IN THE SUPREME COURT OF FLORIDA

Case No. 63,899
and 63,933

JACK NEIL,)

Petitioner,)

vs.)

STATE OF FLORIDA,)

Respondent.)

PETITIONER'S REPLY BRIEF

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

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REPLY[1]

POINT I

Neil v. State,[2] is an anachronistic authority which permits a prosecutor to blatantly discriminate by excluding jurors solely on the basis of their race, religion, sex or other group bias under the auspices of the peremptory challenge. The state fallaciously contends that any judicial review of this system will destroy the peremptory challenge in Florida. Such scare tactics are ill-founded. A reversal in this case will only place the constitutional right of a defendant to a trial by an impartial jury above the statutory privilege of the peremptory challenge, instead of the present subordinate position it now has in Florida jurisprudence. The Honorable Wilkie Ferguson forcefully points this out in his concurring opinion in Andrews v. State, 8 FLW 2385 (Fla.3d DCA 1983):

> This court in Neil v. State, 433 So.2d 51 (Fla.3d DCA 1983), oblivious to the immediate social impact, has raised the peremptory challenge, a procedural tool without constitutional foundation, see Swain v. Alabama 380 U.S. 208, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), to a position of such jurisprudential eminence that it now transcends the right of any minority group not to be systematically excluded from participation in the administration of criminal justice - a right which is constitutionally guaranteed. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

Moreover, "the monster" Swain v. Alabama,[3] itself, acknowledges

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[1]The parties will be referred to as they were in Petitioner's Initial Brief and the same designations will be used with the following additions:
RB - Respondent's Answer Brief
PB - Petitioner's Initial Brief

[2]433 So.2d 51 (Fla.3d DCA 1983)

[3]380 U.S.202, 219, 13 L.Ed.2d 759, 772, 85 S.Ct, 824, 835 (1965).

that the peremptory challenge is not constitutionally derived --- contrary to the state's contention (RB 22). See also Commonwealth v. Henderson, 438 A.2d 951, 954 (Pa.1981).

Judge Ferguson also emphatically states that "Neil is wrong"[4] because the Third District in reaching its decision felt compelled to follow the precedent set forth in Swain, supra, rather than relying upon the Sixth Amendment right to a jury drawn from a representative cross-section of the community under Taylor v. Louisiana, 419 U.S.522, 95 S.Ct. 692, 42 L.Ed. 690 (1975). Although Taylor dealt specifically with the exclusion of women from venires, the constitutional principal is just as applicable to petit juries (PB 15,18).[5] Justice Meyer in his dissent in McCray v. New York, 457 N.Y.S.2d, 441, 447, 57 N.Y.2d 542, 553, 443 N.E.2d 915 (Ct.App.1982) stated:

> [T]he purpose of the requirement [of a jury from a cross-section of the community] is to assure that the jury reflects a broad range of experience. But a petit jury from which all members of defendant's race have been purposely excluded is not a petit jury 'representative of a cross-section of the community who have the duty and the opportunity to deliberate.'

Hence, the fair cross-section of the community rule set forth in Taylor will be rendered meaningless, if a party is allowed

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[4]Apparently Judge Ferguson is not the only judge in the Third District who does not support Neil v. State, supra. In Andrews v. State, supra, Judge Ferguson noted in footnote 8 that by a close 5-4 vote the Third District decided not hold a rehearing en banc on Neil v. State.

[5]The state's assertion that Judge Ferguson "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" is erroneous (RB at 16 f.n. 7). A reading of Judge Ferguson's opinion reflects that he, as others have, has seen no reason why the holding in Taylor should not also apply to petit juries.

to systematically exclude persons for reasons of race from the petit jury by use of the peremptory challenge. Even Swain frowned upon this invidious discrimination sanctioned by the Neil court: "Jurors should be selected as individuals, on the basis of individual qualifications, and not as members of a race." Swain, 380 U.S. at 204, 855 S.Ct. at 827.

Next the state claims that the United States Supreme Court in its opinion denying certiorari in McCray v. New York, ____ U.S. ____, 103 S.Ct. 243, 77 L.Ed.2d 1322 (1983) "declined to revisit Swain."(RB 13) This statement is misleading. If anything the Supreme Court in that opinion opened the door to a future review and challenge of Swain after the states have worked out the Wheeler[6] - Soares[7] test procedural kinks. The Supreme Court announced that the states are to serve as "laboratories to test the issues." At some future date, the United States Supreme Court will again approach this troublesome issue in light of Taylor and its Sixth Amendment requirement and Wheeler and Soares under state constitutional provisions.

Defendant, Neil, next takes issue with the state's and the Third District's contention that the Florida Supreme Court has reaffirmed Swain v. Alabama in its decisions in both Francis v. State, 413 So.2d 1175 (Fla.1982) and Dobbert v. State, 409 So.2d 1053 (Fla.1982). As noted by Judge Ferguson in Andrews v. State, supra, "those cases do not support the Neil holding." In

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[6]People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

[7]Commonwealth v. Soares, 387 N.E.2d 499 (Mass.1979).

Francis, a case involving an accused's involuntary absence during the exercise of peremptory challenges, Swain was cited merely as authority for the principle that the peremptory challenge is an important right secured to a defendant. Andrews v. State, supra. Likewise, Dobbert is factually dissimilar to Swain and the instant case. As mentioned in Jack's Initial Brief (PB 29-30), the Dobbert court was confronted with the issue of exclusion of jurors with scruples against the imposition of the death penalty. This Court refused to extend Swain's principle to systematic exclusions based on ideologies, such as those held by death-scrupled jurors. It is an elementary rule of law that a case is only authority for what it actually decides.[8] The Florida Supreme Court has not yet ruled on this important constitutional issue and is certainly not bound to follow the dicta found in Francis and Dobbert, supra in deciding the certified question in the present case.

The state asserts the erroneous notion that if the Wheeler - Soares test is implemented in Florida thereby making the peremptory challenge open to judicial scrutiny, "an illegal quota system will be created with the prosecution being pressured to accept a requisite number of minority jurors." (RB 17) This is simply not the case, and such a system has not arisen in California nor Massachusetts under the Wheeler - Soares test. Both Wheeler and Soares adhere to the long settled rule that no litigant has the right to a jury that mirrors the

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[8]Stickney v. Belcher Yacht, Inc., 424 So.2d 962, 966 n.4 (Fla.3d DCA 1983).

demographic composition of the population or necessarily includes members of his own group, or indeed is composed of any particular individuals. In Wheeler, the Court stated:

> This does not mean that members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias. . . Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community.
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> * * *
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> What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. Wheeler, 583 P.2d at 762.

Moreover, the Court in Commonwealth v. Soares, recognized, as did the Taylor Court, that the petit jury need not "mirror the community and reflect various distinctive groups in the population." Taylor, supra, 419 U.S. at 538, 95 S.Ct. at 702. However, the Soares Court emphasized that it is not enough that there be a representative venire. The desired cross-section of the community must occur within the jury room itself. Although this cross-section may be affected by justified exclusions for cause or the elimination of jurors by peremptory challenges for reasons of individual bias. Soares, 387 N.E.2d at 513-514. A defendant is entitled to a petit jury that is as near an approximation of the cross-section of the community as the process of random draw permits without an intentional decimation of the surviving jurors by peremptory challenges on the grounds of group bias alone. Soares, 387 N.E.2d at 516. Consequently, Defendant, Neil, does dispute any precedent which allows a prosecutor carte blanche to exclude all Blacks from a jury solely because they are Black. The state has mistaken this

to mean the creation of a quota system, which is an erroneous conclusion. The Wheeler-Soares approach does not require that a prosecutor may never exercise a peremptory challenge against a Black in a case with a Black defendant -- and establish a "quota system." See People v. Rousseau, 129 Cal.App.3d 526, 179 Cal.Rptr. 892 (1982) where under Wheeler the defendant failed to show prosecutorial abuse in excluding the only two Blacks from the jury.

Next the state incorrectly contends that the Wheeler - Soares courts operates on the presumption that the state is improperly exercising the peremptory challenge (RB 26). In contrast, Wheeler expressly provides:

> We begin with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. We adopt this presumption for several reasons; in deference to the legislative intent underlying such challenges, in order to encourage their use in all proper cases, and out of respect for counsel as officers of the Court. Wheeler, 583 P.2d at 762-763.

Likewise in Soares the Court took the same position:

> We begin with the presumption of the proper use of peremptory challenges. That presumption is rebuttable, however, by either party on a showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership. Soares, 387 N.E. 2d at 516-7.

Only after the trial judge determines that the presumption has been overcome, does the burden shift to the offending party to explain the reasons for their challenges and show that the jurors excluded were not excused merely because of their group association. Soares, 387 N.E.2d at 516-517. Therefore, the

Soares court clearly has not turned the presumption against the state as the state asserts in its brief (RB 26).

From a reading of the state's brief one might be led to believe that the Swain proof is not so difficult nor impossible to meet. The difficulty with the test in Swain is that it is concerned with an extended pattern of abuse by a particular prosecutor while the Wheeler - Soares approach is concerned about the prosecutorial abuse of the peremptory challenge, in each particular trial. Swain was also rejected by Wheeler and Soares, as noted by Judge Ferguson, because of the insurmountable burden placed upon defendants. Another major rationale for Swain's rejection, was that Swain provides no protection to the first defendant who suffers discrimination and all succeeding defendants until enough of a pattern of discrimination has been established. Andrews, 8 FLW at 2386 fn. 2. The dissenting opinion in the U.S. Supreme Court's decision in McCray denying certiorari also points out the numerous failed attempts to comply with Swain despite proof that unmistakenly creates an inference of racial discrimination being present at trial. McCray v. New York, ___ U.S. ___, 103 S.Ct. 243, 77 L.Ed.2d 1322 (1983).

Swain's burden of proof is not realistic. A defendant cannot readily obtain and analyze on the eve of trial the required records and data, as the state suggests in its brief, not to mention the cost of compiling such statistics would be prohibitive to most defendants, (RB 30-31). The state's own explanation of what such a study would entail clearly demonstrates the impossibility of the Swain test (RB 30-31).

Next, the state's contention that the prosecutor be called as a witness and testify whether he has discriminated over a period of time is totally without merit (RB 31). Such a requirement is even more burdensome than the Wheeler-Soares approach which the state is now opposing. First it subjects the prosecutor to admitting to a civil right's violation. Moreover, just because a prosecutor has not excluded Blacks in all his cases in the past does not prove he is not discriminating in the present case. See People v. Johnson, 22 Cal.3d 296, 583 P.2d 774 (1978) and Cotes v. State, 8 FLW 2530 (Fla.3d DCA 1983)[9] where the state took the position that they had the right to intentionally remove all Blacks from the jury with impunity by virtue of the peremptory challenge. Swain offers no protection whatsoever to a defendant in such a situation.

Finally, the third method suggested by the state is also ineffective. First in a metropolitan area such as Dade County no such witness can be found to testify to the discrimination of any one prosecutor in every case due to the number of prosecutors and defense attorneys in Dade County. The two cases the state relies upon to demonstrate the ease of meeting Swain by this method are not typical cases factually and can be readily distinguished. A reading of State v. Brown, 371 So.2d 751 (La.1979) and State v. Washington, 375 So.2d 1162 (La.1979) reveals that the prosecutor was the same individual in both actions. Moreover, the prosecutor, Mr. Roy, admitted in open

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[9] See discussion of this case, Andrews v. State, supra at 2386.

Court in one case and noted by the judge in the later that he excluded more Blacks proportionally than whites over the course of the years merely because they were Black. Mr. Roy was a trial lawyer for some 23 years in a district known as East Baton Rouge Parish, Louisiana. Apparently, Mr. Roy was well known by the legal community, as shown by the testimony of numerous defense attorneys who stated that he regularly excluded Blacks from petit jury panels without interrogation of the particular veniremen to determine specific bias. It is true that under this set of unique circumstances the Swain burden of proof could be met. However, Jack suggests that such unique circumstances are not common in Dade County -- the average tenure of a Dade County prosecutor is less than 3 years and there are over 100 prosecutors in Dade's State's Attorneys Office --- nor do they exist in all probability in the majority of jurisdictions in the United States.

In attempting to hide its blatant discriminatory practices in the present case, the state asserts the spurious arguments that there was no Black issue involved, and that the defendant was excluding White jurors. These same arguments were rejected in a similar case by the Court in People v. Fuller, 136 Cal. App.3d 403, 186 Cal. Rptr.283 (Ct.App.1982) where the Court reversed the conviction of the defendant and ordered a new trial. There, as in the present case, the defendant was Black as was the victim. As in the instant case, three of the Black prospective jurors in the venire were excused pursuant to the prosecutor's peremptory challenges although the three jurors were well qualified --- as in Neil. The examination of these

jurors in both cases was desultory. The answers provided failed to show that any of the three jurors were reasonably likely to be specifically biased against the prosecution. Except for sharing one single characteristic, their race, they were in all other respects heterogeneous to the community.

In responding to the argument that the Defendant had excluded certain white jurors, the Court in Fuller reiterated the position of Judge Mosk in Wheeler that "a party does not sustain his burden of justification by attempting to cast a different burden on his opponent." People v. Wheeler, 583 P.2d at 766 fn. 30. Such an argument by the state does not vindicate nor excuse the state's discriminatory practice in the present case. Moreover, Neil's actions with regard to excluding white jurors was precipitated by the state's blatant elimination of the Blacks on the petit jury at the initial stages of exercising challenges. If Wheeler was in effect, the defense would not have been forced to attempt to restore a cross-section of the community to the jury by striking white jurors, since the entire venire would have been struck, and jury selection would have began anew.

As to the prosecutor's argument that there were no racial overtones in the case because the Black defendant's victim was also Black, the Fuller Court stated:

> Since the cross-section rule does not even require that the defendant and the excluded jurors be of the same group, a fortiori it would seem there can be no requirement that the victim be white, or of a majority or of any particular other group. It is not essential that there be "group overtones." Fuller, 136 Cal.App. 3d at 419.

Moreover, the Fuller Court determined that the record disclosed a significant "race factor" by the fact that the defendant and witnesses were all Black, while the jury was all White. In the present case, it is hard to imagine that if there was no race issue, why did the prosecutor exercise 3 of his 4 challenges to eliminate all Black jurors from the petit jury. Those jurors were as well qualified as the white jurors. The only characteristic that they shared in common was being Black. When a prosecutor presumes that certain jurors are biased merely because they are members of an identifiable group, that is, due to race as in the instant case, then he is intentionally frustrating the primary purpose of the representative cross-section requirement, when he peremptorily removes them from the jury. This clearly defeats the right of the defendant to trial by impartial jury by surreptitiously hiding behind the mask of the peremptory challenge.

The state in its brief also makes the statements that the Wheeler - Soares approach is "constitutionally invalid" and that" the cross-section analysis which forms the constitutional foundation for Wheeler and Soares is illogical and inappropriate," but the state fails to provide an explanation or reason for such comments (RB 16). Nevertheless, in response, Jack directs this Court to a string of California cases cited in PB 27 where numerous California courts since Wheeler have had no problems with the standard.[10] Further, Neil set forth in his

[10] See also California Justice Stanley Mosk's letter to the editor (A 10) extolling the Wheeler test and its application in California.

brief at 27-28 state court decisions demonstrating the workability and efficiency of the standard by its growing acceptance in many state courts. In fact, Judge Ferguson, in Andrews, 8 FLW at 2386 fn. 2, mentions two recent Alaska and Pennsylvania state Court decisions in which the majorities in both cases deferred a decision on the adoption of the Wheeler - Soares approach only because of an insufficient record on appeal. Commonwealth v. Futch, 492 Pa.359, 494 A.2d 1231 (1981); Mallott v. State, 608 P.2d 737 (Alaska 1980). The concurring opinion in Futch, 492 A.2d at 1235, and the dissenting opinion in Mallott, 608 P.2d at 752, urged the adoption of the Wheeler test in their respective states.

CONCLUSION

It demeans both the Federal and Florida Constitutions to declare that trial by an impartial jury is a fundamental personal right guaranteed to all citizens and, at the same time, make it virtually impossible for an aggrieved citizen to protect that right, when a prosecutor intentionally removes certain jurors merely because they are a member of a certain race or group. Swain offers no protection whatsoever in this situation. In fact it is a legal oxymoron since it fosters discrimination, instead of eliminating it, by virtually making it impossible for a citizen to meet its requirements. More importantly, it is based on an illogical premise. Just because a prosecutor has not discriminated in every case does not mean that he is not discriminating in a particular case against a particular group, as dictated by the circumstances of that particular case. Under the present system, a prosecutor may

strike all Blacks from the jury in one case, all women from the jury in his next case, all Jews or Hispanics from the jury in his next case and never be restricted in his discriminatory practices by Swain.

In the present case, the trial judge, in awarding the defendant more peremptory challenges, recognized that the state was indeed excluding Blacks from the jury merely because of their race. He was powerless to proceed any further due to Swain. These jurors were all qualified with no apparent specific bias which would cause their exclusion. Yet when all the state's rhetoric is put aside, the basic argument that the state presents is that the prosecutor has an unrestricted right to discriminate with impunity in the selection of the petit jury by virtue of the inherent nature of the peremptory challenge. Yet, such discrimination is morally and legally wrong no matter what form it takes or what excuse is given for doing it.

The state contends that to subject the peremptory challenge to any judicial review will destroy that right. However, it is apparent that such arguments are without merit since the Wheeler - Soares rule has not destroyed the peremptory challenge in either California or Massachusetts. Instead, the trial judges in those jurisdictions have established a viable means to control discrimination in the jury selection process in each and every case. It is only upon a showing by a party that there is a strong likelihood that jurors are being excluded merely because of group bias does the rule come into effect. Then only if the trial judge determines a sufficient basis has

been shown can he require a party to explain its challenges. If the party refuses to give a reason or it is deemed insufficient, the only sanction imposed is to strike the entire jury venire and begin jury selection again. Such a system does not destroy the peremptory challenge or convert it into a challenge for cause. Moreover, the application of such a test is no more vague and indefinite than numerous other discretionary determinations a trial judge is required to make during a criminal proceeding , i.e., ruling on challenges for cause, motions for mistrial, etc. It has been said, "the state of a man's mind is as much a fact as the state of his digestion." A trial judge is certainly capable of determining such abuses of the peremptory challenge as the trial judge did in the present case.

Without Wheeler - Soares, a trial judge is powerless to deal with the situation as exemplified in Cotes v. State,[11] supra, or People v. Johnson, supra, where a prosecutor admits he is specifically excluding Blacks from a jury. Consequently, the abuses of the exercise of the peremptory challenge in discriminating against individuals in jury selection more than outweighs any problems foreseen by the state in applying the Wheeler - Soares rule. Just because the remedy is not easy is not a valid argument for maintaining the present system which provides no protection at all. As Judge Ferguson noted in his concurring opinion in Andrews v. State, 8 FLW at 2386:

> The "social interest," as well as the welfare of a tarnished judicial system, compels this Court to seize the opportunity to stake a new course. Adop-

[11] See discussion of this case in Andrews v. State, supra, at 2386.

tion of the Wheeler - Soares principle is that new course; it is also a reasonable way to restore some credibility to the system while at the same time salvaging the peremptory challenge.

Recently the United States Congress proclaimed the birthdate of Martin Luther King, Jr. a national holiday -- an honor previously granted to only one American citizen, George Washington. The creation of this new holiday was intended by Congress to symbolize the commitment of all Americans to racial equality. Yet, Neil is an anarchronism, as well as, a moral obcenity to this ideal. The issue presented in Neil is one which must be revisited and changed. We believe the Wheeler - Soares approach provides a good beginning to solving this problem, and that it should be adopted in Florida with such modifications and changes as this Court deems appropriate. As Judge Ferguson concluded "Neil is wrong!" and we submit it must be reversed. To do otherwise, this Court will allow discrimination to continue in the selection of the petit jury through the unrestrained use of peremptory challenges.

Respectfully submitted

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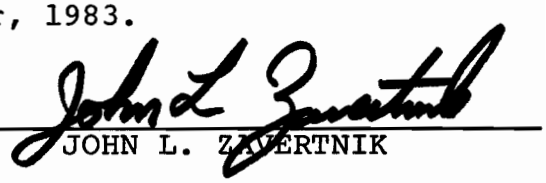
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to Dianne Leeds, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue Miami, Florida 33128, this 31st day of October, 1983.

By 
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