SUPREME COURT OF FLORIDA

CASE NO. 77,127

EBONY HALL, etc., et al,

Petitioners,

-vs.-

HOSAIN DAEE, M.D., et al,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA
DISTRICT COURT CASE NO. 88-1628

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

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STATEMENT OF THE CASE AND OF THE FACTS

This case is before the Court on a question certified as being of great public importance, pertaining to the evolving issue of racial discrimination in jury selection. Petitioners were the Plaintiffs at the trial court level and the unsuccessful Appellants in the District Court. The decision of the Third District denying rehearing and certifying the question herein considered provides the following overview of the pertinent facts and the issue:

> The facts relevant to this one issue are briefly stated. Plaintiffs, James and Emily Hall, the parents of Ebony Hall, brought suit against Dr. Hosain Daee, Dr. Raul Hernandez, and James Archer Smith Memorial Hospital, for malpractice for injuries their daughter allegedly sustained at birth.
>
> During voir dire, the trial court allowed the defendants to pool their peremptory challenges. Of the thirty-five veniremembers, six were black; five of those six were reached in voir dire four of those five were the subject of defendants' peremptory challenges.
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> * * *
>
> When the plaintiffs, who are black, objected to defense counsels' striking of the four black potential jurors, claiming the strikes were being exercised in a racially discriminatory manner, the trial court carefully considered plaintiffs' motion and determined that there was no need to inquire as to the defendants' reasons for the strikes.
>
> The plaintiffs argue that the final judgment must be reversed and a new trial ordered, where the trial court failed to conduct an inquiry as to why the defendants struck four out of five black veniremembers. The plaintiffs claim that this panel's majority decision does not conform to State v. Neil . . ., and its progeny. We do not agree.

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Hall v. Daee, 15 FLW D2827, at 2827-28 (Fla. 3d DCA 11/20/90).

In reiterating its affirmance of the trial court's refusal to conduct a Neil inquiry, the Third District held that the record did not "demonstrate that there was a strong likelihood that the jurors were challenged solely on the basis of their race." Id. at 2828. Cited as support for that determination was the following: "Of these five [black panel members reached in voir dire], three had close ties to the medical community." Id.

Chief Judge Schwartz wrote a vigorous dissent from the denial of rehearing, which in essence was based upon the belief "that the exercise of defense peremptory challenges to remove four out of five black potential jurors demonstrated, on the face of it, a 'strong likelihood' that the challenges were motivated by an impermissible bias against African-Americans . . . ." Id. at 2829 (Schwartz, C.J., dissenting).

The question certified as being of great public importance is phrased as follows:

> WHETHER, AS A MATTER OF LAW, A NEIL INQUIRY MUST BE CONDUCTED BY THE TRIAL COURT, EVEN THOUGH THE TRIAL COURT FOUND THERE HAD BEEN NO CHALLENGE OF JURORS ON A RACIALLY DISCRIMINATORY BASIS, WHERE THE DEFENDANTS EXERCISED PEREMPTORY CHALLENGES ON FOUR OUT OF FIVE BLACK PROSPECTIVE JURORS?

15 FLW D2827 at 2829. This proceeding ensued.

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SUMMARY OF THE ARGUMENT

The certified question should be answered in the affirmative, because the record reflects a sufficient showing of the likelihood of prejudice, notwithstanding the trial court's finding to the contrary. The use of peremptory strikes to eliminate each and every black on the panel who was reached in voir dire (until the Defendants had exhausted their strikes) is sufficient showing to shift the burden of showing nonracial reasons for the strikes to the party exercising them.

It is not enough to say in retrospect that there were some nonracial reasons reflected in the record, even without a Neil inquiry. Were the law to be that a trial court's pre-inquiry finding of nonprejudicial grounds is absolutely determinative, there would be an unacceptable risk of not ascertaining the striking counsels' true motives, because of subtle prejudices held by the trial courts themselves, as opposed to the prejudices of the attorneys.

There should be some reasonable objective standard of probable prejudice, which invokes the duty to conduct a Neil inquiry, so as to reduce the risk that subconscious prejudices by the trial judges taint their decisions as to whether to inquire in the first place. Especially in light of America's longstanding practice of prejudice against blacks (which we are finally coming to admit), there should be some recognition that the striking of some number of potential

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black jurors, such as a "majority-of-the-minority," will trigger a duty to inquire as to the reasons therefor.

This Court recently recognized such an objective standard where a party strikes every African-American from the panel. Even if the Court should not accept the proposition that striking most of the sitting blacks should trigger a Neil inquiry, the reasoning which recognizes such a duty where every black is stricken should hold true where every black who is reached in voir dire is stricken, until the side excusing them runs out of strikes.

As an alternative to establishing such an objective standard for inquiry, the facts of the present case compel an affirmative answer to the certified question still, for the record supports a finding that one or more of the stricken black panel members were removed solely on the basis of impermissible racial considerations. The Third DCA's justification for the trial court not inquiring into counsels' motives--that some of the African-Americans had "close ties to the medical community"--is not persuasive. The record reflects that white jurors who actually served in the case had family ties to the medical profession themselves, yet they were not stricken by the defendants.

Even without an objective, numerical standard of fewer-than-all panel members, which invokes the duty to inquire into motives, where the same type of background applies to panel members of both races--yet the blacks are stricken and the whites allowed to serve--courts should deem improper prejudice as sufficiently shown to ask the party exercising such strikes to go forward with an explanation

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of some other valid grounds.

Assuming that it could be said that the record supports a finding that racial prejudice was not the "sole" basis for striking the African-Americans from the jury, this Court still should answer the certified question affirmatively, and take the opportunity to clarify one troubling point. AFTL contends that a Neil inquiry is called-for wherever discrimination is a but-for cause for striking jurors, even if not the sole articulable reason for excusing panel members. It is going to be a rare case in which no inquiry is conducted, yet the trial or reviewing courts cannot come up with some reasonable explanation for a strike, especially after being assisted by the counsel who struck the jurors looking back on his or her actions after being accused of discrimination. Therefore, under either of these analyses, the trial court should have asked the Defendants to state the grounds for their strikes.

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ARGUMENT

I.

THIS COURT SHOULD ESTABLISH A REASONABLE OBJECTIVE STANDARD WHEREBY THE STRIKING OF FEWER-THAN-ALL BLACK PANEL MEMBERS GIVES RISE TO A PRESUMPTION OF PREJUDICE SUFFICIENT TO CALL FOR A NEIL-TYPE INQUIRY

The Academy of Florida Trial Lawyers agrees with Chief Judge Schwartz in his dissent from the decision under review: "that the exercise of defense peremptory challenges to remove four out of five black potential jurors demonstrated, on the face of it, a 'strong likelihood' that the challenges were motivated by an impermissible bias against African-Americans . . . ." 15 FLW D2827 at 2829 (Schwartz, C.J., dissenting).

It must be emphasized that there were thirty-five jurors voir-dired and twenty-eight reached in jury selection--only five of whom were black--before the six who served on the jury were selected. While a single African-American did serve on the jury[1], he was the twenty-fifth panel member to be reached in voir dire, and the defense side already had used-up their peremptory strikes before that juror, Mr. Lowry, was reached. By way of demonstration, AFTL will summarize what occurred to allow Mr. Lowry to sit, through no choice or sense of racial equality on the part of the defense.

Twenty panel members sat in the first venire, three of whom were black: Ms. Dixon, Mr. Parekh, and Mr. Coley. The Defendants,

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[1]Another black was an alternate but did not deliberate.

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having been permitted to pool their strikes for a total of nine, used their first one on Mr. Parekh, who came to this country from Kenya, Africa. (Tr. 55, 183). The defense used its sixth strike to eliminate Mr. Coley. (See Tr. 309). Ms. Dixon was left as the only African-American on the first venire, when fifteen more panel members were brought up to sit, the defendants having three remaining strikes. (Tr. 300). There were three black Americans on the second panel, Ms. Thornton, Mr. Lowry, and Ms. Tiggett.

While the panels were questioned by the parties en masse, it is significant to note that the procedure employed by the trial court was for the parties to consider each juror individually, until such time as the first six remained without having been stricken. (Tr. 300-301). After the parties finished questioning the second panel, all of the parties initially passed as to the first juror in that group, an African-American named Ms. Thornton. (Tr. 301). The Defendants then used their seventh peremptory to backstrike Mr. Palomo, who had been one of the five remaining from the first panel. (Tr. 302). That brought juror Suarez into consideration. Plaintiffs backstruck Ms. Bolado, so the next one reached was Mr. Gonzalez. (Tr. 303). Thereupon, the defense used their next-to-last peremptory to strike Ms. Thornton. (Tr. 305). The Plaintiffs renewed their call for a Neil inquiry. (Id.).

At this juncture in the jury selection, the defense had one strike left, there was one black still under consideration, Ms. Dixon (who was juror no. 2 from the first venire and who had been sitting while the parties struck others who followed her, as far

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down the list as the twenty-third member), and the next black on the second panel (Mr. Lowry) was second-in-line to be considered. Plaintiffs still had two peremptories left (see Tr. 312), so it seemed inevitable that Mr. Lowry would be reached. The defense thereupon used its last peremptory strike to remove Ms. Dixon from the jury. (Tr. 311). It was impossible for the defense to have stricken both Mr. Lowry and Ms. Dixon, so they struck one of them, and Mr. Lowry sat on the jury. It was not a matter of the defense evenhandedly choosing to leave an African American on the jury, it was a matter of selecting which one they would strike!

This Court adopted one measure of objective criterion which would give rise to a presumption of racial prejudice, in the case of Reynolds v. State, 16 FLW S159 (Fla. 1/31/91), holding that "[t]he act of eliminating all minority venire members, even if their number totals only one, shifts the burden to the [striking party] to justify the excusal upon proper . . . motion." Id. at S160 (emphasis added). Accord., Knowles v. State, 543 So. 2d 1258 (Fla. 4th DCA 1989) (use of peremptory to strike the sole black person from panel). The Academy of Florida Trial Lawyers submits that a more reasonable standard should be laid down, for if ninety-nine out of one hundred blacks were stricken, the trial court should conduct a Neil inquiry, regardless of its belief that some other nondiscriminatory grounds existed.

This case would be a good one to impose the standard that the striking of a majority of the black panel members is enough to shift the burden of explaining nondiscriminatory reasons to the

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striking party. Other decisions seemed to be leaning toward a standard of fewer-than-all in establishing such an objective criterion, such as this Court's decision in State v. Slappy, 522 So. 2d 18 (Fla. 1988), where four out of six black potential jurors were stricken[2]. See also Bryant v. State, 565 So. 2d 1298 (Fla. 1990) (burden satisfied on showing that party used five out of first seven strikes against blacks).

If this Court decides not to adopt a standard such as a "majority-of-the-minority," another available standard should be considered, which would apply to the facts of this case: the defense struck every black who was reached to be considered in voir dire, even if they could not strike them all.

Unless it is expressly held that some objective standard of fewer-than-all (such as striking most of the blacks on the panel or all of the blacks reached in voir dire), is reason enough to require that nondiscriminatory reasons be stated, then all that would need to be done to avoid having to explain is for the striking-party's attorney to ask a few perfunctory questions first. It would be tragically unfair to allow a bigoted lawyer to go unchallenged--not even to have to articulate some plausible-sounding ground for striking nine out of ten or so able panel members--because he or she premeditated the acts of racism long enough to know to ask a few questions of the already-doomed panel

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[2] Slappy stopped-short of so holding, however, because in addition to having stricken the majority of blacks, the attorney in question had done so without even questioning them, a fact noted by this Court in its decision.

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members.

An objective standard would afford more protection than from coldly-calculating bigoted attorneys, but would help to guard against the subtle prejudices instilled in many through no fault of their own. While none of us likes to admit to the chance that a trial judge or two out there harbors prejudices against blacks, it can scarcely be denied that there are subconscious motivations and orientations in all of us, even the jurists.

American society is, finally, owning-up to a history of racial prejudice that will take a long time to overcome, both emotionally for the victims thereof and in changing the actions of those who perpetuated the cycle, whether intentionally or out of habit and thoughtlessness. As part of the acceptance of that history, we recognize the need to take affirmative action to overcome the ill effects of such discrimination. AFTL submits that this Court must and should act affirmatively to undo the pattern of injustice which has for too long insidiously invaded the courts, not through acts of conscious racism by judges, but by inertia of inaction. If a trial court's threshold determination of no entitlement to a Neil inquiry always is dispositive, notwithstanding the sheer weight of the numbers of stricken minority members and other proof of prejudice, then the subtle prejudices within never will be beaten.

Absent a standard of objective measure which would invoke a Neil inquiry, even the most honorable of judges could erroneously allow discrimination by seeing some plausible reason for the strike, which may or may not even have occurred to the attorney

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striking the blacks. Well-meaning prejudice should not be any more accepted or encouraged than is hateful prejudice.

II.

IN THE ALTERNATIVE TO RECOGNIZING OBJECTIVE STANDARDS FOR REQUIRING ARTICULATION OF NONDISCRIMINATORY REASONS FOR STRIKING AFRICAN-AMERICANS, THIS COURT SHOULD ANSWER THE QUESTION AFFIRMATIVELY ON THE FACTS OF THIS CASE

In the event that this Court should decide against imposing objective standards of requiring nondiscriminatory motives in striking black jury panel members, the certified question should be answered in the affirmative in any event, because the facts of this case compel a preliminary finding of probable discrimination, which needed to be refuted with a statement of nondiscriminatory grounds for the exercise of peremptory strikes on blacks.

The only allegedly-nondiscriminatory explanation for not inquiring into the Defendants' motives is that set forth by the majority decision of the Third District as follows: "Of these five [black panel members reached in voir dire, four of whom were stricken], three had close ties to the medical community." That explanation is no justification for striking the African-Americans, (even in the hindsight way it is offered in support of Defendants' position), because the majority of the non-black jurors who were not stricken and sat on the jury also had ties to the medical community!

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Juror Martinez stated in voir dire that her "cousin is in medical school in Minnesota." (Tr. 85). Mrs. Traurig has a daughter who is married to a physician and a sister-in-law who is a nurse. (Tr. 92). Juror Perez, when asked if he had "close relatives or very close friends in the medical field, either doctors of nurses," answered: "Friends, yes." (Tr. 226). While the Defendants may point to quantitatively-closer ties to the field by stricken blacks, the fact remains that the qualitative feature of the stricken African Americans which supposedly evidenced the absence of discrimination was shared by the non-black jurors who served.

Thus, this case is similar to a Third District case in which that court reversed the trial court's failure to conduct a Neil-type inquiry following the state's use of four out of seven of its peremptory strikes against blacks, "where the record tends to show that those who were peremptorily challenged did not indicate any partiality or inability to judge fairly . . . [and] 'the black people questioned did not sit any different[ly] than those who [were] not excluded . . . .'" Norwood v. State, 559 So. 2d 1255, 1256 (Fla. 3d DCA 1990).

As stated above, it should not be held to be a determinative factor in this case that a single African-American actually served on the jury, for the record reflects that the black juror sat fortuitously, and not as the result of any fair decision on the part of the Defendants to keep Mr. Lowry. Defendants had exhausted their peremptory strikes before reaching him, having finally used the last one on black panel member Mrs. Dixon, who had been the

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second juror in the first venire of twenty. (Tr. 311).

With all due respect to the learned trial court, it appears that any nondiscriminatory grounds for the strikes in this case did not leap out in support of the decision not to inquire into defense counsels' motives. The first thing the trial court did when the objection was made was not to cite to a nondiscriminatory ground as a possible reason for the strikes, but to state: "Perhaps I missed the case that has extended the Neal [sic] decision to the civil cases." (Tr. 306). When assured that the principle had been held applicable to civil litigation, the trial court said: "First I want to see the case [so holding], then I'll make the decision." (Id.) Any finding which would support a decision not to inquire was a mere afterthought, which should be held to be not conclusive.

Briefly in closing on this discussion[3], the Court should use this case as an opportunity to clarify one troubling aspect of the language of State v. Neil, 457 So. 2d 481 (Fla. 1984). That is the part of the decision which established the threshold for shifting the burden of showing nondiscriminatory grounds for peremptory strikes as "a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race." 457 So. 2d at 486 (emphasis added). Race ought not to be a permissible matter to consider at all in the selection of a fair jury, so if any part

[3]The undersigned and AFTL urge the Court not to consider the brevity of this discussion as reflective of its lack of importance, and to recognize that simple time constraints have prevented a deeper analysis of the matter. It is hoped that a little seed will be planted which is better than saying nothing on the point.

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of the decision to strike a juror is determined to have been likely based upon race, the burden ought to shift to show some legitimate nonracial grounds for the decision to strike the juror.

AFTL will not go into a discussion as to the propriety of allowing racial discrimination to be a nonexclusive, yet valid consideration in the peremptory striking of a juror, except to say that it would be a tragedy to allow a party to say something like: "I struck juror Smith for two reasons: one, because he is a liberal social worker; two because he is black and so is the Plaintiff." The propriety of such a situation is not now before the Court, because the only issue at bar is whether an inquiry should have been made to see if to see if there was some articulable nonracial reason for the strike[4]. At issue here is what degree of showing ought to be made to give rise to a duty to inquire into counsel's reasons.

It seems to great a burden to ask a complaining litigant to make a showing that racial discrimination was the likely sole reason for peremptorily striking an African-American juror. Would not it be fair to require a statement of ground where a complaining party shows that "but-for" the venire-member's race, he or she

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[4]Of course, if such an inquiry had been made and some plausible-sounding reason were not given, the only logical conclusion is that racial discrimination was the sole reason, and the strike of the jury would be error. It seems that under the current law, once a legitimate reason is stated as a part of counsel's grounds for the strike, the decision will be affirmed. AFTL will, therefore, reluctantly live with the idea that partial discrimination within striking counsel's decision making process is still permissible, and go onto the narrow point under review.

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would not have been stricken, even if race was not the only matter considered?

Under the current statement of the standard for an inquiry under Neil, a trial court declining to inquire into reasons for a party striking a black panel member could hold: "I find that the complaining party has shown that ninety percent of the reason that the adversary struck Juror Johnson was because she was black, but ten percent of the reason was lack of any higher education." At the risk of sounding flip, race under such circumstances would not have been the "sole" reason, so no duty to inquire into counsel's decision would arise. That should not be the law. Any showing of racial discrimination sufficient to have been a but-for cause of the exercise of a peremptory strike should be held to be enough to inquire under Neil.

CONCLUSION

WHEREFORE, for the reasons stated herein, the certified question should be answered in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail upon Betsy Gallagher, Esq., KUBICKI, BRADLEY, DRAPER, GALLAGHER & McGRANE, P.A., 25 West Flagler Street, Miami, FL 33130; Joe N. Unger, Esq., LAW OFFICES OF JOE N. UNGER, P.A., 606 Concord Building, 66 West Flagler Street, Miami, FL 33130; Steven E. Stark, Esq., FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., 11th Floor Courthouse Center, 175 N.W. 1st Avenue, Miami, FL 33128; Debra Snow, Esq., STEPHENS, LYNN, KLEIN & McNICHOLAS, 9100 South Dadeland Blvd., Miami, FL 33156; and STANLEY M. ROSENBLATT, P.A., 12th Floor Concord Building, 66 West Flagler Street, Miami, FL 33130, on this the 16th day of February, 1991.

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