OA 11-3-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,331

THE STATE OF FLORIDA,

Petitioner,

v.

CHARLES SLAPPY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE	2-3
STATEMENT OF FACTS	4-7
ISSUE PRESENTED FOR REVIEW	8
SUMMARY OF ARGUMENT	9
ARGUMENT	10-23
CONCLUSION	23
CERTIFICATE OF SERVICE	24

TABLE OF CITATIONS

BALLARD v. UNITED STATES 329 U.S.187,195, 67 S.Ct.261,265 (1946)	23
BATSON v. KENTUCKY, 476 U.S. ___, 106 S.Ct.1712, 90 L.Ed. 2d 60 (1986)	9,12,13,14,15,20
BOOKER v. JABE 775 F.2d 762 (6th Cir. 1985)	16
CITY OF MIAMI v. CORNETT 463 So.2d 399 (Fla.3d DCA 1985)	15
COTTON v. STATE 468 So.2d 1047 (Fla.4th DCA 1985)	15,
McCRAY v. ABRAMS 750 F.2d 1113 (2d Cir. 1984)	16,19,
PEOPLE v. WHEELER 22 Cal.3d 258, 148 Cal.Rep. 890, 583 P.2d 748 (Cal.1978)	16,
SMITH v. TEXAS 311 U.S.128, 61 S.Ct.164, 85 L.Ed. 84 (1940)	22
STATE v. BUTLER 41 CrL 2081	20,21,22
STATE v. NEIL, 457 So.2d 481 (Fla. 1984)	9,10,11,12,14,15,
SWAIN v. ALABAMA 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759	9,15
THIEL v. SOUTHERN PACIFIC CO. 238 U.S.217, 66 S.Ct.984, 90 L.Ed.1181 (1946)	22

INTRODUCTION

The Respondent, CHARLES SLAPPY, was the Defendant in the trial court and the Petitioner, THE STATE OF FLORIDA, was the prosecution. In this brief the parties will be referred to as they stood in the trial court.

The symbol "R" will be used to refer to the Record on Appeal before the Third District Court of Appeals and this Court.

The symbol "SR" will identify the Supplemental Record before the Third District Court of Appeal.

The Symbol "T" will designate the Transcript of lower court proceedings.

The Appendix to the Petitioner's Brief will be referred to as "APP", and by the exhibit letter assigned.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On July 28, 1984, the Defendant was charged by Information in Case No. 84-17355, with the crime of carry a concealed firearm in violation of Florida Statue 790.01 (R 1-1A). The trial of this cause thereupon commenced on January 14, 1985, with the selection of a jury. During the course of the jury selection, the Defendant interposed an objection and requested that the entire jury panel be stricken and jury selection begin anew on the grounds that the State was exercising its peremptory challenges on the basis of race to eliminate blacks from the jury. This objection was overruled and the motion was denied (R-2; T-92, 93, 94, 95, and 97).

On January 16, 1985, the Defendant was found guilty by a jury of the crime of carrying a concealed firearm (R-19). The Defendant thereaupon filed a timely motion for new trial on the basis that the court had erred in denying the Defendant's motion to strike the venire and commence jury selection anew because the State had used it peremptory challenges to exlcude blacks from the jury (R-21). This motion was denied on June 17, 1985 (R-25).

Pursuant to the verdict of guilty returned by the jury, the trial court sentenced the Defendant on June 14, 1985, to serve a period of probation of 18 months and further withheld adjudication of guilty (R-24). On June 26, 1985, a timely notice of appeal was filed for record with the Clerk of the lower tribual (R-26).

On February 3, 1987, the District Court of Appeal, Third District, issued its Opinion reversing and remanding the cause for a new trial on the grounds that the proffered reasons for excluding Blacks from the jury by the prosecution were insufficient to overcome the substantial likelihood that the peremptory challenges were being exercised solely on the basis of race. (R-37-47).

These proceedings follow.

STATEMENT OF FACTS

On January 14, 1985, jury selection commenced in the instant cause with each side having six challenges pursuant to Rule 3.350, Florida Rules of Criminal Procedure. The prosecution used all six of their peremptory challenges while the Defendant used only five (R-2). Of the six challenges exercised by the State, four of them were exercised against Blacks (T-92, 93, 94 and 95). In this cause, the Defendant Charles Slappy was himself Black (R-8 and R-10).

Pursuant to the court's manner of jury selection, it was the State who first exercised peremptory challenges against the first six jurors. At that time the State exercised two peremptory challenges, one of which was exercised against juror #4, Mary Ellen Williams, a Black woman, to which the Defendant objected (R-2; T-92). Among the first six jurors who were not challenged at that time by the prosecution, was one Frank A. Williams (R-2). In fact the prosecution did not excuse Mr. Williams until their third opportunity to exercise peremptory challenges, when Ms. Lumpkin had been added to the panel. At that time the prosecution excused Mr. Williams over objection of the Defendant (R-93). Both Mr. Williams and Ms. Lumpkin are Black (R-93 and 95).

At this point the State had exercised three peremptory challenges, two of which had been exercised against Blacks.

On the prosecution's next opportunity to exercise peremptory challenges, none were exercised, even though Ms. Lumpkin was on the panel (T-94).

After the next round of defense challenges one additional juror was added, a Black lady by the name of Oppie Lee Jordan, who was promptly excused by the prosecution over the objection of the Defendant (R-2; T-94).

The prosecution once again had an opportunity to excuse prospective juror Lumpkin and exercised no challenge (T-94). In fact, the prosecution failed to challenge Ms. Lumpkin one additional time after that, but then quickly exercised a change of mind and excused Ms. Lumpkin, making her the fourth Black juror excused by the prosecutor (T-95).

At this time the court sui sponte made inquiry of the prosecutor as to the reasons for excusing the four Black jurors (T-95).

As to Oppie Lee Jordan, the prosecution indicated the reason for her excusal was:

> 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).

In actuality, the only question which Ms. Jordan asked was an inquiry of whether or not it made any difference whether she had been in criminal court before, in response to a series of questions the prosecutor had put to the panel concerning the understanding of the jurors concerning the principles of "presumption of innocence" and "proof beyond a reasonable doubt" (T-34-35).

In response to the Court's inquiry concerning the excusal of Mary Ellen William and Frank Williams, the prosecution indicated that because they worked for the school board as teachers or teachers aides, they were too liberal (T-95-96). The prosecution came to the conclusion that these two jurors were too liberal based upon their occupation, even though he failed to ask either of them a single question during voir dire.

Questioning of the two prospective jurors by the Court and defense counsel merely revealed that Mr. Williams was a divorced teacher's assistant with no children (T-12).

As to Mrs. Williams, questioning by the Court and defense counsel revealed that the prospective juror was a teacher's aide, married to a security guard employed by the Dade County welfare office (T-11-12; 47). Mrs. Williams also disclosed that she was personally afraid of guns and did not like having them around her (T-47-48).

Based upon this record, both of these Black jurors were excused by the State, although they did not excuse another prospective juror employed as a school teacher, Mr. Farrar, who was excused by the defense (R-2; T-54). Additionally, although the prosecutor excluded Mr. Williams, who was afraid of firearms, the prosecutor did not excuse another juror by the name of Wenceslau DeAlmeida, a White juror who was ultimately selected for the panel (R-2). Mr. DeAlmeida was not excused by the prosecutor, notwithstanding the fact that he was a member of the National Rifle Association and did not think the crime with which the

Defendant was charged, i.e. carrying a concealed firearm, was "too much of a crime" (T-25; 28).

The fourth Black juror excused by the State was Ms. Lumpkin who had stated that in a previous trial in which she was a juror she thought the defense counsel in this cause may have been one of the lawyers involved in that case (T-62).

After the aforesaid inquiry the Court overruled the objection of the Defendant and denied the Defendant's motion to dismiss the jury pool and start voir dire over with a new pool based upon the challenging of three prospective jurors solely on the basis of race (T-97; R-2).

ISSUE PRESENTED

WHETHER THE DISTRICT COURT CORRECTLY RULED THAT THE REASONS PROFFERED BY THE PROSECUTION WERE INSUFFICIENT TO OVERCOME THE SUBSTANTIAL LIKELIHOOD THAT THE PEREMPTORY CHALLENGES WERE BEING EXERCISED SOLELY ON THE BASIS OF RACE.

SUMMARY OF THE ARGUMENT

The Third District properly reversed the trial court for the State's failure by its proffered reasons for exluding Blacks to overcome the substantial likelihood that the challenges were being exercised on racial grounds.

By its decision below, the Third District properly ruled that any non-racial reason does not satisfy the challenged party's burden, and further sets appropriate criteria for determining whether or not a proffered explanation is genuine in the spirit of State v. Neal, 457 So.2d 481 (Fla. 1984) and as both explicitly and implicitly held in Batson v. Kentucky, 476 U.S. ____, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).

A ruling contrary to that which the Third District has made in this cause would merely reinstate in another form the "mission impossible" of Swain v. Alabama, and make the Neal and Batson decisions, rights without a remedy.

The opinion of the Third District Court of Appeal should be approved by this Court.

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE REASONS PROFFERED BY THE PROSECUTION WERE INSUFFICIENT TO OVERCOME THE SUBSTANTIAL LIKELIHOOD THAT THE PEREMPTORY CHALLENGES WERE BEING EXERCISED SOLELY ON THE BASIS OF RACE.

In accordance with State v. Neil, 457 So.2d 481 (Fla. 1984), the trial court below made appropriate inquiry of the prosecution concerning its reasons for exercising four of its first five peremptory challenges against Blacks, due to a substantial likelihood that the peremptory challenges were being exercised solely on the basis of race. In Neil, this Court laid down the test to be used in Florida for determining when there has been a discriminatory use of peremptory challenges and the sanction to be imposed when such has been the case. In summary, this Court stated in Neil:

> To recapitulate, a party's peremptories cannot be examined until the issue is properly presented to the trial court, and until the trial court has determined that such examination is warranted. If such occurs, the challenged party must show that the questioned challenges, but no others, were not exercised solely on the basis of race.

Therefore, the procedure to be employed basically goes through three stages. The first stage is the proper presentation to the trial court of the perceived discriminatory use of peremptory challenges as was done in the court below. Neil v. State, supra

at 486. The second stage is the determination by the trial court that there was a substantial likelihood that the peremptory challenges were being exercised solely on the basis of race, thus requiring inquiry of the challenging party. Id. at 486.

The State in its omnibus attack on the Third District's decision in this cause, initially takes the erroneous position that the trial court never found there to be a substantial likelihood that peremptory challenges were being execised solely on the basis of race. This attack is based solely on the fact that the court never uttered what the State would have this Court believe to be "magic words." The record of the proceedings below, however, clearly show that such an argument indulges in form over substance. The fact that the trial court found there to be a substantial likelihood that the challenges were being exercised on the basis of race is clear from a reading of the pertinent portions of the record in toto (T-92-95). The trial of the above cause took place subsequent to this Court's ruling in State v. Neil (T-1). We are not confronted here with a pre-Neil or "pipeline" case already in the appellate system prior to this Court's ruling in State v. Neil, supra. Certainly the State cannot be of the opinion that the trial court was unfamiliar with the "Neil procedure" and, in fact, the court's comments in the record clearly indicate exactly the opposite. On three occasions trial counsel began to make an objection on the basis of State v. Neil, supra, only to have it overruled by the court with comments such as, "At this point I will overrule the objection." (T-92); "I will overrule the objection at this time." (T-93-94).

It was only when the prosecutor exercised his fourth challenge against a Black juror, that the court, before trial counsel could make any comment, began to ask the State to explain the challenges of all four Black jurors that had been excused by the State (T-95). Nothing could be clearer but that the trial court made the inquiry contemplated by State v. Neil because of its belief that there was a substantial likelihood that jurors were being exluded solely because of the reason that they were Black.

In fact, it is submitted that it would be error for the court not to have made such a finding under the facts of this case. Subsequent to this Court's decision, the United States Supreme Court entered its ruling in Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). In Batson, the Supreme Court engages in an analysis strikingly similar to this Court's analysis in State v. Neil, supra. The U.S. Supreme Court in discussing the initial threshold showing, uses the term "a prima facie case of purposeful discrimination in selection of the petit jury" as opposed to the Neil language of "substantial likelihood." The U.S. Supreme Court noted that a prima facie case of purposeful discrimination can be shown solely on the evidence concerning the prosecutor's exercise of preemptory challenges at the defendant's trial. In Batson the court went on to say that what the defendant must show is, first of all, that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. This first prong of the Batson test has been clearly established. Further, the defendant is entitled to

rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. To put it another way, that had the challenged jurors been white, they would not have been excused.

By way of guidance, the Supreme Court of the United States gives examples of what may be considered sufficient to establish a prima facie case. The Supreme Court notes that that a "pattern" of strikes against Black jurors included in the particular venire may give rise to an inference of discrimination. Clearly, the same situation as in the case at bar. Also the Court notes that the prosecutor's questions and statements during voir dire examination and in exercising his challenges, may support or refute an inference of discriminatory purpose. The fact that the prosecutor did not even have to ask two of the Black jurors any questions to know that they would not be allowed to sit on any jury in a case he was trying, clearly adds even further weight to the fact that there was a substantial likelihood that no less than three Black jurors were excused solely on the basis of race; or at the very least, create inferences sufficient to establish a prima facie case of purposeful discrimination pursuant to Batson v. Kentucky, supra.

The question which this Court is now confronted with is, once the substantial likelihood and/or prima facie case of purposeful discrimination has been found and the trial court requires an explanation as to why the peremptory challenges have been exercised against Blacks, is it enough for the challenged party to merely proffer any reason other than the color of the juror's skin to meet his burden. If it is, then Justice Marshall in his concurring opinion in Batson v. Kentucky, supra, is correct:

> Any prosecutor can easily assert facially neutral reasons for striking a juror... if such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on non-racial grounds, then the protection erected by the court today may be illusory.

But obviously this Court did not intend that to be the ultimate result of State v. Neil, nor did the United States Supreme Court in Batson v. Kentucky, supra. As Mr. Justice Powell clearly stated: "Peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." Certainly this warning should be in the mind of the court when determining the validity of the proffered reason. It is beyond question that no two people are exactly the same, and no two people have the exact same background; therefore, it is an easy matter for one wishing to discriminate, to seize upon any juror's unique characteristic in order to achieve the desired result, i.e., the exclusion of as many Blacks as possible from the potential jury.

Although, admittedly the reason given need not be equivalent to a challenge for cause, they must show that the challenges are based on the particular case at trial, the parties are witnesses, or characteristics of the challenged persons other than their race. State v. Neil; City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985).

It is precisely this burden which the State failed to meet, as the Third District properly ruled. In light of the evil which Neil and Batson seek to correct, it certainly cannot be seriously argued that the Third District Court of Appeal incorrectly ruled that the reasons given must be sufficiently particularized to show that they are not a mere subterfuge to obscure what is in reality racial discrimination. Both this court in Neil and the United States Supreme Court in Batson v. Kentucky perceived the need to correct a wrong. Further, both courts realized that the test announced in 1965 in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759, which required absolute proof of discrimination and virtually required the prosecutor to admit to his discriminatory practice, was nothing more than a "mission impossible." If the mere substitution of the label "liberal" for "Black" is sufficient under both Neil and Batson then, although the procedure may change, the result will be the same, and as the Phoenix, Swain v. Alabama will rise from its own ashes and continue to be the law of the land.

Certainly there can be no argument that the reasons proffered by the party whose peremptory challenges are being ques-

tioned must be genuine. McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985). This is what bring us, just as it brought the Third District, to the most important question of all; that is, what test is to be used to determine when the reasons are genuine and when they are a mere subterfuge. Confronted with this problem, the Third District drew heavily upon decisions from the State of California, which has had the longest experience with this situation. In passing, it appears odd that the State now argues that Judge Ferguson in his opinion in the court below, should not have relied so heavily on California cases, and particularly, People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rep. 890, 583 P.2d 748 (Cal. 1978). Since it was the State itself which first brought this decision to the attention of the Third District pursuant to the filing of a Notice of Supplemental Authority, the Third District appropriately drew upon these cases (with amazingly similar facts) not for the rule of law, but for the appropriate analysis to be indulged in to determine the legitimacy of the proffered reasons. And although, as the State correctly draws this Court's attention to, the opinion does list five factors which could weigh heavily against the legitimacy of a proffered reason, these five factors were not meant to be all-inclusive (R-46). And certainly, just as these five factors would weigh heavily against the challenged party in determining the legitimacy of the proffered reasons, just as certainly the converse of each of these factors would weigh heavily in support of the legitimacy of the proffered reasons.

As the District Court correctly recognized, even the cold record clearly shows the trial court's problems with the purportedly racially-neutral reasons of the prosecution (T-96-97). The Court's finding that the explanations fell within a "degree of reasonableness" for exercising peremptory challenges for reasons other than race was not, as the State would have this Court believe, a finding that the reasons were legitimate and not a pretext for discriminatory practices; but rather, merely states that the reasons in the abstract are within a degree of reasonableness. This is not the appropriate standard for this Court to adopt. The appropriate standard for this Court to adopt is as the Third District ruled -- that the Court should look behind facially racial-neutral reasons to determine whether or not in light of all the circumstances it can be said that the challenged party has not only met his burden by proffering non-racial reasons, but further, has met his burden of showing that the reasons proffered are legitimate and not merely unique characteristics grasped upon as an excuse for eliminating yet one more Black from jury service.

The factual scenario of this case clearly shows that the Third District was correct in its ruling. As to Mrs. Williams and Mr. Williams (no relation), the reasons given by the prosecution were that since both of them were teachers aides in an elementary school, it indicated a degree of liberalism (T-96). As the Third District properly ruled, this cannot be a sufficient reason to excuse these jurors. In support of this being a

legitimate reason, apparently it is the State's position that if a person is employed in the educational system and his employment requires him to work in an elementary school, then that person can never be a juror in a criminal case and be fair to the prosecution. What makes this even more odd is the fact that one of the major liberal issues of our times has been gun control and that there should be a ban on the general public being allowed to own and possess handguns. Yet the prosecutor still felt that because these people were "liberal", they would not be good jurors for the prosecution in a case involving the carrying of a concealed firearm. The lack of legitimacy of this reason for the removal of these two jurors is inescapable. All this Court need do is look at the fact that Mrs. Williams stated she was afraid of firearms (T-47-48) but was excused by the prosecution. However, another prospective juror, Mr. DiAlmeida was a former member of the National Rifle Association and stated that he did not think the crime of carrying a concealed firearm was too much of a crime (T-25; 28). However, the prosecution did not feel that Mr. DiAlmeida would not be a good juror for them and did not excuse him. Of course, Mr. DiAlmeida was White (SR-1).

The reason for excluding Opie Lee Jordan was similarly insufficient. The reason stated by the prosecutor for Opie Lee Jordan's excusal was that she didn't seem to have good health and that she asked him a question. Of course the question she asked was whether or not it made any difference if she had been in criminal court before, in response to a series of questions the

prosecutor had put to the panel concerning certain legal principles governing criminal trials (T-34-35). At no time did she show any misunderstanding or difficult in comprehending what was going on, nor did she indicate she did not believe she would be able to understand the Court's instructions. In fact, at no time during its questioning of Ms. Jordan did the prosecution inquire of her concerning her health, whether or not her health would interfere with her ability to be a juror, or inquire of her as to her ability to understand the proceedings and understand the principles of law involved. Yet these very areas where the prosecutor failed to ask any followup questions, when confronted with the necessity to justify his challenges, become the reason for the juror's excusal. What is even more amazing, is that this very same prosecutor failed to ask even a single question of Mary Ellen Williams or Frank Williams.

The failure to question is extremely important, as the State in its brief raised a false issue of "mini trials." Nothing in the Third District's opinion or in the opinions of any court that has dealt with this has ever suggested that "mini trials" would be necessary. In fact, an argument such as this was dealt with by the Second Circuit in McCray v. Abrams, supra. First of all, the court observed that any inconvenience was certainly a small price to pay for vindication of a constitutional right. Further, the court observed:

> [N]or do we think the necessary procedures place an uneasonable burden on the court. The process of identifying discriminatory conduct and pretextural

> explanations is performed daily in the course of litigation under Title VII of the Civil Rights Act of 1964 and a host of other statutes. It should not be considered unduly burdensome, in those cases where a prima facie showing has been made, to scrutinize the prosecutor's action when a defendant's life or liberty may be at stake.
>
> Finally, we note in states that have ruled that the prosecutor's use its peremptory challenges is subject to scrutiny under the state constitution, we have seen no indication in the reported authorities or the commentaries that the implementation of such scrutiny as has been required has created an undue burden for the prosecution or the courts.

Further, it appears that the Third District's opinion in Slappy is clearly within the mainstream of the decisions involving this issue over the last few years, and especially since the United States Supreme Court's decision in Batson v. Kentucky, supra. The Missouri Court of Appeals for the Western District, in April of this year, decided State v. Butler, 41 CrL 2081. The similarity to this case is remarkable (or maybe not so remarkable when one considers the underlying current involved in all of these situations.) The Missouri Court first determined that on the basis of Batson, any non-racial reason does not satisfy the "neutral explanation requirement" but, rather, that the explanation must be neutral, related to the case to be tried, clear and reasonably specific, and legitimate. The court thereupon recognized that implicit in the Batson ruling was an inquiry into the legitimacy of the explanations proffered; otherwise, "Batson would become a right without a remedy." Further, the court held that "rubber stamp" approval of all non-racial explanations, no matter how whimsical or fanciful, would cripple

Batson's commitment to "insure that no citizen is disqualified from jury service because of his race."

The Butler court pointed to a number of factors to be looked at in determining the legitimacy of the purported neutral reasons. One of those factors was whether or not the prosecutor was engaging in a process of careful deliberation based on many factors during voir dire or did the prosecutor fail to engage the challenged jurors in more than desultory voir dire or did he ask them any questions at all. It need not be restated which side of the line the proffered reasons in this case fall, when considered in light of this factor. Also, the Butler court indicates that the trial court should look to see whether or not similarly situated White jurors were struck on grounds similar to those that Black jurors were stricken on. Of great interest to this case is the factor of whether or not the explanation sweeps so broadly as to attenuate its validity. What could sweep broader than the term "liberal?"

This Court need only look at the briefs to see that there is no universal agreement on what being a "liberal" means. Counsel for the Defendant thinks of one thing, counsel for the prosecution in the trial court thinks of another, and counsel for the prosecution in this court thinks of yet a third. The Butler court in reversing the defendant's conviction and ordering a new trial pointed out that one Black juror was removed for the stated reason that she was a nurse (probably another notoriously liberal profession) but failed to remove a White juror who worked for the

American Nurses Association. Further, the prosecutor did not question three of the excluded jurors at all during voir dire.

Although the Butler court draws on many decisions from various state and federal jurisdictions, it does not draw on the Third District's decision in this cause. Yet, using similar reasoning, similar logic, and confronted with similar facts, arrives at the exact same conclusion. The right conclusion, the constitutional conclusion.

Of course now, two and one half years later, the Assistant Attorney General assigned to this cause and representing the Petitioner, has now come up with even more reasons for exluding the three Black jurors in question. It is submitted that this Court should pay no deference at all to these reasons, as they are no more than an after-the-fact attempt to justify the impermissible actions by the prosecution, just as the Third District recognized that the reasons put forth by the prosecutor in the trial court were similarly motivated.

Our democratic society requires that the jury be a body truly representative of the community. Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940). In selecting the members to be this representative body, we must always be mindful of the Supreme Court's words in Thiel v. Southern Pacific Company, 238 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946):

> Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The ramifications of this case are far beyond what happens to Charles Slappy. Mr. Slappy's probation has expired and he has fully served the sentence imposed upon him by the trial court. Rather, it is the words of the Supreme Court of the United States in Ballard v. United States, 329 U.S. 187, 195, 67 S.Ct. 261,265 (1946) of which we must be mindful:

> [B]ut reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community.... the injury is not limited to the defendant -- there is 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 our of courts.

CONCLUSION

It is therefore submitted that based upon the argument, cases and policies cited in this brief, that this Honorable Court should approve the decision of the Third District Court of Appeal and affirm the reversal of the Defendant's conviction and remand this cause to the trial court for a new trial.

Respectfully submitted,

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By: _____
MICHAEL H. TARKOFF
FOR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: CHARLES FAHLBUSCH, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 14 day of August, 1987.

FOR MICHAEL H. TARKOFF