use of the peremptory challenge, so as to make it appear that the prosecutor was exercising his challenges on the basis of group bias alone, when in fact, this was not the case. For instance, in the Soares case, the court concluded that the prosecutor had systematically excluded blacks by virtue of the fact that he excluded ninety-two per cent of the available black jurors and only thirty-four per cent of the available white jurors. Commonwealth v. Soares, supra, 387 N.E.2d at 508. However, this latter figure is based upon the total number of available white jurors, which was ninety-four, Id. n. 7, and not on the total available after the defense had exercised its challenges. Assuming that the three defendants exercised their total of forty-eight challenges available to them, Id. n. 6, against only white prospective jurors, the total number of white prospective jurors available to be challenged by the prosecution was only forty-six. Thus, assuming no challenges for cause, the prosecution actually excluded, at the minimum, seventy per cent of the white prospective jurors available to him.

The statistical approach utilized by the Soares court is especially offensive and runs afoul of Swain because it makes the assumption that counsel is not utilizing his

peremptory challenges for reasons other than group bias. In Swain, the court recognized a presumption "that the prosecutor is using the state's challenges to obtain a fair and impartial jury to try the case before the court." Swain v. Alabama, supra 380 U.S. at 222, 85 S.Ct. at 837. The Soares court turns this presumption around and, instead, operates on the assumption that the prosecutor is improperly exercising his peremptory challenges merely because a certain percentage of minority group members have been challenged.

Such an assumption totally ignores the fact that it has uniformly been recognized that a juror's race, religion, nationality and occupation are perfectly legitimate considerations upon which to base the exercise of a peremptory challenge. Swain v. Alabama, supra 380 U.S. at 220-221, 85 S.Ct. at 836. As pointed out in Swain, supra, "it is well-known that these factors are widely explored during the voir dire, by both prosecutor and accused. Miles v. United States, 103 U.S. 304, 26 L.Ed. 481; Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054." The presumption should be that the prosecutor and/or defense counsel is exercising his challenges in a particular manner not because he is discriminating against members of the minority group merely because they are members of the minority group, but because he has the bona fide, albeit

subjective belief that the individual jurors being challenged are less likely to be fair to the state.

This is especially true in racially sensitive cases. Where the black community has been galvanized to the support or opposition of the defendant, the counsel have to be extremely cautious in jury selection. The answers given by prospective jurors during voir dire in such a case can only afford partial guidance to the attorney seeking to pick a fair jury. Prospective jurors have been known to lie or distort the truth in answering questions on voir dire, See, e.g., State v. Tresvant, 359 So.2d 524 (Fla. 3d DCA 1978), and counsel must often rely upon their instincts to separate the wheat from the chaff, basing their decisions upon the juror's appearance and demeanor as much as upon the specific answers given to their questions.

If a party is required to justify his use of peremptory challenges once a prima facie showing of "systematic exclusion" of minority group prospective jurors has been established, effective guidelines for the review of the reasons given must be established. Neither the Wheeler nor Soares courts were able to establish guidelines and it is submitted that no court can because of the "arbitrary", "capricious" nature of the peremptory challenge. The difficulty the Massachusetts courts have faced is exemplified by two post Soares decisions. In Commonwealth v.

Walker, 397 N.E.2d 1105 (Mass. 1979), the court held that the trial court's finding of no systematic exclusion would not be disturbed in a case where the prosecutor used five of his alloted eight challenges to eliminate blacks, leaving two blacks on the 12 person panel. However, in Commonwealth v. Brown, 416 N.E.2d 218 (Mass. 1981), the court held that there was a prima facie showing of systematic exclusion when the prosecutor utilized three of his six challenges to eliminate all prospective black jurors. The inconsistency in these results as perspicuous.

The effect of Wheeler and Soares is to create a whole new hybrid class of jury challenges. For want of a better term it maybe described as a "peremptory challenge for cause" because it may be exercised when legal cause to excuse a juror does not exist. It differs from the traditionaly peremptory challenge because it must be justified by some "cause". The problem is that by putting the court in the position of evaluating when sufficient cause exists to justify the use of a peremptory challenge, the court is begging placed in a dilemna for which there is no acceptable solution.

The trial judge is placed in the untenable position of having to evaluate and rule upon the credibility of counsel. If he rejects the attorney's explanation for exercising a

peremptory challenge, it is tantamount to calling him a liar. This problem is magnified because there simply exists no objective standards whereby a trial judge, let alone an appellate court, can evaluate a lawyer's decision to exercise a peremptory challenge which is based entirely upon a subjective evaluation of a prospective juror. To paraphrase Swain, how is it possible for an attorney to offer an explanation for "the sudden impressions and unacccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Indeed, very often it will be impossible for an attorney to offer any reason at all, since his decision to exclude a juror may very well be based upon an instinctual feeling of dislike or subconscious perception of hostility which he may be unable to consciously articulate. To preclude any attorney, including a public prosecutor from exercising a peremptory challenge under such circumstances is to fundamentally alter the nature of the peremptory challenge and the jury system as we know it.[11]

[11] In Commonwealth v. Kelly, 406 N.E. 2d 1327 (Mass. 1980), the court held that the prosecutor's explanation of one of his challenges "as based upon the individual's demeanor, manner and the 'smirk' on her face" was "an acceptable reason." Id. at 1328. What would have happened if the trial judge had rejected the prosecutor's explanation because (1) he had not been paying close attention and had not seen the jury "smirk", (2) he subjectively interpreted the "smirk" to be a "friendly smile" or (3) he simply disagreed with the prosecutor's characterization of the juror's demeanor. Would the prosecutor in such a case be given the Hobson's choice of either accepting the juror or of dismissing the panel and starting over?

Further, this concept once legally accepted, will be argued to apply to all other constitutionally protected "suspect classes", for example, sex, religion, national origin. In a diverse, multi-ethnic community such as Dade County, cases will often arise wherein the opposing parties (or in a criminal case, the defendant and the victim) each belong to different cognizable minority groups and in such situations both sides might claim systematic exclusion by their opponent. Ultimately there may be arguments of "reverse discrimination" where a defendant may argue that there were not enough caucasian males on his jury. To accept such a doctrine is tantamount to re-establishing the quota system.

A major impetus for the Wheeler decision was the conclusion of the court that the requirement of Swain that a defendant establish a pattern of discriminataion is insurmountable. People v. Wheeler, supra, 22 Cal.3d at 285-286, 148 Cal. Rptr. at 909. In fact, though the burden placed upon a defendant is great, it is not nearly so difficult as the Wheeler court concluded it was and in recent years there have been successful challenges mounted under the Swain criteria.

For instance, to establish a pattern of discrimination by a particular prosecutor in Dade County a defendant could

run a computer check of the cases in which the prosecutor was involved and obtained a list of his trials. The minutes of the clerk could then be reviewed to obtain the names of the prospective jurors in each case over a certain period of time. It would not be necessary to review every case tried by that prosecutor provided a representative sample could be randomly selected. The names listed by the clerk in the minutes could then be cross-checked against the voter registration lists from which they are drawn to determine the race of each prospective juror.[12] This data could then be collated to determine if the prosecutor was utilizing a disproportionate number of challenges against blacks over a period of time.

Moreover, the prosecutor may be questioned concerning his use of peremptory challenges over a period of time. In this regard, the Swain court observed:

> We see no reason, except for blind application of a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion, why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor, for many years is

[12]The clerk of the court does not keep a record of the race of prospective jurors. However, jurors are selected from voter registration lists and such lists do reflect the race of each registered voter.

> said to be responsible for this practice and is quite available for questioning on this matter.
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> Id. 380 U.S. at 225-226, 85 S.Ct. at 840.

In United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971), the court elaborated on this aspect of Swain:

> We emphasize that it is "conduct" on which the prosecutor should be available for questioning. The Court, did not indicate that the prosecutor could be questioned as to his thought processes. That would be inconsistent with the peremptory challenge system. It might also be requiring the prosecutor to testify as to whether he had committed a crime.

The third way in which a defendant can establish a showing of systematic exclusion of minority group members from juries through the use of peremptory challenges is through the testimony of attorneys and court personnel who may have witnessed or participated in trials.[13]

The practicality of Swain is demonstrated by cases from Louisiana, which follow the Swain rule. e.g. State v. Robinson, supra; State v. Albert, 381 So.2d 424 (La. 1980); State v. Blas, 354 So.2d 1330 (La. 1978). In State v.

[13]Nearly every criminal courthouse has a dedicated core of civilian "trial watchers" who make it a practice or hobby

Brown, 371 So.2d 751 (La. 1979) and in State v. Washington, 375 So.2d 1162 (La. 1979), the court reversed defendants' convictions based upon holdings that the defendants had established prima facie cases of systematic discrimination under Swain. In Brown, the defendant met his burden by producing the testimony of two attorneys concerning their prior experiences with the particular prosecutor and by having other evidence concerning the composition of other juries read into the record. In Washington, the defendant presented the testimony of three attorneys concerning their prior experience with the prosecutor and the prosecutor himself testified concerning his practices.[14] These Louisiana cases are indicative of the fact that the reason why so few successful challenges have been mounted under the Swain criteria is that defense counsel simply have not attempted to make the effort required to make a prima facie showing of systematic discrimination by a prosecutor over a period of time. The Wheeler/Soares approach is wrong because in an effort to ease this burden, it actually shifts the burden to the prosecution to justify the use of peremptory challenges against minority group members in any

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to attend trials. These people can prove to be an excellent source of such information.

[14]The same prosecutor was involved in both the Brown and the Washington cases, and though he did not testify in Brown, the court made note of his testimony in the Washington case. State v. Brown, supra 371 So.2d at 752, n. 1. Nevertheless, in both cases the court concluded that the defendant had met his burden under Swain even without the testimony of the prosecutor.

particular case without requiring the defendant to establish a practice of discriminatory use of peremptory challenges by the prosecution.[15]

It is said that hard cases make bad law and nothing so clearly illustrates the truth of this axiom as do the decisions in Wheeler and Soares. In an effort to cure a perceived defect in the jury selection process, the California and Massachusetts courts have forged a rule and procedure which fundamentally alters the jury system as we know it. State v. Grady, 286 N.W.2d at 607, 612 reasoned:

> "We refuse to adopt Wheeler on the ground that the test proposed by the California court is vague and uncertain, and severely limits the scope of peremptory challenges. If peremptory strikes can only be exercised in a certain way, dependent on circumstances, and subject to judicial scrutiny, they will no longer be peremptory. We refuse to undertake such an altercation of the very nature of the peremptory system."

[15]The inequities involved in shifting the burden to the State are apparent in the instant case. There was absolutely no reason for the State to intentionally exclude black jurors because appellant was black, all the States witnesses were black, the victim was black and the issue itself was not a "black issue" where appellant is claiming discrimination because of his race. (T. 79,85,110,122-123, 130). Further, defendant's motive in raising the issue at all was suspect as it was raised prematurely when the State challenged its first black venire man. (T. 76-77, 87, 123).

This Court is urged to rule accordingly, in align with its sister states, that a party may not be required to state the basis for the exercise of a peremptory challenge as the Sixth amendment does not guarantee a "fair cross section" of jurors in the petit jury. The learned decision of the Third District Court of Appeal should be affirmed.

II

PETITIONER MAY NOT PROPERLY RAISE AN ISSUE NOT ANCILLARY TO THE CERTIFIED QUESTION AND, ASSUMING ARGUENDO THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, THE LOWER COURT DID NOT ERR IN LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF A STATE WITNESS WHERE HIS TESTIMONY WOULD NOT HAVE SHOWN BIAS.

The State reasserts that its motion to strike this point of petitioner's brief should be granted. Pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1982) this court has limited its "certified question jurisdiction" to issues ancillary to the certified question. As this point is in no way even arguably ancillary to the certified question, jurisdiction does not lie. (See Respondent's Motion to Strike and Reply).

However, should this court chose to entertain this issue, the extent to which cross examination should be permitted to show a witness bias, interest, or motive rests within the sound discretion of the trial court and his ruling will not disturbed in absence of a showing a clear abuse of discretion. Welch v. State, 342 So.2d 1070 (Fla. 3d DCA 1977).

In the instant case defendant contends that the court erred in refusing to allow him to question the State's witness about his illegal entry into the United States.

Defendant claimed this would tend to show bias and motive of the witness in that the witness would give favorable testimony for the State for fear of deportation. However, the mere fact that the witness came to the United States as an illegal alien seven years prior (T. 483) does not tend to prove or disprove bias.

Defendant did not proffer that the witness would testify he was in fear of deportation, had been sought, or contacted by the authorities or even knew he could still be deported. There was no proffer that the witness, in any way needed "favors" from the State. In the absence of such a proffer the proposed line of questioniong was irrelevant and not proper for impeachment purposes. McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982). Compare Kufrin v. State, 378 So.2d 1341 (Fla. 3d DCA 1980) where defense counsel sought to prove the witness/officer had arrested defendant in retaliation for defendant's "blowing his cover" as a narcotics officer; Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980) where defense counsel sought to establish the witness/officer had sought to have the defendant killed as he had a grudge against him; and Webb v. State, 336 So.2d 416 (Fla. 2d DCA 1976) where defense counsel sought to elicit from defendant that he had brought a civil suit against the police chief and city for false arrest and his testimony would therefore be biased.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully urged that the lower courts decision be affirmed and this Court hold that absent the criteria established in Swain v. Alabama, a party may not be required to state the basis for the exercise of a peremptory challenge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to MR. PAUL A LOUIS, Law Offices of SINCLAIR, LOUIS, SIEGEL, HEATH, NUSSBAUM & ZAVERTNIK, P.A., Attorneys for Defendant, 1125 A.I. DuPont Building, Miami, Florida 33131, on this 5th day of October, 1983.

Diane Leeds

DIANE E. LEEDS
Assistant Attorney General

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