IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,426

OSCAR L. ANDREWS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Certified Question of the Third District Court of Appeal of Florida

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE AND INTEREST OF AMICUS CURIA

Petitioner Oscar L. Andrews is black. He was convicted of a felony upon a verdict returned by an all-white jury. The prosecutor had exercised its peremptory challenges to exclude the only four blacks who were part of the venire. The prosecution had not asked any questions of any of the blacks on voir dire. Mr. Andrews' counsel made proper and timely objections which were overruled and presented a motion for a mistrial on the ground his constitutional right to a jury trial had been effectively denied him.

The Court of Appeals for the Third District affirmed, but certified to this Court as question of great import:

> 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?

That Court of Appeals certified the same question in Neil v. State, Case No. 63,899 and 63,933.

The American Civil Liberties Union (ACLU) and all its affiliates seek to protect the individual rights guaranteed by the Constitution of the United States and those of the several states. The South Florida chapter of the ACLU ("ACLU-SF") has sought leave to intervene in this case for three reasons. First, this case presents fundamental questions concerning one of our most precious constitutional rights: the right of the individual accused of wrongdoing by the State to be tried by a jury of his or her peers. This case raises questions whose import extends

well beyond the particular interest of the real parties in interest. Second, the demographics and problems of metropolitan Dade County are unique among counties in Florida, but they provide background necessary to enable this Court to consider properly the consequences likely to result from its decision. Third, these demographics coupled with racial tensions in Dade County and the consequences that have flowed from recent trials before all-white juries from which blacks had been systematically excluded enhance the need for consideration in this case that extends beyond the interests of the particular parties. To assist the Court and to provide information that may enable it better to place the issue in context, the ACLU-SF submits this in support of petitioner together with the supporting Appendix.

ARGUMENT

WHETHER THE EXERCISE OF PEREMPTORY CHALLENGES WILL REMAIN BEYOND JUDICIAL SCRUTINY DESPITE UNCONSTITUTIONAL DISCRIMINATORY EFFECT.

> Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races...are excluded as such from jury service. Pierce v. Louisiana, 306 U.S. 354, 358, 59 S.Ct. 536, 83 L.Ed. 757. Quoted in Alexander v. Louisiana, 405 U.S. 625, 636, 92 S.Ct. 1221, 1228, 31 L.Ed.2d (1972)(Douglas, J., concurring.)

This cause is presently before the Court upon a question certified by the Third District Court of Appeal to be of great public interest. That question is before this Court in two cases: Neil v. State, Case No. 63,899 and 63,933 and Andrews v. State, Case No. 64,426.[1/] That question is:

> 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. (Appendix at

The continued vitality of Swain, supra, is troublesome not only to the Third District Court of Appeal. It is equally a source of concern for a majority of the members of the United States Supreme Court who are united in agreeing that the time has come to reappraise the issue of:

[1/] Although this Amicus Curiae brief is submitted in support of Andrews v. State, Case No. 64,426, and expressly adopts herein all argument raised therein, it is the interest of Amicus, the American Civil Liberties Union, that this brief also be considered as Amicus Curiae in support of Neil v. State, Case Nos. 63,899 and 63,933. Similarly, the arguments presented on behalf of Petitioner, Neil, are expressly adopted herein.

> whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group.

McCray v. New York; Miller v. Illinois; Perry v. Louisiana, __U.S.__, 103 S.Ct. 2441, 77 L.Ed.2d 1322 (1983)(hereinafter referred to as McCray).

It is merely a disagreement as to ripeness of resolving the question that has precluded resolution to date. For Justices Marshall and Brennan "it is time to re-examine whether the rule announced in Swain under the Equal Protection Clause can be reconciled with the Sixth Amendment right of every defendant...as applied to the States through the Fourteenth Amendment...(in that these Sixth Amendment rights) were violated by the prosecutor's use of peremptory challenges to exclude all Negroes from the juries..." For Justices Stevens, Blackmun and Powell, "further consideration of the substantial and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date...In my judgment it is a sound exercise of discretion for the Court to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this Court." McCray, supra.

This Court has, then, been given the explicit invitation and opportunity of assisting the United States Supreme Court in refashioning the obviously unsatisfactory method in which these claims have previously been decided under Swain, supra. The High Court has

even pointed the way:

> During the past five years, two state supreme courts have held that a criminal defendant's rights under state constitutional provisions are violated...by the prosecutor's use of peremptory challenges to exclude members of particular racial, ethnic, religious or other groups from the jury. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 NE2d 499 (1979), cert. denied, 444 U.S. 881 (1979).

The Legal Context: The Use of the Peremptory Challenge to Blanketly Exclude Members of an Identifiable Group from Jury Service violates The Spirit and Letter of Federal and Florida Law.

This Court has stated unequivocally: "(w)e are traditionally committed to the doctrine of a fair trial by a jury of one's peers" State v. Lewis, 11 So.2d 337 (Fla. 1949). This Court has further declared that "it is the purpose of the jury to represent the conscience and mores of the community in which a crime was committed." Beckwith v. State, 386 So.2d 836 (Fla. 1980).

Either in combination with the guarantee to a trial by an impartial jury drawn from a cross section of the community contained in the Sixth Amendment to the United States Constitution, binding upon this State via the Fourteenth Amendment (Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)), or independently, three provisions of the Florida Constitution, Declaration of Rights, are implicated in assuring the above quoted result:

> Article I §2, which provides, inter alia,
> No person shall be deprived of any right because of race or religion
>
> Article I §9, which provides:
> No person shall be deprived of life, liberty or property without due process of law...

> Article I §16, which provides, in pertinent part: In all criminal prosecutions the accused shall... have the right...to have a speedy and public trial by an impartial jury in the county where the crime was committed.

In contrast, it must be noted that provision for the exercise of peremptory challenges is by Rule of Criminal Procedure promulgated by this Court.

This Court has a long history of scrutinizing the selection processes of both Grand and Petit Juries to ensure to the citizenry of Florida that:

> (t)he laws of this state prescribing the qualifications of jurors and regulating the manner of selecting, summoning and impaneling of them (do not) discriminate against any person or class of persons on account of race, color or previous condition of servitude... they disqualify no person or class of persons from jury service because of race, color or previous condition of servitude, nor do they authorize any discrimination on this account to be made by those whose duty it is to enforce the regulations...Tarrance v. State, 43 Fla. 446, 30 So. 685 (Fla. 1901), affirmed 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed.2d 572.

Accord, Bonaparte v. State, 65 Fla. 287, 61 So.2d 633 (Fla. 1913); Washington v. State, 116 So. 470 (Fla. 1928). See also: Montgomery v. State, 55 Fla. 97, 45 So. 879; Porter v. State, 160 So.2d 104 (Fla. 1963).

> The mere fact that the negro race is not represented on the jury list on parity with the white race is not violative of the constitutional rights of a negro defendant if it is shown that those who selected the jury discharged their duty honestly and did not in fact discriminate against the negro or any other race. Hale v. Kentucky, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed.2d 1050,... the Grand or petit jury may be composed of all negros or all whites or it may be a mixture of the

> two. In any event it will be lawful if no one is discriminated against because of his race. State v. Lewis, supra, at 339 (Emphasis added).

Justice O'Connell, writing for this Court in Porter v. State, supra, at 107, stated that "discrimination in the selection of juries because of race, class or color is violative of the federal constitution. Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950)."

> The decisions relating to discrimination because of race, color or class in jury selection are not difficult to understand...they...require that... the selection..in preparing...jury venires...be made without regard to the race or class of those available for such service...(a) party to a cause has a right not to have members of his race or class excluded from jury lists or venires arbitrarily or without sound basis...(e)very citizen, not exempt or disqualified, has the right not to be denied the opportunity of jury service arbitrarily or without sound basis. Porter, supra at 109.

Although these early cases were apparently based upon Fourteenth Amendment guarantees, this Court greatly expanded the scope of constitutional protections with its 1972 decision in State v. Silva, 259 So.2d 153 (Fla. 1972). In Silva, supra, this Court struck down Dade County's jury panel selection process which included use of a quota system to exclude or include a fixed percentage of blacks, as violative of the due process and equal protection clauses of the Fifth Amendment to the United States Constitution applicable to the State via the Fourteenth Amendment and Article I §9 of the Florida Constitution and the Sixth Amendment of the United States Constitution, binding upon the State through the Fourteenth Amendment, plus Article I §16 of the Florida Constitution. Silva, supra, clearly implicated and applied two separate lines of constitutional analysis;

the due process and equal protection concepts of the Fifth Amendment and Article I §9 and the fair cross section requirement in trial by jury under the Sixth Amendment and Article I §16. See Reed v. State, 292 So.2d 7 (Fla. 1974)(Ervin J., dissenting)

The foundation upon which the decision was based:

> Jurymen should be selected as individuals, on the basis of individual qualifications (Cassell v. Texas, supra)...The tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community...(this) means that prospective jurors must be selected at random...without systematic and intentional exclusions of any (economic, social, religious, racial, political and geographical) group(s)...(t)hose eligible for jury service are to be found in every stature of society. Jury competence is an individual rather than a group or class matter. See Theil v. Southern Pacific Co., 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1945). See also, Reed v. State, supra, at 13, 14.

The specific challenge in Silva, supra, was that a system that used jury selection index cards that contained a notation designating prospective jurors as black or white constituted prima facie proof of discrimination under Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1952). In both cases, such a system of obvious visual racial "tagging" was found to be prima facie evidence of discrimination. This, coupled with the absence of any blacks on the panel, or only a token number, effectively placed the burden on the State to show the absence of any racial discrimination in the selection.

It can hardly be argued that the best and, perhaps, only opportunity that presently remains for visual racial "tagging" in the jury selection process does not occur until the potential trial jurors

are walked into the courtroom and visually inspected by trial counsel. Clearly, then, under the logic of Avery and Silva, the jury selection at issue in this cause, wherein a party excluded group members because of their "tag" coupled with their absence or only token presence on the panel, constitutes a prima facie case of discrimination that requires a showing of non-discrimination.

In its Silva decision, this Court anticipated Taylor v. Louisiana, 419 U.S. 442, 530, 95 S.Ct. 692, 697, 42 L.Ed.2d 690 (1975) in which the United States Supreme Court stated:

> We accept the fair cross section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation...Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

This principle that the federal and Florida constitutional guarantees of a jury trial include assurances that the jury be drawn from a fair cross section of the community remains the law in Florida. Foxworth v. State, 267 So.2d 647 (Fla. 1979); Bass v. State, 368 So.2d 447 (Fla. 1st DCA 1979).[2/]

The Social Context: Societal Interests Mandate Judicial Scrutiny of the Unfettered Use of Peremptory Challenges to Ensure Trial by Jury Representing a Fair Cross Section of the Community.

[2/] It is noteworthy that in State v. Simpson, 326 So.2d 54 (Fla. 4th DCA 1975), one of the few "pre-Neil" decisions in which Swain criteria were applied to deny the accused's claim of discriminatory use of peremptory challenges, the sole basis of decision was Fourteenth Amendment equal protection grounds asserted in Swain, not the fair cross section analysis set forth in Silva, supra, or Taylor, supra.

Writing for the Court in Taylor v. Louisiana, supra, Mr. Justice White expressed the Court's conclusion that selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial ensured to State defendants via the Fourteenth Amendment. See Duncan v. Louisiana, supra.

In so holding, a number of assertions were set forth that underscore the societal interests that mandate extension of constitutional safeguards upon the otherwise unfettered exercise of peremptory challenges.

> [this] Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940), that '[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and a representative government.'
> 419 U.S. at 527

For Justice White, the function of the jury that compelled the conclusion that the Sixth Amendment contemplates selection of a petit jury from a representative cross section of the community was, albeit in a federal context, shown by the legislative history behind the passage of the Federal Jury Selection and Service Act of 1968 (28 U.S.C. §1861, et seq.)

> In that act, Congress stated 'the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.
> 28 U.S.C. §1861

The Committee Report of the House and the Senate alike "recognized that the jury plays a political function in the administration of the law and that the requirements of a jury's being chosen from a fair cross section of the community is fundamental to the American system of Justice." Taylor v. Louisiana, supra at 529,530. The reason:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result--biased in the sense that they reflect a slanted view of the community they are supposed to represent.

H.R. Rep. No. 1076, 90th Cong. 2d Sess., 8, 1968 U.S. Code Cong. & Admin. News, p. 1797 (1968). See also, S. Rep. No. 92-516, p.3 (1971).

Continuing on, Justice White noted:

> The purpose of a jury is to guard against the exercise of arbitrary power--to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditional or biased response of a judge. Duncan v. Louisiana, 391 U.S. at 155-156, 88 S.Ct., at 1450-1451...Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as imparted in a specific case...[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and party because sharing in the administration of justice is a phase of civic responsibility.' Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting)

Peters v. Kiff, 407 U.S. 493, 502-504, 92 S.Ct. 2163,

2168-69, 33 L.Ed.2d 83 (1972)(Opinion of Marshall, J., joined by Douglas, J., and Stewart, J) also speaks directly to these concerns:

> Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they include the risk of actual bias as well . . .
>
> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases...
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

In essence, then, the constitutional requirement, that the jury represent a fair cross section of the community serves the interests of the participants in each trial and significant social goals as well.

However, none of these interests will be served and none of the goals obtained if the representativeness requirement were applicable to jury pools only. The plethora of authority, federal and Florida, that have zealously guarded against discriminatory selection processes in both grand and petit jury venires to ensure that the resultant venires are neither the product of practices violative of due process and equal protection guarantees or entitlement to an impartial jury representing a fair cross section of the community will be nothing more than noble sentiment if the exercise of peremptory challenges remain outside the realm of constitutional infirmity and judicial scrutiny.

While it is well established that a defendant is not entitled to a jury of a particular composition or to a jury that mirrors the community, a defendant is entitled to jury selection procedures which do not systematically exclude groups from the community. Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); Taylor v. Louisiana, supra; Bryant v. State, 386 So.2d 237 (Fla. 1980); Silva v. State, supra; Porter v. State, supra.

The systematic use of peremptory challenges against a distinctive group results in unrepresentative petit juries: such practices must be scrutinized under the fair cross section requirement espoused by this Court and the United States Supreme Court under the Sixth Amendment and/or Article I §16, no less than are the selection procedures that produce unrepresentative venires, panels or jury pools. McCray, supra, (Marshall, J. and Brennan, J., dissenting) citing Peters v. Kiff, 407 U.S. 493 (1972); Sims v. Georgia, 309 U.S. 404 (1967); Jones v. Georgia, 339 U.S. 24 (1967); Whites v. Georgia, 385 U.S. 545 (1967) Coleman v. Alabama, 377 U.S. 129 (1964); Avery v. Georgia, 345 U.S. 559 (1953); Patton v. Mississippi, 332 U.S. 463 (1947); Hale v. Kentucky, 303 U.S. 613 (1938); Hollins v. Oklahoma, 295 U.S. 394 (1935) Norris v. Alabama, 294 U.S. 587 (1935); Martin v. Texas, 200 U.S. 316 (1906); Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880), Andrews v. State, 8 FLW 2385 (10/7/83) (Fla. 3d DCA)(Decided 9/27/83)(Ferguson, J., specially concurring):

> The many purposes of refusing to tolerate racial discrimination in the composition of the venire is to prevent the state's systematic exclusion of any racial group from juries. The desired interaction of

> a cross-section of the community does not take place within the venire; it is only effected by the jury that is selected and sworn to try the issues. The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process. There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so that they can then be struck because of their race by a prosecutor's use of peremptory challenges. Yet, given the normal allowance of such challenges, a prosecutor who wishes to exclude all Negroes can normally do so. The effect of excluding minorities goes beyond the individual defendant, for such exclusions produces injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts. Ballard v. United States, 329 U.S. 187, 195 (1946).

McCray, supra, (Marshall, J., dissenting).

Events of the recent past, occurring in Dade County, Florida, have borne somber witness to the impact that apparently discriminatory jury selection processes have upon the criminal justice system, in particular, and the community, in general. What is striking about the pattern that emerges is that the adverse impact that such discriminatory practices have upon public confidence in the criminal justice system is that pubic outcry pays no heed to which side, state or defense, engages in it. The question before this Court is, then, not directed toward producing a result that favors the defense over the state or vice versa. This "non-alignment" is manifest by the wording of the Third District's question, which is directed to "a party".

Identifying the cause of the mass violence that exploded in Dade County on May 17 and 18, 1980, costing 18 lives and over 200 million dollars in property damage, was the mandate given by Governor Robert Graham to the members of the Governors Dade County Citizens Committee. (See Appendix for complete text of Committee's Report).

The Committee's findings; "(m)ost of the causes for the disturbances...find their genesis in racism." The specific event

that triggered the distrubance was, the Committee found, the not guilty verdict returned by an all white jury in the Arthur McDuffie case. In that case a group of white police officers were accused of the beating death of a black man. The Committee's report was critical of the fact that the prosecutor "did not engage in a complete and thorough examination of prospective jurors" and suggested that the Dade State Attorney's Office re-evalutate their jury selection procedures. (Report at 49-50.) Another source of outrage that the Committee was also called upon to examine was the conviction of Dr. Johnny Jones, a black man, by an all white jury (Circuit Court Case No. 80-3039). (Hereinafter referred to as Jones I). The Committee stated:

> (t)he practice of the State Attorney's office in excusing Black jurors in cases involving Black defendants solely because they are Black is inexcusable...the verdict...would have been far more acceptable to this community if a Black had been seated on the jury...
>
> It is the duty of the State Attorney to seek justice, not merely to secure convictions. The refusal to seat a prospective Black juror, who declares himself unprejudiced, willing to follow the instructions of the Court, and able to arrive at a fair and just verdict, merely because he is Black, must never be permitted to occur in our courts.
>
> The State Attorney has suggested that the solution may be the elimination of the system of peremptory challenges. Our system of justice, permitting the exercise of peremptory challenges, should not be attacked or criticized because of its improper application by the State Attorney's Office. Peremptory challenges provide a protection to which every citizen is entitled; it permits an attorney to excuse a juror who is obviously or perceived to be prejudiced against his client, notwithstanding the statements by the juror that he will be fair and impartial. The State Attorney is also entitled to excuse any person from the jury regardless of his or her race. But when it becomes obvious that the purpose is to excuse everyone because of their race, it becomes an improper abuse of the State Attorney's right of peremptory challenge. Whether intentional or not, such an act is racist. (Report at 45-47).

During jury selection in Jones I, the State used peremptory challenges to strike each of the five Black veniremen, thus obtaining the all white jury. Defense efforts to empanel additional Blacks or obtain additional peremptory challenges were unsuccessful. The trial court was also provided evidence of the State Attorney's history of excluding Blacks from juries in the Eleventh Judicial Circuit by use of the peremptory challenge; the absence of a policy or directive to Assistant State's Attorneys not to strike Blacks from jury panels to ensure all white juries; and the absence of records kept by the Clerk of the Circuit Court or the prosecutor's office that indicate racial groupings of jury panelists. (Brief of Appellant Jones, DCA #81-2176, Jones I, See Appendix).

In the related prosecution of Solomon Barnes, Case No. 80-3039, Eleventh Judicial Circuit, Dade County and Case No. 80-4541 CF, Fifteenth Judicial Circuit, Palm Beach Count, jury selection process was interrupted and a hearing conducted to determine whether the State was using the peremptory challenge to exclude blacks. Andrews, supra, (Ferguson, J., concurring). During the course of that hearing, Dade State Attorney Janet Reno stated:

> I am convinced he [the prosecutor] did not exercise the per-emptory [sic] challenge on the ground of the person's race, but I believe it is extremely important in this case that there be no appearance of such, and your finding on the record, I think, might influence an Appellate Court and I think it absolutely essential that we try our best to select a jury that is totally representative of the community and can reach a fair and impartial decision.
>
> If there are questions, if there are any opinions, if your Honor has any feeling 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 the appearance of fairness.

(Brief of Appellant in Jones I, see Appendix).

The question of peremptory challenges was, itself, specifically addressed by the Governor's Committee. Their report:

> We have had testimony and sworn Affidavits before us stating that various members of the State Attorney's office engage in the practice of excusing Black jurors from jury panels where the defendants are Black, solely because of the color of the juror's skin. The State Attorney denied this accusation, but she is not active in trial of cases in court. This accusation was leveled against certain of her assistants. The record in one case affirmatively shows that a mistrial was granted by a judge of the Criminal Division of the Circuit Court because of the State's systematic exclusion of Blacks from the jury panel. Ms. Reno denied having any knowledge of this practice. During the course of our actual investigation, the State was attempting to select a jury in the Solomon Barnes case in Miami. At that time, it appeared that once again the State was engaging in a systematic exclusion of Blacks from the jury panel, although the State Attorney denies this. Even the visiting judge commented that he had not seen anything like it before. It is not the province of the State Attorney's Office or the State Attorney merely to secure convictions; it is her duty to see that justice is done. We do not believe that the presence of a Black juror on the jury panel will in and of itself cause the acquittal of a Black defendant whom the State otherwise proves to be guilty beyond a reasonable doubt. This is again a manifestation of the State Attorney's office's insensitivity towards the Black community. (See Appendix)

Subsequent to the issuance of the Committee's report, Dr. Jones was convicted of a second offense, again by an all white jury (Case No. 80-6565, Eleventh Judicial Circuit, Dade County) (Case No. 81-2175, Third District Court of Appeal, hereinafter referred to as Jones II). Again, the use of the State's peremptory challenges was at the fore, notwithstanding the comments of Dade

State Attorney Janet Reno, condemning even the appearance of racially motivated peremptory strikes made shortly before in the Barnes case.

The record excerpts filed by stipulation of State and Defense for the appeals in Jones I and II, contained in the Appendix, include Dade County population figures by ethnic group and voter registration (1980), a listing of all the State's peremptory challenges with notations as to Black veniremen, Clerk's minutes from Case No. 77-34465, Eleventh Judicial Circuit, Dade County, striking jury panel due to State's systematic exclusion of all prospective black jurors, attorneys' affidavits attesting to the discriminatory practices of the Dade State Attorney's Office in jury selection, plus news articles and polls indicating the absence of confidence that Miami's Black population has in the judicial system and the inability of an all-white jury to fairly judge a Black. (See Appendix). See also Brief excerpts from Jones I and II in Appendix.[3/]

More recently, public furor over racially discriminatory jury selection practices again arose but against the actions of the Defense, not the State. The context was a series of manslaughter indictments returned against white police officers for the shooting death of black men. Trials in two cases, that of Det. Thomas Pellechio and Officer Ernesto Urtiago ended in not guilty verdicts by all white juries (See Appendix).

During jury selection in the third case, that of Officer Robert Koenig, Circuit Judge David Gersten on his own, excused an entire 30 member panel when confronted with what promised

3/ Although both Jones I and II have been fully briefed and argued before the Third District Court of Appeal, no decision has, as yet been issued.

to be an all white panel due to defense peremptory challenges. His rationale: An all white jury would not reflect the racial make up of Dade County (See Appendix).

In a public confrontation between Dade State Attorney Reno and members of the Black Community about the absence of black jurors, Ms. Reno, no longer the target of discriminatory activity, explained that the problem was out of her hands but was controlled instead by the defense, by the computerized selection of potential jurors and by judges who limit the number of potential jurors she can discuss.(Appendix).

The Remedy: Judicial Scrutiny of the Exercise of Peremptory Challenges that Create A Prima Facie Showing of Usage That Excludes Jurors on the Base of Group Identity.

To avoid the evils of the "progressive reduction" pattern in representation of various racial, ethnic or sexual groups, so strongly criticized by Mr. Justice White in Alexander v. Louisiana, supra, a modification of the peremptory challenge process has developed and is currently in use that harmonizes the traditional role reserved for the peremptory challenge with the constitutionally requirement of eliminating the discrimination based upon group membership from the selection of a trial jury.

In Alexander v. Louisiana, supra, relying upon Avery v. Georgia, supra and Whites v. Georgia, supra, visual means of racial identification which markedly reduced the pool of prospective Negro jurors constituted a prima facie case of invidious discrimination, shifting the burden of proof to the State to rebut the presumption of unconstitutional action by showing that racially neutral selection

criteria and procedures have produced the monochromatic result.[4/]

Borrowing freely from the rationales of both Alexander v. Louisiana, supra and Taylor v. Louisiana, supra, and applying them to their own state constitutions or the Sixth Amendment, six state courts have each expressly rejected the belief that the peremptory challenge must remain without judicial scrutiny or constitutional implication. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, People v. Payne, 106 Ill.App. 3d 1034, 436 N.E.2d 1046 (App Ct. 1982); State v. Brown, 371 So.2d 751 (La. 1979); Commonwealth v. Soarles, 377 Mass. 461, 387 NE 2d 499 (1979), cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); People v. Thompson, 79 A.D.2d 87, 435 NYS 2d 739 (1981).

The reason for a modified standard, one that rejects Swain, supra, relying instead on either Sixth Amendment concerns or applicable State Constitutional promises, is the proven near impossibility of meeting the high burden of proof placed upon defendants seeking to challenge a prosecutor's use of the peremptory challenge. Winick, Prosecutorial Peremptory Challenges Practice In Capital Cases: An Empirical Study and a Constitutional Analyses, 81:1 Michigan L.R. 6-20; 79 A.L.R.3, 14 (1977 and supp.1981); People v. Wheeler, supra; Brown, McGwin & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 NW Eng. L. Rev. 192 (1978); Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Har. L. Rev. 338, (1967); Comment, The Prosecutor's Exercise of the Peremptory Challenge to

4/ Both Alexander v. Louisiana, supra and Turner v. Fouche, 396 U.S. 346, 361, 90 S.Ct. 532, 540, 24 L.Ed.2d 567 (1970) are authority for the proposition that the Sixth Amendment prohibits discrimination, intentional or not, in the grand jury selection process. U.S. v. Holman, 680 F.2d 1340 (11th Cir. 1982).

Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause, 46 N. Car. L. Rev. 555 (1977); Note, Fair Jury Selection Procedures, 75 Yale L. J. 322, 323 (1965); Note, Limiting of the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L.J. 1715, 1723 and n.36 (1977).

As analysis and discussion of the Soares, supra, and Wheeler, supra, decisions have been previously presented to the Court in the briefs submitted on behalf of Jack Neil (Case No. 66,899 and 63,933) and Oscar Andrews (Case No. 64,426), they will not be repeated herein, save to state that the arguments asserted therein are incorporated herein.

The more lenient standard adopted by the California Supreme Court in Wheeler, supra, was deemed necessary to provide a means to challenge systematic exclusion of all or nearly all members of a group on the basis of a single voir dire.[5/] Under Wheeler, there is a presumption that peremptory challenges are being used without discriminatory effect. However, this presumption may be rebutted by a prima facie showing, based upon the circumstances of the case at issue that there is a strong likelihood that the exclusion of all or nearly all members of a cognizable group within the meaning of the representative cross section rule or the exercise of a disproportionate number of peremptories at such a group were made because of group affliations. Once this showing is made, the burden

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[5/] Another alternative means of establishing systematic exclusion may be that employed by the Louisiana Supreme Court in State v. Brown, 371 So.2d 751 (La. 1979) in which prior cases of the trial prosecutor and others in the same district were accepted to establish systematic exclusion.

then shifts to the other party to show that the challenges were based on trial related factors rather than group bias.[6/]

At least one Florida court appears to have adopted this approach. In Cotes v. State, __So.2d__ (Fla. 3d DCA 1983)(Circuit Court Case Nos. 82-2184 and 82-2448), the trial judge conducted a separate hearing during which the prosecutor was required to explain why the exercise of peremptory challenges had resulted in the removal of all blacks seated as prospective jurors. Andrews, supra (Ferguson, J. concurring) 8 FLW at 2386.

Nothing about this approach limits its applicability to only one party. Rather, this remedy is available to both the State and the Defense. Commonwealth v. Soares, supra, at 517, n. 35; Andrews, supra.(Opinion of Ferguson, J. n.10).

Under the Wheeler or Brown approach to establishing systematic exclusion, the "newer" approach fits, with little or no modification into the analytical scheme set forth by the Supreme Court in Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, __L.Ed.2d__ (1979), to establish a prima facie violation of the fair cross section requirement. Under Duren, supra, the complaining party is required to show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that representation (in venires) of this group is not fair and reasonable in relation to the number of such

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[6/] The courts of at least four other states have adopted this methodology. Commonwealth v. Soares, supra; People v. Payne, supra; State v. Crespin, supra; and People v. Thompson, supra.

persons in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury selection process. See also U.S. v. Perez-Hernandez, 672 F.2d 1380, 1385 (11th Cir. 1982) (Fair cross section analysis is applicable to groups such as grand or petit jury, which can represent society as a whole).

Marking a clear distinction between challenges to jury selection procedures based on a violation of equal protection from those at issue in Duren based on Sixth Amendment guarantees the Court stated:

> In contrast, in Sixth Amendment fair cross-section cases, systematic disproportion itself demonstrates an infringement of the defendants interest in a jury chosen from a fair cross section. The only remaining question is whether there is adequate justification for this infringement.

CONCLUSION

The profound nature of the issue raised herein cannot be denied. Nor can it be denied that an available remedy, fashioned to comport with the fair cross section requirements of State constitutional provisions analogous to Article I §16 as well as the mandate of the Sixth Amendment to the United States Constitution, exists. By this remedy, the operation of a rule of procedure may give way to a constitutional mandate in a fashion that ensures the continued integrity of both.

Accordingly, this Court should rid the jury selection process of the exercise of discriminatory peremptory challenges by answering the certified question of the Third District Court of Appeal in the affirmative and adopting the approach represented by Wheeler and Soares. Such a step merely secures that the constitutional assur-

ances set forth in this Court's prior decisions will not be for naught.

> In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypothesis, continually re-tested in those great laboratories of the law, the courts of justice. Every law case is an experiment; and if the accepted rule vehicle seems applicable and which is found to be unjust, the rule is re-considered. It may not be modified at once...but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.
> Munroe Smith, quoted in B. Cardozo, The Nature of the Judicial Process Part I (1921).

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BY 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was this 14 day of November, 1983, forwarded to: Geoffrey C. Fleck, Weiner, Robbins, Tunkey & Ross, P.A. 2250 SW Third Avenue, Miami, FL 33129; Office of the Attorney General, 401 NW Second Avenue, Suite 820, Miami, FL 33128 and to Elliot Scherker, Office of the Public Defender, 1351 NW 12 Street, Miami, FL 33125.

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