IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,331

THE STATE OF FLORIDA

Petitioner,

vs.

CHARLES SLAPPY

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, **CHARLES SLAPPY**, was the defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida and the Appellant in the Third District Court of Appeal. Petitioner, **THE STATE OF FLORIDA**, was the prosecution in the trial court and the Appellee in the district court. The parties, in this brief, will be referred to as they appear before this court.

The symbol "R" will be used, in this brief, to refer to the Record-on-Appeal before the Third District, the symbol "SR" will identify the Supplemental Record before that court, and the symbol "T" will designate the transcript of lower-court proceedings. The terms "Appellant's Brief" and "Appellee's Brief" will refer to the initial briefs filed by the respective parties in the Third District Court of Appeal. The appendix to this brief will be referred to as "App." and by the exhibit letter assigned. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

The respondent was charged, on July 28, 1984, with Carrying a Concealed Firearm in violation of F.S. §790.01 (1983)(R. 1-1A).

Jury selection commenced on January 14, 1985. The respondent, during voir dire, moved to strike the jury panel, presumably on grounds of alleged use of peremptory challenges to systematically exclude black persons from the jury, which was denied. (R. 2; T. 97). (The facts concerned in jury voir dire will be set forth in the Statement of the Facts).

The respondent was found guilty by the jury, on January 16, 1987, of Carrying a Concealed Firearm. (R. 19).

The respondent filed a Motion for New Trial on March 2, 1985 on the grounds that the State was using its peremptory challenges to exclude blacks from the jury. (R. 21). It was denied on June 14, 1985 and an Order Denying Motion for New Trial was entered on June 17. (R. 25).

The respondent, on June 14, 1985, was placed on eighteen (18) months probation and adjudication was withheld. (R. 24). Respondent filed a timely Notice of Appeal on June 16, 1985. (R. 26).

The District Court, on February 3, 1987, issued its order reversing and remanding the case for a new trial on the grounds that the trial court apparently considered itself bound to accept any explanation offered for the challenges and found the explanations insufficient. (App., Exh. A).

The State petitioned this court for discretionary review based on conflict and this court accepted jurisdiction on July 6, 1987.

STATEMENT OF THE FACTS

The State exercised seven peremptory challenges in this case (one against an alternate), four of which were exercised against black persons, leaving one black person on the jury. (R. 2, SR., T. 97). The challenge of Mrs. Lumpkin, one of the black people excused, was not an issue in this appeal because the appellant admitted that the State demonstrated that she was not excused on the basis of race. (Appellant's Brief, 8). She believed she had previously been a juror in a case in which the defense counsel was one of the lawyers (T. 61-63) and did not believe she could judge the case as if she had never served on a jury before. (T. 63).

Mrs. Ellen Williams, the first black person challenged by the State, was a teacher's aid at Ludlum Elementary School from South Miami whose husband used to carry a gun for work, as a guard. (T. 11-12, 52, 92).

Frank Williams was a teacher's assistant at Amelia Earhart Elementary School whose ex-wife was a teacher. (T. 12).

Mrs. Oppie Jordan, a disabled widow (T. 16), when asked, "Would you have any problem abandoning the presumption of innocence if I proved to you that the defendant committed the crime?" answered, "Do it make a difference whether you been in criminal court before?" (T. 35). When she was asked, "Do you think you could be a fair juror in this case?", by the defense, her answer was "If I could understand it better. I haven't heard anything now to really know because I never been in this kind of court before." (T. 79-81).

The defense objected after the challenge of Mrs. Williams, which was overruled. (T. 92). It objected to the challenge of Mr. Williams, which was overruled (T. 93-94), and it objected to the challenge of Mrs. Jordan, which was not ruled upon. (T. 94). The challenge of Mrs. Lumpkin, although not objected to, resulted in the court asking the reasons for the challenge of each of the black veniremen concerned (although without making any specific finding that there was a substantial likelihood that challenges were being utilized on the basis of race, alone). This resulted in the following exchange:

> State, why are you excusing Ms. Lumpkin?
>
> MR. RANCK: She said she thinks she knew Mr. Tarkoff from previously in her response. Whether or not she did or did not-- I don't want someone on a defense--
>
> THE COURT: Why did you excuse Ms. Jordan?

MR. RANCK: She didn't seem to be too secure about sitting on a jury. She asked questions, I think, twice, whether or not she needs to know anything about the law or criminal justice system. Her health doesn't seem to be very good. I just didn't want someone like that on the jury.

THE COURT: How about Mr. Williams?

MR. RANCK: Both Mr. Williams and Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have on a jury.

THE COURT: Liberalism?

MR. RANCK: Yeah, maybe more sympathetic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.

MR. TARKOFF: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.

MR. RANCK: He was also in the army.

THE COURT: You never heard of liberals in the army?

MR. RANCK: I think you are less likely to find help in the military than elementary school.

THE COURT: Anyhow, I made the inquiry. Let's see. What do we have? We have Sanchez, we have Sylves, we have Bibby, Aguinaga, DeAlmeida. That's one, two, three, four, five. I need one more gentleman to make six. (T. 95-96).

Shortly thereafter, defense counsel moved for Judge Kogan to dismiss the panel, as follows:

> MR. TARKOFF: First I would move the Court to strike the entire panel for which the state has exercised its challenges in order to--
>
> THE COURT: I will deny the motion. There is one black juror, Mr. Bibby, who remains on the jury panel. The Court is also satisfied that based upon the explanations given by Mr. Ranck, that these reasons why he excused the other four black jurors fall within a degree of reasonableness as far as exercising a peremptory challenge for reasons other than race. (T. 97).

The Third District reversed the trial court on the basis that ". . . the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value. . . ." (App., Exh. A, 10).

The opinion of the Third District also contains two (2) misapprehensions of fact which should be noted. The district court stated the following:

> Mrs. Jordan is a disabled widow. The only questions directed to her specifically during voir dire were whether she had ever served as a juror in a criminal case, whether she could be a fair juror in this case and whether she understood the principles of "presumption of innocence" and "proof beyond a reasonable doubt." She responded that she had previously served as a juror in a civil case and that she could be a fair juror with a better understanding of the case. (App., Exh. A, 2).

Mrs. Jordan was actually asked a number of questions in addition to those set forth by the district court, permitting the court and counsel additional time to assess her demeanor and manner of answering questions. (T. 15-16, 34-35, 79-81).

Also, the district court, in discussing the issue of allegedly disparate treatment of persons in the same occupation, stated that, "Although liberalism is, according to the prosecutor, a trait antagonistic to the State's interest and common to schoolteachers, a white schoolteacher, Mr. Farrar, was not challenged by the state. . . ." (App., Exh. A, 9).

> THE COURT: How about Mr. Williams?
>
> MR. RANCK: Both Mr. Williams and Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have on a jury.
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> THE COURT: Liberalism?
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> MR. RANCK: Yeah, maybe more sympathetic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.
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> MR. TARKOFF: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.
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> MR. RANCK: He was also in the army.
>
> THE COURT: You never heard of liberals in the army?
>
> MR. RANCK: I think you are less likely to find help in the military than elementary school. (T. 95-96).

Along with being an army veteran, Mr. Farrar was not involved in elementary education at all, being a teacher of business courses at North Miami Senior High School. (T. 54).

The Third District also drew a number of presumptions, assumptions and inferences against the State which will be discussed in the argument portion of this brief.

Petitioner reserves the right to present additional facts in the argument portion of this brief, as relevant.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN CONDUCTING A DE NOVO REVIEW OF THE TRIAL COURT, RESULTING IN REVERSAL OF THE TRIAL COURT'S RULING THAT THE STATE HAD NOT SYSTEMATICALLY EXCLUDED PERSONS FROM THE JURY DUE SOLELY TO THEIR RACE?

SUMMARY OF THE ARGUMENT

The Third District erred in reversing the trial court based on standards for reviewing the explanations of peremptory challenges which are higher and more difficult to meet than those propounded by any other court in the country.

Further, the district court paid no deference, whatsoever, to the trial court's decision, requires evidentiary hearings in virtually all cases involving objections to peremptory challenges in which an inquiry is made, and therefore encourages trial courts to find no "substantial likelihood" that challenges are being exercised on racial grounds due to the ease of reversing trial courts once such an inquiry is made.

The district court should be reversed.

ARGUMENT

THE DISTRICT COURT ERRED IN CONDUCTING A DE NOVO REVIEW OF THE TRIAL COURT, RESULTING IN REVERSAL OF THE TRIAL COURT'S RULING THAT THE STATE HAD NOT SYSTEMATICALLY EXCLUDED PERSONS FROM THE JURY DUE SOLELY TO THEIR RACE.

First, there can certainly be no question that a de novo review was conducted by the district court in this case. It has conducted an extensive, complex and rather convoluted analysis based upon California Law (which was rejected by this court in State v. Neil, 457 So.2d 481 (Fla. 1984)) and decided that Judge Kogan failed to apply five (5) factors which he should have "weighed heavily" against the legitimacy of any race-neutral explanation. (App., Exh. A). Neither abuse of discretion nor any other standard for appellate review was discussed in its opinion which limited its discussion to factors which it felt the trial court should have applied, but failed to. (App., Exh. A).

A. Unjustified Assumptions and Inferences of the District Court

The district court justified conducting such a review by drawing three (3) major inferences against the prevailing party (and which the record does not support) in direct contravention of Schlanger v. State, 397 So.2d 1028 (Fla. 3d

DCA 1981); rev. denied, 407 So.2d 1105 (Fla. 1981) and numerous other cases requiring all inferences and deductions to be interpreted in favor of the trial court and the prevailing party. First, in the absence of any such finding expressed by the trial judge, the district court assumed that, because the court asked about reasons, it was ". . . obviously satisfied that a prima facie showing was made that the State was excluding jurors based on race. . . ." (App. Exh. A, 3). Second, from a cold record, the district court finds that the trial court's statement "Anyhow, I made the inquiry" (T. 96) was made "With a hint of frustration-- as if legally obligated to accept the State's explanation...." (App., Exh. A, 3-4). Third, it finds that the above comment, together with the trial judge's finding that the reasons given for the challenges were "reasonable" (App., Exh. A, 4) meant that ". . .the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value. . . ." (App., Exh. A, 10), an assumption which is not only unsupported, but is contradicted by the record.

The district court's inference that the fact that any inquiry was conducted means that a prima facie case of racial discrimination was made out would appear to have some support from the language in Neil stating that, if the court does not find that there is a substantial likelihood that peremptory challenges are being exercised solely on the basis of race, it may make no inquiry about reasons. State v. Neil, 457

So.2d 481, 486 (Fla. 1984). However, subsequent cases have concluded (probably based on the law that all inferences are to be interpreted in favor of the prevailing party) that the required strong or substantial likelihood of racial discrimination was not found even in cases where justification for the exercise of peremptory challenges was required. Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986); See also, Macklin v. State, 491 So.2d 1153 (Fla. 3d DCA 1986); Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985). This was true even where nine (9) black jurors were challenged resulting in an all-white jury. Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985). Certainly, had the trial court refused to conduct an inquiry, it would have been virtually "reversal proof" given the statements that the judge attending the voir dire is in a better position than the reviewing court to determine whether a substantial likelihood of systematic exclusion was demonstrated, together with the fact that challenges of eight (8) or nine (9) black jurors resulting in all-white juries have been held not to demonstrate such a substantial likelihood. Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987); Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985); City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCA 1985); See also, Woods v. State, 490 So.2d 24 (Fla. 1986); Parker v. State, 476 So.2d 134 (Fla. 1985). This view is also supported by the United States Supreme Court's statement that; ". . . . We have confidence that trial judges, experienced in supervising voir dire, will be able to decide

if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69, 88 (1986).

There are two additional reasons which would support the interpretation that conducting an inquiry does not automatically mean that the trial court found the required substantial likelihood. First, at the time of the trial in this case, the appellate courts of this state had tended to lean on the side of reversal where there was insufficient information to determine whether peremptory challenges had been racially motivated or not. See, State v. Neil, 457 So.2d 481, 487 (Fla. 1984); Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1984); modified on other grounds, 486 So.2d 565 (Fla. 1986). Second, the court's comment of "Anyhow, I made the inquiry." (T. 96), especially when combined with its ruling that the explanations given were reasonable to show that challenges were exercised for reasons other than race (T. 97) would clearly support an inference that the court felt the inquiry was unnecessary, but conducted one solely to insure that the appellate record was clear.

This leads us to the third assumption, which is what the district court found to be the reversible error in this case, that the trial court " . . . apparently considered itself bound to accept all of the prosecutor's explanations at face

value. . . ." (App., Exh. A, 10), which is totally without support in the record. Even the district court admits that the court found the prosecutor's stated reasons for excluding the four (only three were issues on appeal) black jurors to be "reasonable" (App. Exh. A, 4) (what the court actually said was that ". . . . The Court is also satisfied that based upon the explanations given by Mr. Ranck, that these reasons why he excused the other four black jurors, fall within a degree of reasonableness as far as exercising a peremptory challenge for reasons other than race.")(T. 97). This admission refutes the assumption that the court felt bound to accept any race neutral reasons. If that were the case, the reasonableness or unreasonableness of the explanations would have been irrelevant, since the fact that the explanations were race neutral would have bound the court, and a finding that they were race neutral would have been dispositive.

Further, the specific language used by Judge Kogan, "... within a degree of reasonableness. . ." (T. 97) clearly infers that the judge felt there was a required degree of reasonableness which, if the explanations failed to meet, would require that they be found insufficient. It suggest that Judge Kogan carefully evaluated the reasons given to see if, under the totality of the circumstances, they reasonably demonstrated that jurors were not being challenged solely due to their race and indicates that he would have rejected any race-neutral explanation which he found not to be within the

required degree of reasonableness. That the trial court conducted its evaluation seriously, properly and in good faith is further supported by the fact that the court made its inquiry sua sponte, before any objection had even been made. (T. 95).

People v. Hall, 35 Cal. 3d 161, 197 Cal. Rptr. 71, 672 P.2d 854 (Cal. 1983), the primary case relied upon by the district court because it found an identical error (App., Exh. A, 10) really provides no support, at all for this conclusion. The trial judge in Hall, ". . . expressed a view that systematic exclusion of a class of potential jurors occurs only when the prosecutor announces an intent to keep all members of that group off the jury. . . ." Id. at 856. That judge, rather obviously felt bound to accept explanations at face value. Judge Kogan, on the other hand, required explanations on his own motion and evaluated them based upon a "reasonableness" standard. (T. 95-97). The two situations are hardly comparable.

B. What is the Current Standard for Reviewing Explanations of Challenges?

The district court believed, based upon the above assumptions, that ". . . . the central question here is whether the State made a bona fide showing that its use of the peremptory challenges was for reasons other than race."

Rather than the question of whether the trial court abused its discretion in determining that the showing was bona fide. (App., Exh. A, 2). However, whichever standard is applied, an examination of what the correct standard should be for review of explanations of challenges appears necessary.

First, a brief explanation of peremptory challenges is necessary to provide a basis for the discussion.

The word "peremptory" means not requiring any cause to be shown. Henry Campbell Black, Black's Law Dictionary, 1295 (Revised 4th Ed. 1968). Therefore, a "peremptory challenge" is a species of challenge which the prosecution or the defense is allowed to have against a certain number of jurors, without assigning any cause. Henry Campbell Black, Black's Law Dictionary, 291 (Revised 4th Ed. 1968). As the Third District stated in Neil v. State, 433 So.2d 51 (Fla. 3d DCA 1983); remanded State v. Neil, 457 So.2d 481 (Fla. 1984), "When peremptory challenges are subjected to judicial scrutiny, they will no longer be peremptory." (citations omitted). Since the Neil and Batson decisions, we know that, under certain circumstances, such challenges are subject to some explanation. However, caution is dictated to keep from destroying the peremptory challenge as an effective tool because, as the United States Supreme Court has stated:

> Experience has shown that one of the most effective means to free the jury

> box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted.
>
> Hayes v. Missouri, 120 U.S. 68, 70; 30 L. Ed.2d 578, 580 (1887).

It has a history of over six hundred (600) years and has been held by this court to be an essential component of the right to trial by jury. United States v. Leslie, 759 F.2d 381, 385 (5th Cir. 1985); Tedder v. Video Electronics, Inc., 491 So.2d 533 (Fla. 1986). This court has recently held that the state may exercise peremptory challenges as it deems necessary, Adams v. Wainwright, 484 So.2d 1211 (Fla. 1986). It is an arbitrary and capricious right which permits rejection for real or imagined partiality and is often exercised based only on bare looks and gestures. Lewis v. United States, 146 U.S. 370, 376; 36 L.Ed. 1011, 1014 (1892); Francis v. State, 413 So.2d 1175, 1178-1179 (Fla. 1982); Koenig v. State, 497 So.2d 875, 879 (Fla. 3d DCA 1986).

The district court has relied heavily on California law interpreting People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal. 1978), a standard that this court refused to embrace in State v. Neil, 457 So.2d 481, 485 (Fla.

1984). However, these are two results of Wheeler that appear unique to California and which are excellent reasons to reject their interpretations.

The first reason is that "racial bias" is not the evil which Wheeler protects against, it is designed as protection against "group bias", a far broader concern, and one far more likely to destroy the peremptory challenge system. The standard for judging what "groups" may not be challenged on the basis of group membership is that group members ". . . share with other members of their groups a common perspective arising from their respective experiences as a group, and no other members of the community are capable of adequately representing their perspective. . . ." People v. Trevino, 704 P.2d 719 (Cal. 1985)(In Bank). This definition is so broad that it could conceivably cover everything from drug addicts to ex-convicts. Indeed, the California Supreme Court, as the Third District pointed out with approval, found that excluding a prospective juror because he was a truck driver evinced impermissible group bias, by itself, since it suggested an attempt to exclude ". . .working-class people. . ." from the jury. (App., Exh. A, 7), People v. Turner, 726 P.2d 102, 108 (Cal. 1986)(In Bank). Occupation has not been considered an improper basis for challenge by any other court in the country and has, in fact, been considered a permissible basis for challenges for many years. See, United States v. Leslie, 759 F.2d 381, 386 (5th Cir. 1985); Rose v. State, 492 So.2d

1353 (Fla. 5th DCA 1986). Neil was deliberately limited specifically to race. Because of the numerous "groups" that bias may be impermissible against in California, indicating that virtually every challenged juror may be a member of a group that bias against is prohibited, adoption of the standards of California could well require that every peremptory challenge must be explained.

The second reason is that California has held that the only permissible reason for challenges, for cause or peremptory, is specific bias of the juror. Wheeler at 760. Thus, although Wheeler indicated that "bare looks and gestures" were acceptable, Wheeler at 760-761, the California Supreme Court subsequently held that ". . . the district attorneys reason for excluding Robert Guerrero based on his body language and made of answering certain questions, is particularly untenable in light of Wheeler's requirement of a showing of specific bias. . . ." (the prosecutor had stated that he challenged the juror because sitting with his arms folded during voir dire indicated a bit of a closed relationship with his fellow jurors and he smiled at the defense attorney while giving an evasive reply). People v. Trevino, 704 P.2d 719, 732-733 (Cal. 1985)(In Bank). It should be noted that Trevino is another case that the Third District cited with approval for rejecting the trial court's finding that explanations for challenges were "reasonable". (App. Exh. A, 5-6). Thus, the challenging attorneys "judgment" or

"sincerity" are irrelevant under Wheeler, which requires that "specific bias" he demonstrated. People v. Turner, 726 P.2d 102, 108 (Cal. 1986)(In Bank). It appears safe to assume that there are no more "peremptory" challenges in the State of California, where every challenge must be based upon "specific bias".

It would be extremely useful, of course, if there were cases interpreting the standard for reviewing explanations for challenges pursuant to People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (2d Div. 1981), which was adopted in Neil. However, this is not possible because, subsequent to Thompson, it was implicitly overruled in People v. McCray, 57 N.Y.2d 542, 443 N.E. 2d 915 (N.Y. 1982) on the grounds that examining the motives behind peremptory challenges would require extended voir dire and extensive evidentiary hearings, further delaying an already overburdened justice system. Id. at 918. However, it should be noted that the Thompson court stated:

> ". . . .We expect that the determination whether there has been such a showing may ordinarily be made solely on the basis of the trial court's observation of the jury selection procedure, the prosecutor's explanation of the reasons for the use of his challenges, and argument of counsel. Only in the unusual case, if at all, would it appear that a hearing would be necessary. . . . Id. at 754.

It appears that the New York appellate court was willing to rely heavily on judgments of the trial courts.

However, the Massachusetts courts have been dealing with the issue nearly as long as California, since Commonwealth v. Soares, 387 N.E. 2d 499 (Mass. 1979). They have eliminated the "infinite number of groups" problem faced by the California courts by defining the "suspect" groups as ".... sex, race, color, creed or national origin." Id. at 516. Further, they specifically set forth their intent to rely heavily on the judgment of trial judges, both to determine "substantial likelihood:" and the validity of explanations, as follows:

> Presented with evidence as to these two elements, the trial judge must determine whether to draw the reasonable inference that peremptory challenges have been exercised so as to exclude individuals on account of their group affiliation. Although decisions of this nature are always difficult, we are convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with attorneys on both sides, will address these questions with the requisite sensitivity.
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> * * *
>
> ". . . . And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories [sic] from sham excuses belatedly contrived to avoid admitting facts of group discrimination." People v. Wheeler, supra, 22

> Cal.3d at 282, 148 Cal.Rptr. at 906, 583 P.2d at 765.
>
> Id. at 517.

This has led to the following standards in determining if explanations are valid;

> . . . . Justification is adequate if it consists of a reason that "pertain[s] to the individual qualities of the prospective juror and not to that juror's group association." Soares, 377 Mass. at 491, 387 N.E. 2d 499. This reason need not rise to the level of grounds required for a challenge for cause. Moreover, the trial judge retains discretion to distinguish between bona fide and sham excuses. We note that the distinction here drawn is between good and bad faith, not good and bad explanations. "Sorting out whether a permissible or impermissible reason underlies a peremptory challenge is the function of the trial judge, and we do not substitute our judgment for his if there is support for it on the record." Commonwealth v. DiMatteo, 12 Mass.App.Ct. 547, 552, 427 N.E. 2d 754 (1981).
>
> Commonwealth v. Thomas, 471 N.E. 2d 376, 377-378 (Mass. App. 1984).

Therefore, the standard for evaluating explanations is whether it pertains to individual qualities of the prospective juror and not to that jurors group association, based upon an evaluation of the good or bad faith of the challenging party. The standard for appellate review is that the

trial court will be affirmed ". . .if there is support for it in the record. Commonwealth v. Perry, 444 N.E. 2d 1298 (Mass. 1983); Commonwealth v. DiMatteo, 427 N.E. 2d 754 (Mass. App. 1981). Thus, challenging a black venireman because he wore a gold earring and the prosecutor didn't like his looks was upheld. Commonwealth v. Lattimore, 486 N.E. 2d 723 (Mass. App. 1985). Similarly, challenging three (3) black persons because one (1) had been challenged by the prosecutor twice before, one (1) had served on a jury that resulted in a "problem" for the Commonwealth and the third was a carpenter at Harvard University which the prosecutor felt indicated that he ". . . would not make a particularly fair Commonwealth juror. . . ." was upheld. Commonwealth v. Smith, 428 N.E. 2d 348 (Mass. App. 1981). However, explaining that the defense was peremptorily challenging all available white jurors was insufficient and required reversal. Commonwealth v. Brown, 416 N.E. 2d 218 (Mass. App. 1981).

Other standards have been adopted and discussed in other jurisdictions. The fact that valid reasons could be discerned from the record of voir dire for the challenge of two of the three Spanish-surnamed jurors challenged was held to have prevented the defense from establishing a prima facie case of unconstitutional discrimination in Fields v. People, 732 P.2d 1145 (Colo. 1987). Reasons such as religious preference away from the main stream, never serving on a jury before, having illegible handwriting, being young,

misspelling "Baptist" and being inattentive were held to be proper reasons for exercise of challenges in Texas in Chambers v. State, 724 S.W. 2d 440 (Tex. 14th Dist. 1987). Offering neutral and logical explanations for challenges at a post-appeal hearing was held to refute the prima facie case established when all three black persons were challenged, in Oklahoma in Johnson v. State, 731 P.2d 993 (Okl. Cr. 1987).

A number of courts in Florida have also spoken on the issue. The Third District (in a case they chose to ignore, in this case) stated that;

> In our view, State v. Neil, defines the outer limits of interference with the exercise of peremptory challenges --their exercise may be enjoined through the device of dismissal of the pool only when the court concludes, after inquiry, that a party is challenging jurors solely on the basis of race. Interference is therefore not permitted simply because the prospective jury is lacking a member of a particular race, or does not, as in the opinion of the court below, have "a good cross section." (emphasis added).
>
> Koenig v. State, 497 So.2d 875, 879-880 (Fla. 3d DCA 1986).

Such language would infer an extremely high standard for reversing trial court determinations that challenges were properly exercised. Certainly it is clear, from the language of Neil and subsequent cases that, unlike California or many other states, race is the only impermissible reason for peremptorily challenging jurors in Florida:

> Instead of Swain, trial courts should apply the following test. The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis or race. It the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool. (emphasis added).
>
> State v. Neil, 457 So.2d 481, 486 (Fla. 1984).

See also, City of Miami v. Cornett, 463 So.2d 399, 401-402 (Fla. 3d DCA 1985). Indeed, demonstrating a valid non-racial

reason for almost every challenge was held to be sufficient in Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985). Occupation certainly, a factor in this case, has been held to be a valid reason for challenges where the prosecutor's challenge of a black teacher on the grounds that ". . . teachers do not make good jurors. . . ." was upheld in Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986).

This leads us to the question of what the correct standard should be in evaluating explanations. It is respectfully submitted that explanations which are race-neutral, reasonable, and made in good faith should be acceptable. This combines the "race neutral" criteria set forth in Neil (also in Batson, see 90 L.Ed.2d 88) with the "good faith" standard of the Massachusetts courts subsequent to Soares and the "logical" requirement of the Oklahoma courts. "Reasonable" is suggested rather than "logical" because it is the traditional term used in attempting to set objective standards and, as a result, there are significantly more cases interpreting the term "reasonable" than "logical" (i.e. the "reasonable man" standard used in negligence and in self-defense cases). This was also the term used by this court in interpreting the statute setting up procedures for grand jury selection (a clearly related issue), when it said, "It is clear that a class of citizens may be singled out for different treatment concerning jury duty so long as the classification is based upon some reasonable basis for

excluding that particular class of citizens. . . ." (emphasis added)(footnote omitted). Williams v. State, 285 So.2d 13 (Fla. 1973). This is also the term which was used by Judge Kogan in his trial-level evaluation. Such a standard would prevent the use of "sham" excuses which concerned the district court (App., Exh. A), provides a body of law useful in interpreting explanations, and, at the same time, avoids the pitfalls of the standards set by California law and the Third District in this case (which will be subsequently discussed).

It is respectfully submitted that the standard for review of trial court decisions regarding challenges (not discussed by the district court in this case) should remain as it has been. This court has stated, concerning the review of challenges for cause, that:

> The person in the best position to determine this actual bias is the trial judge. The trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him. This is why a trial court has broad discretion regarding juror bias, Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981), and his or her finding will not be disturbed "unless error is manifest." Singer v. State, 109 So.2d 7, 22 (Fla. 1959).
>
> State v. Williams, 465 So.2d 1229, 1231 (Fla. 1985).

Thus, in such cases, ". . . . Appellant has the heavy burden of showing an abuse of discretion. . . ." Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981); rvs'd on other grounds, 420 So.2d 877 (Fla. 1982), cert. denied, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

Further, the trial court's determination, in this area, is a mixed question of law and fact which will not be disturbed unless manifest error is demonstrated. Ross v. State, 474 So.2d 1170 (Fla. 1985); Christopher v. State, 407 So.2d 198 (Fla. 1981); cert. denied, 456 U.S. 910, 72 L.Ed.2d 169 (1982). Therefore, it has been held that excusal of a juror rarely constitutes reversible error. Piccott v. State, 116 So.2d 626, 627 (Fla. 1959), cert. dismissed, 364 U.S. 293, 5 L.Ed.2d 83 (1960).

Applying this to peremptory challenges, it has been held that broad discretion is vested in the trial to control the manner in which peremptory challenges are to be exercised. Eastern Air Lines, Inc. v. Gellert, 438 So.2d 924 (Fla. 3d DCA 1983). Nevertheless, denial to a litigant of peremptory challenges to which he is entitled constitutes reversible error. Id., Saborit v. Deliford, 312 So.2d 795 (Fla. 3d DCA 1975); cert. denied, 327 So.2d 32 (Fla. 1976).

Adoption, by this court, of the standards proposed above for evaluating the reasons given by challenging parties and

for review of the decisions of trial courts would prevent the substantial problems which could arise from allowing those standards proposed by the Third District, in this case, to stand.

First, it should be noted that setting forth (5) factors which "will weigh heavily against the legitimacy of any race-neutral explanation" (App. Exh. A, 9) and none to be weighed in favor creates the highest and most difficult to meet standard for reviewing explanations of any court in the country. Although the concern of the Third District that trial court's must discriminate between legitimate and "sham" excuses is certainly valid, setting a standard of review which is so high that trial courts will be tempted to not inquire about reasons, at all, is clearly counterproductive to this goal. We know that, under present law, a finding that no substantial likelihood has been demonstrated is a virtually "reversal proof" decision. See, Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987); Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985); City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCA 1985); See also, Woods v. State, 490 So.2d 24 (Fla. 1986); Parker v. State, 476 So.2d 134 (Fla. 1985). Thus, under the standards of the Third District in this case, trial courts would be encouraged to conduct no inquiry, at all, destroying the effectiveness and purpose of the Neil decision.

Second, the opinion of the Third District encourages lengthy evidentiary hearings. The district court states, ". . . .It is not shown by the record what liberalism is in this context or how it affects an ability to follow the law in a concealed firearms case. There is also a want of evidence that liberalism plagues school teachers peculiarly or that it may be cured by a stint in the army." (App., Exh. A, 9-10). Such language is clearly designed to discourage trial courts from passing on explanations for challenges without first conducting extensive evidentiary hearings, the precise problem that resulted in the highest court of New York rejecting a Neil type solution to the problem of race-based exercise of peremptory challenges in People v. McCray, 443 N. E. 2d 915, 918 (N.Y. 1982). Although the proposed standard certainly does not forbid evidentiary hearings on the issues concerned with peremptory challenges, it does lessen the probability that jury selection will degenerate into as many "mini-trials" as there are challenges, the problem complained of in Roman v. Abrams, 608 F.Supp. 629 (D.C. N.Y. 1985), in which the court stated;

> On December 4th of last year, breaking with long stand precedent, the Second Circuit, in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), rehearing en banc den., 756 F.2d 277 (2d Cir. 1985), petition for cert. filed, 756 F.2d 277, "spell[ed] the end of the peremptory challenge as an effective jury selection tool," in state criminal trials (Meskill, J., dissenting). The Court held that: "[T]he Sixth Amendment's guarantee of

> trial by an impartial jury. . . forbids the exercise of [peremptory] challenges to excuse jurors solely on the basis of their racial affiliation." 750 F.2d at 1131. It also turned the jury selection process into a possibility of twenty mini-trials within a Class A felony trial in New York, as the court determines whether the prosecutor's "reasons" for exercising peremptories are "genuine" or merely "pretextual". Id. at 1132.
>
> Id. at 630.

The district court's requirement that it have evidence in the record of what liberalism is, how it affects jurors ability in a specific case, that school teachers (actually teachers assistants in elementary schools) are more likely to be liberal than others and that teachers who are army infantry veterans are less likely to be liberal than teachers who aren't, before it can uphold a trial court finding that explanations were proper (App. Exh. A, 9-10) not only encourages, but virtually requires such "mini-trials." It is respectfully submitted that this was not the intent of this court when it decided Neil and that the standard proposed by the Petitioner above provides a more workable solution than that proposed by the district court.

Finally, the district court's decision adopts the requirements of the California courts that the only permissible reason for exercising a peremptory challenge is demonstrated specific bias of the juror (App., Exh. A, 6) and

that exclusion due to occupation is impermissible group bias (App., Exh. A, 7). Thus, under that analysis, there are no true, peremptory" challenges, at all, and virtually any group becomes the proper subject of a Neil objection. It is respectfully submitted that these were a primary reason that this court could not embrace the Wheeler analysis in Neil and that they are unworkable, if a peremptory challenge system is to be maintained, at all.

Finally, the reasons given by the prosecutor, in this case, meet the proposed standard and virtually any reasonable standard for review.

Mrs. Jordan was challenged because;

> She didn't seem to be too secure about sitting on a jury. She asked questions, I think, twice, whether or not she needs to know anything about the law or criminal justice system. Her health doesn't seem to be very good. I just didn't want someone like that on the jury. (T. 95).

The district court found that ". . . . The only questions directed to her specifically during voir dire were whether she had ever served as a juror in a criminal case, whether she could be a fair juror in this case and whether she understood the principles of 'presumption of innocence' and 'proof beyond a reasonable doubt.' She responded that she had previously served as a juror in a civil case and she

could be a fair juror with a better understanding of the case." (App., Exh. A, 2). This is a rather oversimplified version of the following;

> Would you have any problem abandoning the presumption of innocence if I proved to you that the defendant committed this crime?
>
> MS. JORDAN: Do it make a difference whether you been in criminal court before? (T. 35).
>
> * * *
>
> MR. TARKOFF: Ms. Jordan, do you belong to any sort of organizations?
>
> MS. JORDAN: No.
>
> MR. TARKOFF: Do you subscribe to any newspapers or magazines?
>
> MS. JORDAN: No, I don't. I buy them if I want to read them.
>
> MR. TARKOFF: Are there any that you make a point of buying on a regular basis?
>
> MS. JORDAN: The Herald.
>
> MR. TARKOFF: Do you have any friends or relatives who are lawyers?
>
> MS. JORDAN: No.
>
> MR. TARKOFF: Do you think you could be a fair juror in this case?
>
> MS. JORDAN: If I could understand it better. I haven't heard anything now to really know because I never been in this kind of court before.
>
> MR. TARKOFF: Have you been in any court before?
>
> MS. JORDAN: Yes.

THE COURT: What kind of court?

MS. JORDAN: About real estate.

MR. TARKOFF: You sued somebody or sombody sued you?

MR. JORDAN: No, I was there as a juror.

MR. TARKOFF: You served on a jury before?

MS. JORDAN: For real estate, something concerning real estate in court.

MR. TARKOFF: Do you remember when that was?

MS. JORDAN: In the 70's, but I don't remember what year.

MR. TARKOFF: Do you remember exactly what the case was about?

MS. JORDAN: Real estate.

MR. TARKOFF: Was it what they call condemnation, where they are condemning property, or was it over a contract or over who owned real estate?

MS. JORDAN: It was over selling.

MR. TARKOFF: Did that jury return a verdict?

MS. JORDAN: Yes, it did.

MR. TARKOFF: Were you the forewoman or foreperson of the jury?

MS. JORDAN: No.

MR. TARKOFF: Was that here in Miami?

MS. JORDAN: Yes.

MR. TARKOFF: Civil courthouse?

MS. JORDAN: In the Justice Building, right here.

MR. TARKOFF: It was in this building?

MS. JORDAN: Yes.

MR. TARKOFF: Do you remember who the judge was?

MS. JORDAN: No, I don't.

MR. TARKOFF: Do you remember who any of the lawyers were?

MS. JORDAN: No, I don't.

(T. 79-81).

First, concern about the juror's health (remembering that both the prosecution and the trial judge could see the juror and the Third District could not) would certainly appear legitimate. A juror who didn't feel well would obviously be under more pressure to agree with other jurors than one who did, since the jury gets to leave once a verdict is reached. Thus, such a juror is less likely to be completely independent than a juror whose health is unimpaired. The Third District is critical of the prosecution for not questioning her concerning her health. (App., Exh. A, 4). However, such questioning on a personal subject is not unlikely to alienate either that juror, or others.

Further, "bare looks and gestures" has always been held a reasonable basis for peremptory challenge. Lewis v. United States, 146 U.S. 370, 376; 36 L.Ed. 1011, 1014 (1892); Koenig v. State, 497 So.2d 875, 879 (Fla. 3d DCA 1986). Demeanor

has also been held a proper reason for challenges. Thomas v. State, 502 So.2d 994, 995 (Fla. 4th DCA 1987); Commonwealth v. Kelly, 406 N.E. 2d 1327 (Mass. App., 1980). Thus, clothes or hair length provide a proper basis (even in California). People v. Wheeler, 583 P.2d 748, 760 (Cal. 1978). Wearing a gold earring is a proper basis. Commonwealth v. Lattimore, 486 N.E. 2d 723 (Mass. 1985). Having a beard is a proper basis. Wallace v. State, 41 Crim.L.Rep. (BNA) 2019 (Ala Ct. Crim.App. 1987). Given the above, it is respectfully submitted that the appearance of ill health, where upheld by the trial court, should also be a proper basis, where the prosecutor and Judge Kogan could see the juror, but neither we nor the Third District can.

Also, some of Mrs. Jordan's answers could properly be characterized as "evasive" and it could easily be said that she was a "reluctant juror", both of which have been held proper reasons for peremptory challenges. Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); cert. denied, 464 U.S. 1046 (1984); Woods v. State, 490 So.2d 24, 26 (Fla. 1986).

Mr. and Mrs. Williams were challenged due to their occupation, teacher's assistants at elementary schools, based upon the following reasoning;

THE COURT: How about Mr. Williams?

MR. RANCK: Both Mr. Williams and

> Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have on a jury.
>
> THE COURT: Liberalism?
>
> MR. RANCK: Yeah, maybe more sympathetic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.
>
> MR. TARKOFF: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.
>
> MR. RANCK: He was also in the army.
>
> THE COURT: You never heard of liberals in the army?
>
> MR. RANCK: I think you are less likely to find help in the military than elementary school. (T. 95-96).

Occupation is a traditional reason for exercising peremptory challenges. United States v. Leslie, 759 F.2d 381, 386 (5th Cir. 1985); United States v. McDaniels, 379 F.Supp. 1243, 1246 (E.D. La. 1974). This is not because a juror having a particular occupation is, in fact, partial, but because one from another occupation may be less likely to be partial. Leslie at 383. Thus, excluding a juror because he was a carpenter at Harvard, or even because she was a teacher, has been considered acceptable. Commonwealth v. Smith, 428 N.E. 2d 348 (Mass. App. 1981); Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986). Occupation has been a proper and successful basis for peremptory challenges in every state except

California. See, People v. Turner, 726 P.2d 102, 108 (Cal. 1986)(In Bank).

However, the Third District, along with advocating the expansion to Neil to include occupational, as well as racial, groups (App. Exh. A, 7) used a comparison of Mr. and Mrs. Williams with Mr. Farrar as an example of disparate treatment. (App., Exh. A, 9). However, this fails because Mr. Farrar wasn't involved in elementary education (the concern of the prosecutor - T. 95-96) at all, but was a Senior High School Business Teacher, an infantry veteran and Secretary of the Democratic Club of Greater Miami. (T. 54-55). Nevertheless, and even though, presumably, a party has a right to treat persons with different backgrounds differently, the district court found that the Williams being treated differently than Farrar "strongly inferred" that the Williams were excluded to the race, alone. (App., Exh. A, 9). The Third District would also require evidence to be presented of what liberalism is, how it affects a juror's ability to follow the law in a concealed firearms case, that teachers are more likely to be liberal than others and that army infantry veterans are less liberal than others before it could consider such a basis valid. (App., Exh. A, 10).

It is respectfully submitted that Judge Kogan's determination that the explanations given by the State for its peremptory challenges was reasonable (T. 97) was correct, met

the standard of review required, and should have been affirmed. The United States Supreme Court, in Batson v. Kentucky, 90 L Ed.2d 69, 89 f. 21 (1986), in discussing review of a trial court's findings on the sufficiency of the explanation's given, said that ". . . . Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give these findings great weight." (Citations omitted). The district court failed to do that and should be reversed.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petitioner respectfully submits that this court should reverse the decision of the Third District Court of Appeals and remand the case for affirmance of the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to LAW OFFICES OF FLYNN AND TARKOFF, 1414 Coral Way, Miami, Florida 33145, on this 31st day of July, 1987.

Charles M. Fahlbusch
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