IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,127

FLORIDA BAR NOS: 094953
158499

EBONY HALL, by and through her parents and natural guardians, JAMES HALL and EMILY HALL, and JAMES HALL and EMILY HALL, individually,

Petitioners,

v.

HOSAIN DAEE, M.D., HOSAIN DAEE, M.D., P.A., RAUL HERNANDEZ, M.D., CITY OF HOMESTEAD, d/b/a JAMES ARCHER SMITH HOSPITAL, and THE FLORIDA PATIENTS COMPENSATION FUND,

Respondents.
_____/

AMICUS CURIAE BRIEF OF THE NATIONAL BAR ASSOCIATION

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INTRODUCTION

This Brief is filed on behalf of Florida Chapter of the National Bar Association as Amicus Curiae.

STATEMENT OF THE CASE AND FACTS

The following question has been Certified to this Court as one of great public importance:

> 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 prospective jurors?

The selection of jurors in this medical malpractice case in March 1988 in Dade County, Florida, reflects blatent and overt racially-motivated peremptory challenges. A black, Afro-American family sued non-black professionals. In a total jury panel of thirty-five prospective jurors, there were six black jurors. Five black jurors were reached and four out of the five were challenged by the defendants. The defendants ran out of challenges so they were forced to have one black on their jury.

The trial judge, Judge Sidney Shapiro, refused to conduct a Neil inquiry, declaring that the Plaintiffs still had one black on their Jury. For the very first time, in the appellate court, the defendants suggested that the four black jurors were excused because they had "ties to the medical community". Numerous white jurors who were not excused by the defendants had similar such medical ties. Those same white jurors, on an objective basis, were

far less desirable jurors in that several indicated it would be difficult to keep sympathy out of their Verdict.

The Majority Opinion of the Third District Court of Appeal grants a trial court almost unbridled discretion in making the threshhold determination as to whether or not a Neil inquiry should be conducted. According to the Majority Opinion, even where the Plaintiffs are black and non-black defendants exercise peremptory challenges against four out of five black jurors, the trial Judge would nevertheless have broad discretion in determining whether he deemed it necessary to conduct a Neil inquiry. Chief Judge Schwartz' dissent in both the original Opinion and the Opinion on Rehearing, Clarification and Certification, is well-reasoned and sets forth the correct law.

SUMMARY OF THE ARGUMENT

This Court should answer "Yes" to the question certified by the Third District Court of Appeal. A Neil inquiry is mandated where non-black defendants excuse four of five prospective black jurors in an action brought by a black family.

It is difficult to determine just how "the trial court found there had been no challenge of jurors on a racially discriminatory basis" when no Neil inquiry was ever conducted. This is particularly true where the trial court expressed surprise when Plaintiffs' counsel argued that Neil and Slappy had been extended to civil cases by City of Miami v. Cornett, 463 So.2d 399 (Fla.3d DCA 1985). The trial judge was hardly on the look out for racial discrimination.

A careful review of the Voir Dire examination in this case conclusively points to one and only one conclusion. Jurors were excused because of the color of their skin. This is impermissible under Florida law and particularly in this, at times, divided multi-ethnic community of Dade County, Florida.

ARGUMENT

AS A MATTER OF LAW A NEIL INQUIRY MUST BE CONDUCTED BY THE TRIAL COURT WHERE THE DEFENDANTS EXERCISED PEREMPTORY CHALLENGES ON FOUR OUT OF FIVE BLACK PROSPECTIVE JURORS.

The Certified question should be answered affirmatively. The National Bar Association has intentionally deleted the trial court's "finding" of no racial discrimination, since there is no basis in the record for such a finding, without a Neil inquiry.

There should most certainly be an automatic shifting of the burden of proof to the party exercising peremptory challenges where, as here, four out of five black prospective jurors are challenged. Under the facts of this case, the excusal of four or five black jurors was tantamount to excusing all blacks, since the defendants simply ran out of challenges. Where all black jurors are excused, even where there was only one prospective black juror, the burden automatically shifts to the party exercising the challenges and a Neil inquiry must be conducted. Reynolds v. State, _____ So.2d _____ (Fla. Case No. 75-680, Opinion filed 1/31/91 [16 FLW S159]); Floyd v. State, 511 So.2d 762 (Fla.3d DCA 1987); Parrish v. State, 540 So.2d 870 (Fla.3d DCA 1989).

Trial Judge Shapiro appeared to be of the opinion that there could be no "systematic" challenge of black jurors if one black juror remained on the panel. Firstly, a "systematic" pattern need not be shown -- Thompson v. State, 548 So.2d 198 (Fla.1989). Furthermore, the fact that one or more black jurors ultimately

serve on the Jury in no way justifies racially - motivated peremptory challenges. See State v. Slappy, 522 So.2d 18 (Fla.1988); Thompson v. State, 548 So.2d 198 (Fla.1989); Bryant v. State, 565 So.2d 1298 (Fla.1990).

A review of the Voir Dire examination reveals that had the trial Judge properly conducted a Neil inquiry, it would have been impossible for defense counsel to present legitimate, racially-neutral reasons for the excusal of the four black jurors. The Neil inquiry should not be conducted before this Court -- the trial Judge has the obligation to closely and carefully scrutinize the reasons presented to ascertain whether they are in fact legitimate racially - neutral reasons. State v. Slappy, supra.

This record reflects that whatever possible reasons defendants can now come up with to justify their excusal of black jurors, would be equally applicable to white jurors that were selected to serve on the Jury. This disparate treatment "weighs heavily" against an acceptable racially - neutral reason and requires a new trial. See Parrish v. State, 540 So.2d 870 (Fla.3d DCA 1989); State v. Slappy, supra and Floyd v. State, 511 So.2d 762 (Fla.3d DCA 1987).

Judge Schwartz really says it all in his dissenting Opinion:

> I continue to believe 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 -- one which was especially understandable, although certainly not excusable, in a case like this in which black Plaintiffs were

suing non-black professional defendants. . . I believe that because of the sensitivity of the issue and the announced policy that "any doubts as to the existence of a 'likelihood' of impermissible bias must be resolved in the objecting party's favor," Thompson v. State, 548 So.2d 198, 200 (Fla.1989) (citing State v. Slappy, 522 So.2d 18, 21-22 (Fla.1988), cert. den. 487 U.S. 1219, 108 S.Ct. 2873, Bryant should control. Accordingly, I would hold that the trial court reversibly erred by declining to put the defendants to the Slappy test of presenting an acceptable race-neutral explanation for their challenges. In my view, therefore, the Judgment below must be reversed.

CONCLUSION

Racial discrimination in any form is abhorrent and should be eliminated, to the best of our abilities. Ebony Hall and her family deserve a new trial. This Court should take this opportunity to advise the trial bar and trial judges that they must be color blind when exercising peremptory challenges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 18th day of February, 1991 to: Stanley M. Rosenblatt, Esquire, 66 West Flagler Street, Penthouse, Miami, Florida 33130; Betsy Gallagher, Esquire, Penthouse, 25 West Flagler Street, Miami, Florida 33130; Debra Snow, Esquire, Stephens, Lynn, Klein & McNicholas, P.A., Suite 1500, One Datran Center, 9100 South Dadeland Boulevard, Miami, Florida 33156; Steven Stark, Esquire, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 175 N.W. 1st Avenue, Courthouse Tower, 11th

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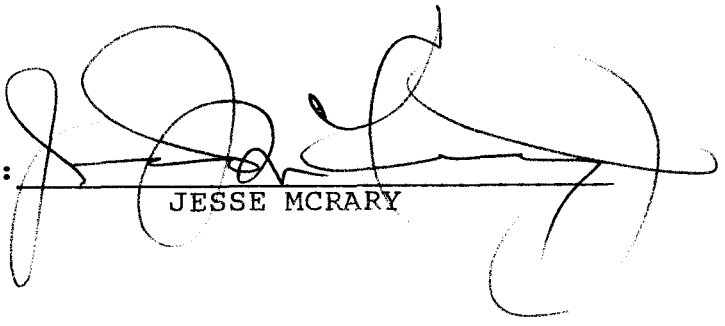
By: 
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