IN THE SUPREME COURT OF FLORIDA

Case No. 63,899
and 63,933

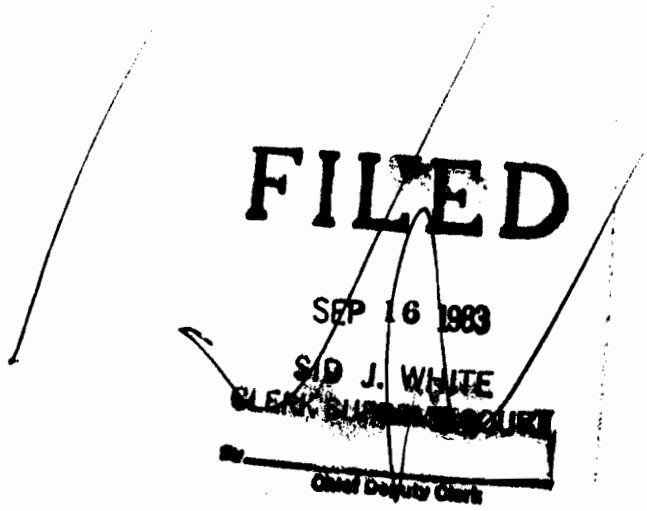
JACK NEIL,)

Petitioner,)

vs.)

STATE OF FLORIDA,)

Respondent.)



PETITIONER'S INITIAL BRIEF ON THE MERITS

From a Decision of the Third District Court
of Appeal of Florida

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PREFACE

Petitioner, Jack Neil (hereafter Jack), a Black American, appeals his conviction by an all-White jury for the Second Degree Murder of a Black Haitian. The Trial Court committed reversible error in permitting the state to intentionally exclude without cause or explanation all prospective Black jurors from the jury through the use of its peremptory challenges. This action constituted a violation of Jack's right to a fair trial by jury selected from a cross-section of the community as guaranteed by the United States and Florida Constitutions. The Third District Court of Appeal affirmed the ruling of the Trial Court but certified the question as one of great public importance to the Florida Supreme Court based upon its belief that "the issue is particularly troublesome and capable of repetition" (R 448). Accordingly, this Court must adjudicate and determine whether the state's exercise of statutory peremptory challenges, which in this case resulted in the elimination of all Black citizens from the jury solely because they are Black, takes precedence over the constitutional right of the accused to a "trial by an impartial jury" as guaranteed by the Sixth Amendment of the United States Constitution, and Article I, Section 16, of the Florida Constitution.

The importance of this constitutional issue and the necessity for new standards to be established by this Court in Florida for reviewing the exercise of peremptory challenges in the selection of criminal petit juries is demonstrated by a Miami Herald poll of 444 Blacks taken in the aftermath of the 1980 Liberty City-McDuffie riots. The poll revealed that 36% of those polled blamed the

rioting on "an unfair judicial system." Miami Herald, June 22, 1980, at §A at 1, Col. 1; at 23, Col. 1 (A 1). When questioned about the system of justice in Dade County, 77% claimed the State's Attorney's office was biased against Black defendants, 88% responded that it was almost impossible for a Black person to get a fair trial in Dade County, and 92% asserted that Black defendants do not get justice from all-White juries. Id. (A 1).

STATEMENT OF THE CASE AND FACTS[1]

Venire and Jury Selection

Jack Neil was charged with Second Degree Murder and the Display of a Firearm in the Commission of a Felony on 6 July 1981 (T 744) and brought to jury trial on 5 January 1982 (T 242). Jury selection began on 4 January 1982 (T 20). From a panel of thirty-five prospective jurors, six jurors and one alternate were chosen. The thirty-five member pool included (31) thirty-one Whites and (4) four Blacks.[2]

With only four Blacks in the thirty-five member venire, the cross-section of the community was limited from the very beginning. Then through the use of its peremptory challenges, the state systematically excluded all Blacks from the jury without any apparent cause or reason(T 75-76, 82, 100). Of the four jurors struck by the

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[1]In this brief the following designations will be used:
R Record on Appeal
T Transcript of Testimony
TS Transcript of Sentencing
A Appendix
All emphasis is ours unless otherwise indicated.

[2]The Court can take judicial notice that 15-16% of the Dade County population is composed of Black persons. The percentage of Blacks on the venire in this case was 11.42% with only four Blacks in the thirty-five member pool.

state from the first panel of seventeen members, three were Black prospective jurors (T 75-76,82,100,106). In fact, the state used only four peremptory challenges throughout jury selection.

Three of the four Blacks, who had a chance to serve, (Brenda Ferguson, Willie Porter and Sheila Spicer) were excused by the state (T 75-76, 82, 100), notwithstanding, the state asked no questions, nor received any answers from these Black prospective jurors which might account for their excusal (T 48-49).[3] In fact, Mr. Sheard, a White juror, expressed the same opinions as the Black jurors but he was accepted by the state (T 46-47, 74).[4] As pointed out by the defense at trial:

> MR. LOUIS: [T]he state made absolutely no attempt to voir-dire [Sheila Spicer] to find out any reason why she shouldn't be on this jury.
>
> . . . [The state] didn't show or . . . didn't attempt to bring out a single thing in regard to these three people, particularly the lady [Sheila Spicer] . . . (T 101).

The questions the state did ask the Black prospective jurors were limited to those concerning whether or not they had been the victims of crime, and if so, were they (the prospective jurors) satisfied with the police work involved (T 46-49). As shown by the

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[3]For the state's voir dire of Brenda Ferguson and Willie Porter, the two Black prospective jurors, see Appendix at A 3-4. The Court asked a few questions of each juror in the areas of marital status, type of employment, residence, if they had served on a jury before, and if they or anyone closely associated was involved in a criminal case. The responses by the Black jurors could not be interpreted as prejudicial by the state (T 34-35, 37-38, 44). Likewise, questions propounded by defense counsel and the Black jurors' responses did not reveal a partiality towards either side. For complete questions and answers concerning the defense's voir dire with the Black jurors see Appendix at A 4-5.

[4]For the State's complete voir dire of Mr. Sheard see Appendix at A 2-3.

testimony, the state's questions were directed to only two of the three Black potential jurors: Brenda Ferguson and Willie Porter (T 48-49). The two Black jurors responded as others had that they had been the victim of a burglary (T 48-49). Although there were mixed feelings about the satisfaction with the police work, the two Black prospective jurors stated that their experience with the police would in no way influence their decision as jurors (T 48-49). Sheila Spicer, the third and final Black prospective juror was not asked any questions by the state.

Other than the fact that these three prospective jurors excluded by the state were Black, they were qualified jurors. Through voir dire the background of the three Blacks was revealed:

1. Brenda Ferguson is married and a secretary for a government agency (T 35). She is against individuals possessing hand guns in their homes (T 71);

2. Willie Porter is single, a plumber's helper, and no individual associated with him had been involved with a crime (T 37); and

3. Sheila Spicer is single, an elementary school teacher and knew of no one involved with a criminal proceeding (T 44).

The discriminatory action by the state did not go unnoticed or unchallenged. As soon as the state began its practice of systematic exclusion, defense counsel raised objections and moved to strike the entire panel and begin anew (T 76). At first, the Court denied the motion without hearing argument (T 76-77). However, after the state used its peremptory challenges to exclude Sheila Spicer, the last Black to be considered for the jury, the defense renewed its motion (T 82), and the Court agreed to hear argument (T 83-84).

Defense counsel, amazed with the state's flagrant exclusion of Blacks taking place in a modern day American courtroom, declared:

> [MR. LOUIS]: I hear the State come along and I have three Black people on the jury and without the slightest basis, the State turns around and says, you know the basis is, not because he's a Jew, but because he's a Black -- is this whiteys law?
>
> Say, where are you going to get a trial like that? Are you going to give me [Adolf] Eichman being tried in Israel? He wasn't Jesse Jackson that came down here. This man is entitled to be tried by a jury of his peers, not a systematic exclusion. (T 86)

Defense counsel argued that the state's use of peremptory challenges to exclude all Blacks from the jury constituted affirmative state action which violated Jack's right to a fair trial by a jury selected from a cross-section of the community (T 107, 135), which is a fundamental right guaranteed by the United States and the Florida Constitutions.

Defense counsel requested the opportunity to present the testimony of the Public Defender, Bennett Brummer and lawyers from the community regarding the state's discriminatory practice in selecting juries over a period of time, however, the Court denied the request (T 114-29). Moreover, the trial judge ruled that the state did not have to provide an explanation for the three Blacks' excluded and denied the defense motion to strike the panel (T 132,135).

Since the first panel of seventeen prospective jurors yielded only four jurors acceptable to both counsel, the trial judge called out and seated a second panel of ten people, none of whom were Black (T 136). The defense, during selection from the first panel, used eight of its initial grant of ten challenges. Apparently, concerned

over the state's exclusion of the three Blacks, the Court granted five additional challenges to both the defendant and the state (T 136). After the remaining two jurors were chosen, the trial judge allowed an additional two challenges for selection of the alternate (T 195). Even with the additional challenges, the defense exhausted all its challenges without being able to seat the only remaining Black juror in the venire.

As a result of the state's use of its peremptory challenges, an all-White, white collar jury possessing the following characteristics was empanelled and sworn in. Voir dire disclosed:

1. The jury foreman, Walter Falk, lives in Coconut Grove with his wife, a housewife. Falk is a mortgage broker and his two children work for him in the brokerage business (T 32-33);

2. Cindy Rosenfeld, living in North Miami, is working in the real estate business (T 29);

3. Jackson Sheard is a developer with his place of residence in South Miami (T 31);

4. Donald Steffey is an electronics salesman and resides in North Miami (T 34).

5. Eugene Westbrook owns a towing company and lives in Hialeah (T 143); and

6. Ana Gloria Perez, a computer systems analyst for Florida Power & Light, cohabits with her parents in the Southwest section of Miami (T 150, 170).

The one Black remaining in the pool of thirty-five jurors was selected as an alternate, but was never called to serve on the jury (T 124-25, 196-97, 738).

Denial of Full Cross-Examination

The jury trial commenced on 5 January 1982 (T 242). There was no dispute over whether Jack had shot the victim. The primary issue

before the jury was whether Jack had acted in self-defense. The state's case against this justification was based upon the testimony of two alleged eye witnesses, St. Louis Sainthilair and Jean St. Jean, to the incident.

During cross-examination, a problem arose when defense counsel attempted to impeach the testimony of St. Louis Sainthilair (T 481-482). Questions were asked by the defense concerning the immigration status of the witness in an attempt to reveal bias and the motive of self-preservation behind his willingness to testify for the state (T 481-482).[5] St. Louis Sainthilair, at his deposition, revealed that he had arrived in this country illegally from Haiti (R 225) and was placed in a Miami jail by the immigration authorities for one day (T 232). When the prosecution objected to the defense inquiry about the witness' illegal entry, the defense made a proffer to the court (T 482-483). The defense cross-examination of St. Louis Sainthilair and subsequent proffer, in pertinent part, were as follows:

> Q (BY MR. LOUIS): Isn't it true that Charles came here illegally?
>
> MR. PUROW: Objection.
> THE COURT: Sustained.
>
> MR. LOUIS: Can I make a proffer?
>
> * * *
>
> THE COURT: Do you want to make a proffer?

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[5]The threat of immigration charges or deportation was a likely perception of the unsophisticated, uneducated Haitian witness. The witness undoubtedly lacked the ability to distinguish governmental authorities, i.e. the state's attorney as opposed to the federal immigration authority. In light of this self-interest, the witness would feel compelled to give favorable testimony for the state, without hesitation.

MR. LOUIS: I will do it later, your Honor.

Q (BY MR. LOUIS): You testified that you came here in 1974?

A Yes.

Q You came from Bahamas?

A Yes.

Q And, how did you come here from the Bahamas?

MR. PUROW: Objection.

MR. LOUIS: He brought it out on direct.

THE COURT: It shows when he came here but he came here, the conditions under which he came are not relevant to this case at hand.

MR. LOUIS: I will ask that you excuse the jury because I want to [proffer]

* * *

THE COURT: I will hear your proffer.

* * *

MR. LOUIS: I will proffer that he and Charles came to this country illegally, that they knew each other in Haiti, that he came here illegally, and therefore it shows when you listen to his testimony and the jury will have to decide some of it because he doesn't know east from west or 8 o'clock from 11 o'clock and he doesn't know certain things that I wouldn't know if I had to go to Haiti and had to learn somebody else's language. I don't condemn the man for it, but whether or not he is wising up to the State because he came here illegally and he wants to stay in good with the authority and it goes to his whole credibility and to say I can't ask a question when you permitted him to say who he worked for, the other man, who he worked for, and these other things.

THE COURT: Who he worked for is part of his identification of what he is doing now. What he was doing, he was here, he was working, that was at least germane to a current event which took place at or near the event that is before the Court. You're going back seven years, if he

came here legally or illegally and in my judgment, that does not bear upon the issues at hand.

MR. LOUIS: In my opinion, whether he had a green card, whether Charles had a green card, it goes to the state of mind of a witness that is testifying.

THE COURT: The color of the card doesn't enter into the issue.

MR. LOUIS: It is unfortunate, your Honor, if you will permit, that is apparently what has happened to this country. Half the world, they employ people who are in here and don't obey the law. They don't pay their taxes. I'm talking about green cards and suddenly if some guy crosses the law, they give him 20 years in jail at the proper time and I say it is relevant to show the man's motive in testifying.

(T 481-84)

THE COURT: I understand that. Bring the jury back.

MR. LOUIS: I have no further questions.

Notwithstanding, the court denied the proffer of the defense, refused to allow cross-examination on the matter, and thereby prevented Jack's right to a fair trial (T 483-84).

At the end of the state's case, the defense moved that the eye witness, St. Louis Sainthilair, be recalled for examination about (1) his illegal entry into the United States and, (2) any conversations the witness had with the state, prior to trial, concerning his illegal status (T 528-32). Again, the Court disallowed the defense from making inquiry into the witness' motivation for testifying (T 532).

The all-White jury convicted Jack of second degree murder for the killing of a black Haitian and the display of a firearm in the commission of a felony. Jack's request for a new trial was denied and he then timely filed a Notice of Appeal. The Third District

Court of Appeal in its opinion of 21 June 1983 (R 445-448) per curiam affirmed the Final Order of the Eleventh Judicial Circuit Court and certified the following question to the Florida Supreme Court as one of great public importance:

> ABSENT THE CRITERIA ESTABLISHED IN SWAIN V. ALABAMA, 380 U.S.202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), MAY A PARTY BE REQUIRED TO STATE THE BASIS FOR THE EXERCISE OF A PEREMPTORY CHALLENGE?

ARGUMENT

POINT I

> THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 (1968), OF THE FLORIDA CONSTITUTION REQUIRE A PARTY TO STATE THE BASIS FOR THE USE OF THE PEREMPTORY CHALLENGE ABSENT THE CRITERIA ESTABLISHED IN SWAIN.

A thorn in the side of justice, the state's unchecked use of peremptory challenges to exclude all Black persons from the jury is one of the last loopholes in our legal system through which racial discrimination may rear its ugly head. Jack Neil was denied the type of fair trial guaranteed under the Sixth Amendment (made applicable to the states by the Fourteenth Amendment due process clause) of the United States Constitution and the Florida Constitution, Declaration of Rights, Article I, Section 16 (1968) because the state affirmatively frustrated his right to a jury drawn from a fair cross-section of the community.

The following presentation, in two parts, of constitutional and decisional law sets forth two distinct legal rationales to abolish the practice of racial discrimination in the jury selection process. Part A of the presentation will discuss the Sixth Amendment right to an impartial jury trial under the United States Constitution via the United States Supreme Court decisions in Duncan v. Louisiana, 391

U.S. 145 (1968) and Taylor v. Louisiana 419 U.S. 552 (1975). Part B will present this inviolate right under the individual state constitutions as interpreted by People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) and its progeny, Commonwealth v. Soares, 387 N.E.2d 499 (Mass.1979).

A.

SIXTH AMENDMENT PROTECTION

Swain, The Old Rule Based On The Fourteenth Amendment

The problem of systematic exclusion of persons from a jury is by no means a new one. It was recognized by the United States Supreme Court as early as 1880, and the issue has been litigated over and over again in a number of cases in all levels of the judiciary, both state and federal. Nevertheless, until a closely divided United States Supreme Court rendered its opinion in Swain v. Alabama, 380 U.S.202 (1965), in 1965, it was a well-settled rule of law that the state could not systematically exclude persons from juries solely because of their race or color. See Strauder v. West Virginia, 100 U.S. 303 (1879).[6] In his dissenting opinion, Justice Goldberg, in Swain, expressed his regret at the Court creating an additional barrier to the elimination of jury discrimination practices:

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[6]See also Ex parte Virginia, 100 U.S. 339 (1879); Neal v. Delaware, 103 U.S. 370 (1880); Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hills v. Texas 316 U.S. 400 (1942); Akins v. Texas, 325 U.S. 398 (1945); Patton v. Mississippi, 332 U.S. 463 (1947); Cassell v. Texas, 339 U.S. 282 (1950); Hernandez v. Texas, 347 U.S. 475 (1954); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964).

> The principles and reasoning upon which this long line of decisions rests are sound. The need for reaffirmation is present.
>
> * * *
>
> It is unthinkable, therefore, that the principles of Strauder and the cases following should be in any way weakened or undermined at this late date particularly when this court has made it clear in other areas, where the course of decision has not been so uniform that the States may not discriminate on the basis of race.
> Swain, 380 U.S. at 231

The Swain decision gave new life to the discriminatory practices of the states, the days of which had seemed numbered. But instead of affirming the well-established cases, Justice White's opinion in Swain pays them mere lip service before proceeding to pull back the protections and safeguards therein.

As it stands now, under Swain before the Fourteenth Amendment equal protection clause will shield a defendant from a state's practice of racial discrimination by the use of its peremptory challenges in the selection of a jury, the following must be proved. A defendant must show that "1) a particular prosecutor 2) in every type of case 3) in every set of circumstances and 4) for an extended provable period of time has 5) peremptorily excused Black venire 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, 433 So.2d 51 (Fla.3d DCA 1983); Swain, 380 U.S. at 223.

By any stretch of the imagination, this standard is difficult if not impossible to achieve. Nevertheless, that is the law, or at least as far as the equal protection clause of the Fourteenth Amendment is concerned. However, later in the opinion, the Swain Court, retreating from its rigid position, states that it would

consider an equal protection challenge to the peremptory challenge, if "the purposes of the peremptory challenge are perverted." Swain, 380 U.S. at 224. Thus, under Swain, the trial court may control peremptory challenges, if it appears that they are being used to violate the defendant's constitutional rights.

Swain was decided eighteen years ago, and as was observed in Commonwealth v. Soares, at 510 n. 11, "[s]ince its release in 1965, Swain has been the subject of extensive and biting criticism."[7] Since then, the Supreme Court of the United States has handed down two other decisions dealing with this important jury trial issue which we believe require the Court to reject the test set forth in Swain. Although the two cases do not overrule Swain, they provide the Court with a different basis to remedy the misuse of the peremptory challenge under Swain. This is accomplished under the Six Amendment to the U.S. Constitution and not the Fourteenth Amendment

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[7]Justice Marshall's dissent in the United States Supreme Court opinion denying petitions for certiorari, in McCray v. New York, No. 82-1381; Miller v. Illinois No. 82-5840; Perry v. Louisiana, No. 82-5910, cert. denied (May 31, 1983) 33 Crim. L. 4067 (1983) (A 6-8), cites numerous authorities as follows attesting to the unpopularity of Swain: See Martin, The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury, 4 Hous. L. Rev. 448 (1966); Note, The Supreme Court, 1964 Term, 79 Harv. L. Rev. 103, 135-139 (1965); Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1157 (1966); Note, Fair Jury selection Procedures, 75 Yale L.J. 322 (1965); Note, Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss. L.J. 157 (1967); Note, The Jury: A Reflection of the Prejudice of the Community, 20 Hastings L.JU. 1417 (1969); Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U.L. J. 662 (1974); Comment, The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite jurors: A valued Common Law Privilege in Conflict with the Equal Protection Clause, 46 U. Cin. L. Rev. 554 (1977); Recent Development, Racial Discrimination in Jury Selection, 41 Alb. L. Rev. 623 (1977); Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L. J. 1715 (1977).

under which Swain was decided. Swain pre-dates the Sixth Amendment's application to state criminal trials, and the accused's right to a jury drawn from a fair cross-section of the community.

Transition - Sixth Amendment Now Applicable To States

In 1968, the United States Supreme Court held, for the first time, that the Sixth Amendment to the United States Constitution, mandating fair and impartial jury trial, applies to state criminal trials through the Fourteenth Amendment due process clause. Duncan v. Louisiana, supra. The Duncan Court stated that "in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." 391 U.S. at 157-158.

Seven years later, the Court decided Taylor v. Louisiana, supra, and reaffirmed the holding in Duncan that the Sixth Amendment's provision for jury trials is made binding on the states through the due process clause of the Fourteenth Amendment. The Taylor Court then inquired as to "whether the presence of a fair cross-section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." 419 U.S. at 526. It was then held: "We accept the fair cross-section requirements as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has a solid foundation." 419 U.S. at 530.

Taylor sets forth the leading cases establishing the cross-section requirement under the Sixth Amendment. For example, Taylor

mentions the case of Glasser v. United States, 315 U.S. 60 (1942), in the context of a federal criminal case where women were excluded from a grand jury, which indicted a male defendant. Pursuant to the Sixth Amendment's jury trial requirement and the "historical common law concept of the jury as a body of one's peers," the Supreme Court reversed the conviction and held: "[T]he state must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Glasser, 315 U.S. at 85. Also see Ballard v. United States, 329 U.S. 287, 191 (1946), and Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), where the reversal of both convictions was founded upon the Sixth Amendment right to an impartial jury drawn from a cross-section of the community. See also Peters v. Kiff, 407 U.S. 493 (1972) where the U.S. Supreme Court found the Sixth Amendment right to a fair and impartial jury did not apply to state criminal trials before the rendering of the Duncan decision.

It is true that Taylor was directly concerned with the selection process of the venire, rather than petit juries. However, as aptly put by a New York Appellate Court, in People v. Thompson, 79 A.D.2d 87 (App.Div. 1981) this rationale is just as applicable to petit juries:

> [W]e believe that its principles are equally applicable to the selection of petit jurors since the court's rationale was largely derived from a recognition that the vice of exclusion of cognizable groups from jury venires is that such exclusion necessarily results in the absence of members of such groups from petit juries, with grave consequences both for the petit jury's capacity to serve as a guard against governmental oppression and for the public's perception of the fairness of the jury system. People v. Thompson, at page 749.

The United States Supreme Court cases discussed above clearly establish the principle that the jury should be representative of a cross-section of the community. Although each jury need not be of a particular composition or mirror the community, the state is prohibited from intentionally thwarting the defendant's constitutional right to be tried by a jury of his peers drawn from a fair cross-section of the community.

Taylor and Duncan Applied to Petit Juries in Payne

The principles set forth in both Taylor and Duncan have been applied in Illinois rather than the Swain test as the basis for reviewing discriminatory use of peremptory challenges by the state.[8] In People v. Payne, 106 Ill.App.3d 1034, 436 N.E.2d 1046 (App.Ct. 1982), the Court reversed a state court conviction of a Black defendant for the reason that the prosecution had systematically excluded Blacks from the jury solely due to their color. There the prosecutor exercised a total of eight peremptory challenges. Six of the eight challenges were used to strike six of the seven prospective Black jurors - one Black was accepted by the state. Basing its decision upon Duncan and Taylor (rather than Swain) the Court ruled:

> When it reasonably appears to the trial court, either by its own observation or after motion by the defendant, that the prosecuting attorney is using peremptory challenges to systematically exclude Blacks from the jury solely because they are Black, the court should require the prosecutor to demonstrate,by whatever facts and circumstances exist,that Blacks were not being systematically excluded from the jury solely because they were Black. Payne, 436 N.E. 2nd at 1050.

[8] (Swain's constitutional basis for permitting the striking of Blacks from the jury, solely because they are Black, in state criminal trials was the Fourteenth Amendment equal protection clause only.)

Also aware that Taylor involved the exclusion of women from the venire rather than the petit jury, the Court in Payne "saw no rational difference warranting the allowance of racial discrimination by the state in the latter instance but not the former." Payne, 436 N.E. 2d at 1048.

Analogous Florida Law

As in Taylor, this Court has also considered the issue of the Sixth Amendment right to an impartial jury trial, and the parallel state constitutional provision's barring racially biased jury venires. In State v. Silva, 259 So.2d 153 (Fla.1972), this Court considered whether the quota system employed in Dade County to either exclude or include a fixed percentage of qualified Black citizens in the selection of jury lists violated state and federal law. In finding that it did, this Court held that "prospective jurors must be selected at random ... without systematic and intentional exclusion of any economic, social, religious, racial, political, or geographical group." 259 So.2d at 163.

Subsequent Florida cases indicate that Silva is well-established in Florida jurisprudence. See Bryant v. State, 301 So.2d 762 (Fla.1974); Huffman v. State, 350 So.2d 5 (Fla.1977); Slaughter v. State, 301 So.2d 762 (Fla.1974); Reed v. State, 292 So.2d 7 (Fla. 1974); and Bass v. State, 368 So.2d 447 (Fla.1st DCA 1977). Although Silva and its progeny have protected the defendant's right to an impartial jury venire drawn from a cross-section of the community, the Florida courts have not as yet taken the next step to protect the defendant in the selection of the petit jury. At that

point, the state is still free to intervene and systematically exclude a class of people without cause, as it did in the instant case, through the totally unchecked use of peremptory challenges. In effect, all the protections afforded a defendant with respect to the selection of the venire under Florida and federal case law can be summarily destroyed by the state by its use of the peremptory challenge. In the present case, even the Trial Court recognized the state's discriminatory practice in removing jurors solely because they were Black by allowing additional challenges to both sides. Consequently, there should be no distinction made between applying the Sixth Amendment to the venire and not the petit jury.

Therefore, as in Payne, this Court should extend its reasoning in Silva to its logical conclusion and hold that the systematic exclusion of Blacks by the state from juries, through the use of its peremptory challenges, violates the defendant's right to a fair and impartial trial under the Sixth Amendment to the U.S. Constitution. The harsh and unrealistic Swain test should not be adopted by this Court. Instead, the enlightened approach in Payne via the Sixth Amendment or the Wheeler - Soares approach pursuant to Article I, Section 16, of the Florida Constitution, should be adopted as the law in this state. A review of the Wheeler and Soares decisions demonstrates even more definitively why this Court should reject Swain.

B.

STATE CONSTITUTIONAL PROTECTION

THE WHEELER - SOARES APPROACH

Without using the criteria in Swain, the courts have also controlled the use of the peremptory challenges under their state

constitutions. The Wheeler and Soares Courts were the first state courts to reject the Fourteenth Amendment equal protection clause rationale of Swain with respect to the systematic exclusion of Blacks from a jury based upon a distinct construction of their state constitutions, which are similar to the provisions of Article I, Section 16 of the Florida Constitution. By handing down their now famous decisions, the California and Massachusetts courts afford greater protections and freedoms to state criminal defendants through their state constitutions than does the Federal Constitution as interpreted by Swain.

The states are not pre-empted by the United States Constitution in the area of jury selection practices. As interpreted by the United States Supreme Court, the United States Constitution defined only the minimum level of individual rights. Therefore, the states are left with the power to secure greater rights through their constitutions, statutes and rule making authorities and are not limited by Supreme Court decisions concerning the Federal Constitution in interpreting their state constitutions. People v. Thompson, 435 N.Y.S.2d at 744,745; People v. Wheeler, 583 P.2d at 767.

In People v. Wheeler, supra, the two defendants were Black and were charged with the murder of a White victim. Seven prospective jurors were Black and were all peremptorily challenged by the prosecutor. The resulting all-White jury ultimately tried and convicted the defendants. The Supreme Court of California, in reversing the convictions, 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." Wheeler, 583 P.2d at 761-762.

Likewise, in Commonwealth v. Soares, supra, the three defendants were also Black and were also convicted of the murder of a White victim. Of thirteen Blacks on the venire, twelve were peremptorily challenged by the state. One Black person was not removed by the state and was seated as the only Black member of the jury. The Supreme Court of Massachusetts, relying heavily on Wheeler, held that the prosecutor's use of the peremptory challenge to exclude twelve of thirteen potential Black jurors constituted a prima facie case that they were excluded because of their race, and that "the failure of the Trial Judge to allow a hearing on the issue deprived the accused of their constitutionally protected right to a trial by a jury fairly drawn from the community". Soares 387 N.E.2d at 503.

The Near Impossibility of Meeting the Swain Test

The Court in Wheeler, 583 P.2d at 767, reviewed the insurmountable standard set by Swain and emphasized that Swain "furnishes no protection whatever to the first defendant who suffers such discrimination in any given court -- or indeed to all his successors, until "enough" such instances have accumulated to show a pattern of prosecutorial abuse." See also State v. Crespin, 94 N.M. 486, 612 P.2d 716, 717 (Ct.App.1980).

More importantly, the Court in Wheeler found that since Swain numerous Black defendants in California, involving the issue of Blacks being excluded by peremptory challenges, had attempted to comply with Swain's burden of proof, but none had succeeded. 583 P.2d at 767. Wheeler also cited an A.L.R.3d annotation of state and federal court cases where Black defendants had made attempts to meet

Swain's burden of proof. The annotation revealed that "no defendant has yet been successful in proving to the Court's satisfaction an invidious discrimination by the use of the peremptory challenge against Blacks over a period of time." Wheeler, 583 P.2d at 768.[9]

It was noted in Wheeler that even if a defendant attempted to comply with the federal standard of proof in Swain, he is bound to fail:

> First, those defendants who are indigent or of limited means cannot afford to pay investigators to develop the necessary data. Second, even if the funds were available ... the time is not: by definition, abuse of peremptory challenges does not appear until the jury selection process is well under way ... and few if any trial judges would be willing to interrupt the proceedings at that point ... to permit the necessary investigation. Third, even if the funds and time were available, the data is not: we know of no central register conveniently listing the names and races of all jurors peremptorily challenged by the prosecution in a given court. Wheeler, 583 P.2d at 767-768. See People v. Smith, 91 Ill.App.3d 523, 414 N.E. 2d 1117, 1125 (App.Ct. 1980).

In the instant case, the trial judge below was also fully aware of the near impossibility of meeting the Swain test when it read aloud from State v. Simpson, 326 So.2d 54, 56 (Fla.4th DCA 1976) in open court: "In the six years which have passed since Swain, we have not found a single instance of which a defendant has prevailed on the issue. Nonetheless, the burden is not insurmountable." (T 118). Notwithstanding, the trial judge in the instant case chose to

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[9]For the annotation cited in Wheeler of federal and state cases where defendants since Swain in attempting to prove the kind of systematic exclusion required by Swain have always failed see Annot., 79 A.L.R. 3d 14, 56-73 (1977); Annot., 79 A.L.R.3d 14 (Supp.1982).

apply the Swain test adopted by the Fourth District Court in Simpson.

The Wheeler Standard

Unlike Swain, the Wheeler test provides a flexible method of review by the trial judge which is based on the trial judge's observation and discretion. Upon the defendant timely raising the issue, the court must determine whether a reasonable inference arises that peremptory challenges are being used on the basis of group bias alone. If the court finds that a prima facie case has been made, the state is then asked to give a reasonable explanation or demonstrate why the offending prospective juror was struck from the jury. The state need not approximate the grounds necessary for a challenge for cause, but his reason must pertain to the individual qualities of the prospective juror and not to his group association. Soares, 387 N.E.2d at 517.

At this juncture, the trial judge is called upon to exercise his judgment to distinguish bona fide reasons for the peremptory challenge from sham excuses by the state to avoid admitting discrimination based upon group association. Wheeler, 583 P.2d at 765; Soares, 387 N.E.2d at 517. The Wheeler Court believed the trial judge to be in a good position to make such a determination because of his "knowledge of local conditions and of local prosecutors." The trial judge is also well situated to bring his "powers of observation, broad understanding of trial techniques, and broad judicial experience" into play in determining the question. Wheeler, 583 P.2d at 764; Soares, 387 N.E.2d at 517. If the court determines the prosecutor failed to present a reasonable explanation, the jury must be dismissed and the remaining venire quashed. Thereafter, a

different venire will be drawn and the jury selection process will begin anew. Wheeler, 583 P.2d at 765; Soares, 387 N.E.2d at 517-18.

If a prima facie showing is made by the defense that the state was excluding Black jurors because of group bias alone, and the trial court did not require the state to respond to the allegation, then the trial court committed prejudicial error. Wheeler, 583 P.2d at 766; Soares, 387 N.E.2d at 518. The Wheeler court determined such an error was prejudicial per se and; therefore, "no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." Wheeler, 583 P.2d at 766.

Applying the Wheeler Test to the Instant Case

The tests in Wheeler, 583 P.2d at 764 and Soares, 387 N.E.2d at 516-17, to determine if a party is excluding jurors for reasons of group association instead of specific bias, as applied to the facts in the instant case, reflect that the Black jurors were removed by the state because of their group association:

1. First, the defendant must establish that the excluded persons are members of a cognizable group. (See T 75-78,82,84-87, 100,105-107,132 for Jack's showing that all Black jurors were excluded from the petit jury by the state.)

2. Second, a strong likelihood that persons are challenged because of their group association rather than specific bias must be shown. The following evidence demonstrates the "strong likelihood" that the state in the present case excluded the Blacks from the jury merely because of their group association of being Black.

(a) The state struck most or all members of an identifiable group or used a disproportionate number of its challenges

against the group. (See T 86-87, 101, 105-107, 124-25, 196-97, 738.) Of the three Blacks selected to the petit jury in the present case, all were excluded by the state. In fact the state used only four of its challenges, three of which were used to remove Blacks. The last Black on the venire was selected as an alternate but never became one of the six jurors, since the defendant had exhausted all of his challenges. Consequently, 100% of the Blacks were excluded by the state as a result of its challenges, as compared to 6.45% of the Whites.

(b) The jurors that were struck share only one characteristic - their membership in the group. (See T 34-35,44,46-49,68-69,71,73 for the individual characteristics of the three Black prospective jurors. The occupations of the Black jurors excluded were a secretary for a government agency, a school teacher and a plumber's helper.)

(c) The state failed to engage in more than desultory voir dire of the Blacks excluded. (See T 46-49, 100 for the state's voir dire where it completely failed to question one prospective Black juror at all and hardly questioned the other two eligible Blacks.)

The Wheeler and Soares Courts determined that the common group membership of the defendant and the group excluded is an important factor to be considered. Wheeler, 583 P.2d at 764; Soares, 387 N.E.2d at 517. See also Taylor, 419 U.S. at 533. Jack's attorney also believed it was an important factor to be considered, contrary to the trial judge's and the state's belief, when he made the statement to the Court:

> MR. LOUIS: And I'm trying to stay away from rhetoric, although I can't when you say [there is no] Black issue [involved here]. Hey, my man is Black. How would you like to be sitting over there and tried by seven people in Nazi Germany. My man is Black. You can bet [there] is a Black issue. (T 130-31)

The crucial requirement underlying the Wheeler test is that the defense attorney carefully lay a foundation for appeal. Wheeler, 583 P.2d at 752; Soares, 387 N.E.2d at 894; Payne, 436 N.E.2d at 1053; People v. Smith, 414 N.E.2d at 1124. In the instant case upon the "first smell" of racial discrimination, that is, after the first Black was excluded, Jack's attorney moved to strike the panel and begin anew (T 76). Also, after each remaining Black was stricken from the panel, the defense moved to strike the panel again (T 76,82).

In the instant case, the state exercised its peremptory challenges and effectively restricted jury service to non-Blacks. Each time the name of a Black was called, the prospective Black juror was excused by the state with no reason other than being Black. The racial composition of the panel and the state's use of peremptory challenges to remove Blacks was described fully:

> THE COURT: It would appear that we had a panel of 35 brought down. Seventeen were placed in the box and given the preliminary questioning by me and counsel. Each had an opportunity to examine the jurors. Three of those jurors were Black and three were challenged by the State.
>
> MR. LOUIS: How many challenges were made by the State?
>
> THE COURT: Three of the blacks were challenged.
>
> THE CLERK: The State has used four challenges; Defense, eight.
>
> MR. LOUIS: The State has used [four challenges] of which three [were to exclude] blacks. I

would like to be able to identify the names of the blacks. They were Brenda Ferguson--

MR. LOUIS: It is Brenda [Ferguson], Sheila Spicer and Willie Porter.

MR. LOUIS: Can we get an agreement on that?

MR. PUROW: Yes, Judge. (T 100)

Also, as the defense counsel pointed out, three Black prospective jurors were excused because of their group association as Blacks, rather than for specific bias:

MR. LOUIS: [T]hree of the four persons who were excused by the State were Black and that establishes that they excluded members of a cognizable group and that shows there is a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. (T 100-101)

* * *

MR. LOUIS: Now, that would be, for example, if a man--when he was challenging the man [Wonsik] that had the bad experience with your Court, you actually let him off [for cause]. That's what they call specific bias if you are a juror, a prospective juror.

THE COURT: Wonsik--This is the fellow who had a non-jury trial before me five years ago that I found guilty and he found a sense of--

MR. LOUIS: That they called specific bias. (T 102-103)

Aware that three of the four jurors excluded by the state were Black, the Trial Court below indeed recognized the problem. The Court's concern is reflected in his statement:

THE COURT: I want to say this, that I think since all of you have gotten all this law for me and I haven't had a chance to carefully digest that, I am going to take some time to digest it. I have told you my inclination and my likely ruling, but I think you are entitled to have me digest this law carefully. I think the numbers in this case suggest at least that I do that... (T 134)

Despite the Court's subsequent evaluation of the case law presented

by the attorneys and the awareness of the "numbers in this case," the Court would not require the state (although requested by defense counsel (T 115, 121)) to reveal its motives for excluding the three Blacks (T 122-125,132). Instead the Court gave additional challenges to each side which could not rectify the injustice since three of the four Blacks in the venire had already been excused. As it turned out the fourth Black never made it to the jury box since the defense exhausted all of its challenges. Since the state through voir dire never made an attempt to find a reason for excluding the three Blacks from the jury panel, it cannot take the position that it was concerned about any possible prejudice these people may have had against the state's case. Clearly under the Wheeler - Soares test, the state would have been required to explain its challenges of the Blacks, and if its explanation was determined unsatisfactory by the trial judge, the venire panel would have been struck and jury selection started over again.

Apparently, the California courts have had no difficulty in applying the Wheeler - Soares standard. People v. Fuller, 136 Cal.App.3d 403, 186 Cal.Rptr. 283 (1982); People v. Allen, 23 Cal.3d 286, 152 Cal.Rptr. 454, 590 P.2d 30 (1979); People v. Rousseau, 129 Cal.App.3d 526, 179 Cal.Rptr. 892 (1982); and People v. Johnson, 22 Cal.3d 296, 148 Cal.Rptr. 915, 583 P.2d 774 (1978).[10] Moreover, the workability and efficiency of the standard is demonstrated by its growing acceptance in many state courts. People v. Gillard, 112 Ill.App. 799, 445 N.E. 2d 1293 (1983); State v. Crespin, supra;

[10] See the briefs filed in People v. Hall, 139 Cal.App.3d 829, 189 Cal.Rptr. 231 (Ct.App.1983) which are contained in the Appendix at A 13, reviewing the implementation and procedures of the Wheeler standard in an actual trial in California.

Saunders v. State, 401 A.2d 629 (Del.Super. 1979); State v. Emes, 365 So.2d 1361 (La.1978).

Moreover, there is an strong indication that the United States Supreme Court will review the viability of the Swain decision in the near future. On 31 May 1983 in a close decision denying petitions for certiorari in three criminal matters involving the instant issue, the United States Supreme Court opened the door for future reexamination of the standard set forth in Swain. McCray v. New York, No. 82-1381; Miller v. Illinois, No. 82-5840; Perry v. Louisiana, No. 82-5910, cert. denied (May 31, 1983) ____ U.S. _____, _____ U.S.L.W. ____, 33 Crim. L.4067, (A 6-8). The Supreme Court stressed the issue's importance but hesitated to make new law until the state courts -- which have adopted the Wheeler - Soares approach of judicial review of the peremptory challenge - have worked out the new system's procedural and substantive kinks to the Supreme Court's satisfaction. In other words,the state courts were to serve as laboratories for further study of the issue before being addressed by the Supreme Court. 35 Crim.L. 4067.

The New York Times published an editorial on the High Court's refusal to reexamine the Swain standard. N.Y. Times, June 5, 1983, (Editorials) (A 9). In response to the editorial, a California Supreme Court Justice wrote a letter to the editor encouraging state courts not to dispair because of the utility of an independent non-federal ground, which has been employed in California under Wheeler to remedy the inequity of Swain.[11] N.Y. Times, June 24,

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[11]For the New York Times editorial published 5 June 1983 and California Supreme Court Justice Stanley Mosk's 9 June 1983 letter to the editor see Appendix at A 9-10.

1983 (Letters) (A 10). The Justice also pointed out that "since the Wheeler decision complaints about the racial composition of juries have been virtually eliminated in California." Id. (A 10).

The Decision of the Third District in the Instant Case

Prior to rendering the Neil decision, it appeared that the Third District Court of Appeal in Johnson v. State, 418 So.2d 1063 (Fla.3d DCA 1982) was ready and willing to reexamine and discuss the merits of the use of peremptory challenges in the jury selection process. In that case the Third District framed the issue and even cited to the cases of Wheeler, Soares and other state court decisions which had rejected Swain. However, due to an inadequate record, the Court was required to leave the issue for a future determination.

Unlike Johnson, the Neil case presented the Third District Court of Appeal with a clear record to review the abuse of peremptory challenges by the state in the removal of Blacks from the jury. Yet even with these undisputed facts, the Third District chose to remain within the boundaries set by Swain in reviewing such challenges in criminal trials. In affirming the Swain test, the Third District relied upon the Florida cases of State v. Simpson, 326 So.2d 34 (Fla.4th DCA 1976); Dobbert v. State, 409 So.2d 1053 (1982) and Francis v. State, 413 So.2d 1178 (1982). Jack rejects the Fourth District Court's decision in Simpson because of its wholesale adoption of Swain as Florida law for the reasons already discussed above. Dobbert and Francis, although citing to Swain, are not factually concerned with the systematic exclusion of Blacks from juries or substantively involved with the constitutional issues raised herein.

Dobbert is distinguishable in that it deals with a non-racial situation, that is, the exclusion of those with scruples against the death penalty. Moreover, the defendant, in Dobbert, contrary to the instant case, did not contest the Swain rule, but argued that he met the Swain burden of proof. The Court expressed some ambivalence as to whether Swain was applicable at all to the systematic exclusion of "death-scrupled" jurors, notwithstanding, the Court ruled that the defendant failed to meet the Swain test.

Francis concerns a challenge to the defendant's right to be present during the exercise by the court, state and defense counsel of the peremptory challenge. In Francis, Swain was quoted in the context of the importance of the defendant's right to the exercise of the peremptory challenge, and not for the proposition of the state's right to the unhampered exercise of the peremptory challenge, as emphasized by the Neil court. The Neil court in string citing Francis and Dobbert, without further discussion, would lead one to believe that the Florida Supreme Court has directly mandated the use of the Swain test as Florida law. As set forth above, this is indeed not what we believe this Court mandated by rendering its decisions in Dobbert and Francis.

The Third District's belief that the Swain test is firmly entrenched Florida law has not been borne out by recent events. This is demonstrated by the recent ruling by Circuit Judge David Gersten on 12 September 1983 wherein he dismissed, on his own accord, an all-White jury without any reference whatsoever to Swain.[12] The

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[12]For the newspaper accounts in Miami Herald, September 13, 1983, at §B at 1, Col. 2; at 2 and Miami Herald, September 14, 1983, at §D at 1, Col. 1 see Appendix at A 11-12.

defendant, a white police officer, accused of murdering a Black man excluded without explanation four of the five Blacks eligible to serve on the petit jury. The Judge stated at a side-bar conference with the state and defense counsel that Dade County is comprised of Anglos, Cubans and Blacks and an all-White jury was not representative of the community. This is a clear example of the advantages of the Wheeler test over the Swain test, since it allows the trial judge to act within his discretion instead of requiring a party to meet the rigid and impossible test set forth in Swain. The fact that no one has met the Swain test clearly demonstrates its illusory protection.

In short, the state and Third District Court are concerned that if the Wheeler - Soares test is adopted in this state, which would make the peremptory challenge subject to the trial judge's control, the peremptory challenge would be "emasculated." This concern demonstrates a lack of faith in the ability of our judiciary "to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed [by the defendant] simply for purposes of harassment or delay." Wheeler, 583 P.2d at 764; Soares, 387 N.E.2d at 517. The practicality and workability of judicial intervention in certain instances is demonstrated by Judge Gersten's action in dismissing the all-White jury.

Furthermore, "[t]he Constitutional demand [of an impartial jury] must control because the state's peremptory challenge is a statutory procedure and not a constitutional necessity ... or even a common law imperative." Payne, 436 N.E. 2d at 1049. In English law, which is the basis for the vast majority of American jurisprudence, the crown's right to the peremptory challenge was abolished in 1305,

and since that time, peremptory challenges have only been exercised by the defendant. Swain, 380 U.S. at 243-44; Payne, 436 N.E.2d at 1050, f.n.4. The limited restrictions on the peremptory challenge, which the defendant requests be adopted by this Court, would preserve more of that system than now exists in England. It certainly would not destroy or even emasculate the peremptory challenge but would only place the defendant's constitutional right to trial by an impartial jury above the privilege of the peremptory challenge, which is not a constitutional right.

In Summary

Jack Neil, a Black defendant, was not tried before a group of his peers, his neighbors or associates; this right was denied him by affirmative action on the part of the state. Instead, Jack was tried by an all-White jury chosen by the state, specifically for its lack of color. Furthermore, the trial judge allowed the state to practice racially discriminatory trial tactics, notwithstanding its judicial duty to ensure that justice is demonstrated in the criminal trial. A precept firmly rooted in the common law was once quoted by Justice Brennan: "[J]ustice must satisfy the appearance of justice." Richmond v. Newspaper, 448 U.S. 555, 594 (1980) (Brennan J. concurring), quoting Levine v. United States, 362 U.S. 610, 616 (1960).

The Honorable Marvin Mounts in State v. Solomon Barnes, Eleventh Judicial Circuit Court, Case No. 80-3039, stated that it appeared that the prosecutor was excluding Blacks from the jury improperly. In response, the State's Attorney, Janet Reno, appearing in open court on 10 July 1980, made the statement:

> If there are any questions, if there are any opinions, if your Honor has any feelings whatsoever that there is systematic exclusion of

> jurors just on the grounds of race, we will be happy to state the reasons for the record, but I think it is important in this case to have that appearance of fairness.

Nevertheless, as the Miami Herald poll indicates, large segments of Miami's Black population have little confidence in the integrity and fairness of the judicial system, and less confidence in the ability of an all-White jury to fairly judge a Black. While juries that are truly representative of a community can of course never be guaranteed, certainly the demeaning spectacle, occurring when the State of Florida, through its officials, deprives a social minority of its rights to participate in the administration of justice, must be abolished. Hard-earned Fifth, Sixth, and Fourteenth Amendment rights should not be denied Blacks by the state standing at the entrance to the jury box and barring access.

POINT II

> IT WAS ERROR FOR THE COURT TO PRECLUDE DEFENSE COUNSEL FROM CROSS-EXAMINING THE STATE'S WITNESS AS TO HIS BACKGROUND IN ORDER TO EXPOSE THE WITNESS' MOTIVATION FOR TESTIFYING.

The Fifth District Court in Holt v. State, 378 So.2d 106 (Fla.5th DCA 1980) recognizing the defendant's fundamental right of cross-examination opined:

> The exposure of a witness' motivation in testifying is a proper function of the constitutionally protected right of cross-examination (citation omitted). Any evidence which tends to establish that a witness is appearing for the state for any reason other than merely to tell the truth should not be kept from the jury (citation omitted). Holt v. State, 378 So.2d 106, 108 (Fla.5th DCA 1980).

In Holt, defense counsel attempted to inquire as to the details surrounding a grant of immunity to the key prosecution witness. The trial court sustained the prosecution's objections thereby preclud-

ing the defendant from showing the witness' motive for cooperating with the state. Because of the defense's preclusion, the appellate court saw fit to reverse the conviction.

The trial court's refusal to permit cross-examination of a state's witness, who was an alleged co-participant in the case, with regard to his awaiting sentencing in federal court on an unrelated charge was found to be reversible error by the Third District Court in Cowheard v. State, 365 So.2d 191 (Fla.3d DCA 1979). There the defense counsel at trial attempted to expose the witness' motive for testifying against the defendant, that is, to avoid the filing of a perjury charge against the witness which would adversely affect the pre-sentence investigation. In Cowheard, it was found that evidence of the fact that the witness was awaiting sentencing tended to establish his motive or bias for testifying and was permissible.

Discussing the scope of cross-examination, the court in Oliva v. State, 346 So.2d 1066, 1068 (1977), held that it was proper "to cross-examine a witness concerning his current employment, his lack of past employment, his previous convictions, prior addresses and current charges pending against him." The "full history" of the witness was brought out on cross-examination, in Oliva, which ensured that the jury was appraised of the witness' possible motive or self-interest with respect to his testimony.

Set forth in McDuffie v. State, 341 So.2d 840, 841 (Fla.2d DCA 1977) was the principle that "matters tending to show bias or prejudice in a criminal prosecution may be inquired about even when they where not mentioned in direct examination." (Citation omitted).

A careful search of Florida law failed to produce a case squarely on point regarding the propriety of cross-examining an

illegal alien about his immigration status to reveal his motive for testifying. However, an Illinois court was confronted with a similar case where the defense was foreclosed from questioning the witness "as to whether he was in the country illegally." People v. Olmos, 67 Ill. App.3d 281, 384 N.E.2d 853, 862 (Ill.App.Ct.1978).

The Olmos court affirmed the lower court's prohibition taking into consideration that extensive cross-examination about the witness' background with regard to his illegal status had been allowed. The following testimony was elicited on cross-examination:

> [T]he victim was a citizen of Mexico, he last entered the United States from Mexico in 1974, and did not register with the United States Immigration authorities at that time; that he has never registered with the Immigration authorities; that he did not report his address to the United States Post Office in January of each year; that he is not a United States citizen; that he does not have an immigration green card; that when he entered the United States he did not advise the authorities he was not a citizen; and that he never had an immigration or naturalization card in the name of Eulalio Sanchez, or Eulalio Sanchez Aguilar, or Eulalio Gonzales. Olmos, 384 N.E.2d 862.

It was apparent to the court that the testimony brought out in cross-examination clearly established the theory the defense, for the first time on appeal, was presenting. The theory was that the witness/victim involved in a simple altercation, fabricated the story of the robbery of his wallet in order to prevent the approaching police from questioning him about his identification and discovering that he was in the country illegally.

On appeal, defense counsel presented the theory that this was the witness' motive for testifying falsely about his wallet being stolen by the defendants. The appellate court ruled that the defense waived its right to present the issue on appeal since it had "ample

opportunity" to argue its theory to the jury in closing argument but failed to do so. Olmos, 384 N.E.2d 862-3.

In the case sub judice, defense counsel was foreclosed by the court from informing the jury of the "full history" of the key prosecution witness, an eye witness to the incident. Questioning was not allowed with respect to his entry into the United States, his current alien status, and any conversations the witness had with the state about the matter. As a result, the witness' motive for testifying against the defendant was never revealed through cross-examination, and the defense did not have "ample opportunity" to argue its theory to the jury.

In People v. Viniegra, 130 Cal.App.3d 577, 181 Cal.Rpt. 848 (Ct.App.1982), the prosecutor, in an attempt to impeach a defense witness for motive or bias, cross-examined the witness about his alienage thereby developing that the witness was an illegal alien. Over a defense objection of "irrelevant and highly prejudicial," the prosecutor then asked, 'are you not testifying for defendant in fear that you would otherwise be "turned in as an illegal alien."' Viniegra, 181 Cal.Rpt. at 850. The objection was overruled, and the witness replied, "I'm not afraid. No. They would be returning me to my native land." Viniegra, 181 Cal.Rpt. at 850.

The Viniegra court found that a witness may be impeached to establish motive and bias. Therefore, in permitting impeachment of the defense witness as to whether he was an illegal alien, no abuse of judicial discretion was committed. As an aside, the court also stated that assuming arguendo there was error, it would only be harmless. Viniegra, 181 Cal.Rpt. at 850.

If the prosecution is allowed to elicit testimony concerning alienage to impeach a defense witness, then surely the defense should have the same opportunity to impeach a state witness, especially, as in this case, where he was an eye witness to the incident in question. Accordingly, the defendant's right of confrontation was denied and the conviction should be reversed.

CONCLUSION

It is respectfully submitted that based upon the foregoing authorities and arguments presented, the trial and appellate courts below were in error and the Final Judgment of Conviction of the Petitioner should be reversed by this Honorable Court and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief and Appendix has been furnished by mail to Dianne Leeds, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 15th day of September, 1983.

By Ray Ellen Yarkin
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