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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,692

DORIS ELIZABETH BROOKS
etc., at al,

Petitioners,

-vs.-

MASOUD MAZAHERITEHRANI,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND OF THE FACTS

This proceeding arises out of a personal injury case which was tried before a jury to a verdict in favor of the Plaintiffs, who are the Petitioners herein. At the time of jury selection, trial counsel for the Plaintiff (who is black and whose clients were black) requested that the trial court inquire into Defendant's counsel's reasons for attempting to exercise peremptory challenges on three black jury pool members. Upon inquiry, Defendant's counsel made reference only to those prospective jurors' "economic situations" and made one other vague reference to one of the panel members having perhaps "a history of some sort of problem with being involved in a lawsuit," the details of which he did not write down or discuss because, as counsel put it: "I usually have formulated in my mind what I want to do pretty much." (Tr.[1]5).

Upon Plaintiffs' counsel's comment that "Judge, that is half-hearted," the trial court made the following findings as to defense counsel's motives in attempting to strike the black panel members:

> THE COURT: Do you have any comment?
>
> Well, let me say this, gentlemen, with no reflection on Mr. Hoey. The Court is of the opinion that it is done with a racial basis.
>
> I try a lot of cases. In the old days, with some blacks on the jury, there is a black plaintiff, you struck them out and that was accepted practice because it was peremptory.

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[1]The transcript in question is an excerpt from the trial proceedings conducted on May 23, 1989.

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> I don't know how we are going to work this out, but it seems apparent that you are just taking the black people off. You have got a black lawyer and [he has] a black client, and I am going to rule that you did it on a racial basis.

(Tr. 5).

Acknowledging that the Supreme Court had, in State v. Neil[2], 457 So. 2d 481, 487 (Fla. 1984), uttered dictum stating that in such a situation the trial "court should dismiss that jury pool and start voir dire over with a new pool," Plaintiff's counsel asked the court instead to deny Defendant's strikes and to allow those black jurors the opportunity to sit in service. (Tr. 6). The trial court adopted that procedure and trial commenced. (Tr. 10).

Defendant appealed from the judgment in favor of Plaintiffs which followed the jury's verdict, and the only issue decided by the District Court was whether the trial court erred in disallowing the Defendant's strikes of the black jurors. See Mazaheritehrani v. Brooks, 573 So. 2d 925 (Fla. 4th DCA 1990). The Fourth District reversed the trial court, holding that "[t]he proper remedy" would have been to start anew with another pool. Id. at 925. This proceeding ensued.

The Academy otherwise accepts the Statement of the Case and of the Facts as set forth by the Petitioners, being the parties whose position the Academy supports in this Amicus Brief.

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[2]The court reporter apparently misunderstood counsel's references to Neil and typed the name "Heath" where that case was cited.

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SUMMARY OF THE ARGUMENT

The Academy by this brief supplies a voice for the otherwise most silent participants in the jury system--but the most important ones--the jurors and prospective jurors who interrupt their daily lives to decide the cases which the "professionals" in the justice system spend their lives preparing for the moment of that decision. While the Academy supports the Plaintiffs' position that their rights as litigants are impaired by the procedure which the District Court found is proper, the Academy will not present any argument on that point and will instead address another fundamental issue: the rights of the jury pool members to participate in the world's greatest system of justice, and to be free from being excluded because of the color of their skins.

That right of participation overrides the importance of any single lawsuit to the parties, because it is that sense of unity from being a functioning part of our system which shapes society's perceptions of our entire culture. Those perceptions are the forces which direct our actions in our daily lives and which form the fabric of our social order. Whether or not the remedy of starting over with a new panel does justice in any given case for the parties, it is unjust to the prospective jurors who are denied their right to be a part of the system of justice. Therefore, to disallow jurors that right is possibly to shatter their sense of belonging and notion of fairness, or at best to prevent those excluded panel members from forming those perceptions. Without

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such fundamental perceptions as we in America believe are needed as a foundation for a lifetime of actions, the victims' behavior will not comport with the social order which we have come to expect. The cycle of injustice and unhappiness which has accompanied racial discrimination throughout history will be perpetuated by a rule of law which puts more distance between black Americans and whites.

There is only one procedure which will act as a remedy for the type of thinly-disguised prejudice present in the present case: allow the jury panel members to fulfill their societal role and to sit as judges of the facts. To do less is to only give lip service to a policy of equality.

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ARGUMENT

THE DECISION OF THE DISTRICT COURT IS AS VIOLATIVE OF THE RIGHTS OF THE JURORS WHO WERE THE TARGETS OF RACIAL DISCRIMINATION AS WERE THE ACTIONS OF DEFENDANT IN ATTEMPTING TO STRIKE THEM

While the Academy fully agrees with the Petitioners' position regarding their rights as parties to fairness in the process of jury selection, the Academy will not repeat those arguments here. Petitioners' rights will be ably advocated by their counsel of record. By this Amicus Curiae Brief, the Academy endeavors to become the voice of the many, many prospective jurors who have unlawfully been precluded from serving, and of the innumerable others who will not in the future be permitted to serve, absent positive action by this Court now. At the outset it must be noted that jurors and jury panel members have no voice, other than this one. There is no organization which meets to assert the rights of the venire; no lobbying of the legislature is done on their behalf; they are not represented by counsel at trial. Those who do succeed in exercising their rights to serve are never heard, save through their verdicts. Those countless more panel members who are not chosen have no way at all to speak, no way to voice their outrage when the reason for the slight is unlawful racial discrimination, and no way to obtain relief therefrom. This is their only voice.

Because, unlike the jurors, the parties to lawsuits have voices which can be heard, it is not surprising that it is the rights of the litigants that is the subject of most discussions on

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this subject. However, the rights of the prospective jurors to serve have been recognized for more than one hundred years: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . As long ago as Strauder[v. West Virginia, . . . 100 U.S. 303 . . . (1880)] . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." Batson v. Kentucky, 476 U.S. 79, 87, 106 S. Ct. 1712, 1718 (1986). This Court too has emphasized the importance of the jurors' right to serve, holding that "our citizens cannot be precluded improperly from jury service." State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988). Striking the entire venire and starting over again does nothing to remedy that well-established form of racial discrimination.

The remedy of allowing the victims of such blatant racism to serve is necessary to preserve an aspect of our system of justice which is more fundamental than the rights of the particular parties to the lawsuit: the very fabric of our social order is held together by the common thread of equality in jury service. It is that more basic right--the right to be part of the process--which is the subject of the following recent discussion by the United States Supreme Court:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. See Duncan v. Louisiana, 391 U.S. 145, 147-158, 88 S. Ct. 1444, 1446-1452, 20 L. Ed. 2d 491 (1968).

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* * *

And, over 150 years ago, Alex De Tocqueville remarked:

> "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.
>
> * * *
>
> " . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.
>
> * * *
>
> "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ." 1 Democracy in America 334-337 (Schocken 1st ed. 1961).

Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people. See Green v. United States, 356 U.S. 165 . . . (Black, J., dissenting). It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Duncan, supra, 391 U.S. at 187 . . . (Harlan, J., dissenting). Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Powers v. Ohio, _____ U.S. _____, 111 S. Ct. 1364, 1368-69 (1991).

There can be no doubt that the injury sustained by a juror

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stricken on account of race is such a deep wound as to threaten the fabric of our society. "A venireperson excluded from jury service on account of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts . . . ." Powers, supra, 111 S. Ct. at 1372.

There is no other viable remedy for a violation of this basic right of jury service than to permit a juror who has been the victim of an attempted discriminatory strike to sit on the case. The U.S. Supreme Court has recognized the difficulties with other remedies:

> The barriers to a suit by an excluded juror are daunting. Potential jurors . . . have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs . . . . And there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. . . . The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate [her or] his own rights.

Powers, supra, 111 S. Ct. at 1373. Even were an excluded juror to obtain a judicial decree of the wrongfulness of that act, and even if a money award were made, neither of those remedies would begin to replace the missing feeling of participation and involvement in the justice system which is the most fundamental of rights under our law. Thus, permitting the juror to sit is the only real remedy

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which exists.

It seems obvious that the injury which results from racially discriminatory conduct such as exists in this case is at least as severe an injury, and one as worthy of protection, as would be a wound to the flesh of the excluded juror. If, instead of trying to strike her from the venire, an attorney had reached into the jury box and struck a black juror in the face with his fist, would it be any relief to that injured panel member for the trial judge then to pummel the rest of the panel until they were bloody? It would not ease the pain one bit.

The only shred of an excuse for the "remedy" of excusing the whole panel is to analogize it with the act of punching all of the jurors in the face simultaneously; maybe the real targets of malice will not know that their skin color is the cause of disallowing them to serve, so they will not feel so badly about the situation. That excuse does not comport with at least three policies which we should be advancing in dealing with this subject.

First, it does not make the racially-excluded jurors any more of a part of the process to exclude others as well. As stated above, even today's U.S. Supreme Court recognizes the importance of actually becoming a functioning part of the system of justice.

Second, the "remedy" of striking the entire panel does not advance the cause of racial neutrality in jury selection, because that bigoted attorney who struck the blacks gets what was wanted in the first place, a panel without them on it! What is to stop that bigot from striking the blacks from the second panel (if there are

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any) and the third, and so on, until he or she gets that lily-white row of faces which he or she prefers? Instead of making it more likely that a racially-balanced jury will sit, the procedure of striking the whole panel makes that prospect remote.

Third, in these days and times of financially-strapped courts, why would we fashion the most expensive "remedy" in terms of time and effort? Can anyone explain how it could be worth the cost and delay to start voir dire over again from the top? Judicial economy is a worthy enough goal in and of itself; it is even better when the attainment of that goal is enhanced by adopting procedures which further the interests of every aspect of the justice system.

The language of Neil upon which the District Court relied to reverse the trial court's judgment should be held inapplicable on the facts of this case. The premise upon which this Court advised that a new pool should be summoned was as follows: "[I]f the party has actually been challenging prospective jurors solely on account of race. . . ." 457 So. 2d at 487 (emphasis added). Clearly, this Draconian remedy was intended for the situation in which the party already had exercised peremptory challenges, and the minority jurors had been excused by the court. Once those victims of racial discrimination had been excused and sent packing from the courtroom they can scarcely be recalled and reseated. In the present case that problem was not present. The jurors had not yet been excused, so there was no need to discharge the rest of the panel and start anew. The discrimination was remedied in the best and only way it could have been, by allowing the victims thereof to sit on the jury.

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Perhaps it is the reluctance to tamper with the traditional ways of doing things that resulted in the District Court's holding that the procedure described in Neil of striking the panel applies to even the present situation. That method superficially allows us to "have-our-cake-and-eat-it-too" by sparing the victim from being singled-out and sent packing alone, while preserving the hallowed ground of permitting unconditional peremptories. The Academy is of the blunt opinion, however, that a racial bigot has neither a right to strike a juror for that reason, nor any interest worthy of accommodating by a policy which accomplishes that goal on seeming neutral grounds. Perhaps there can be no "deterring" a true bigot with the knowledge that the bigotry will be unsuccessful, but the procedure which is employed at least should not have the promise of practical success which would only encourage the discriminatory use of strikes.

In conclusion, the Academy reminds the Court of the simple nature of the jurors' right which is the subject of these cases: a prospective juror "possess[es] the right not to be excluded from [a jury] on account of race." Powers, supra, 111 S. Ct. at 1370 (emphasis added). That right cannot be protected by a procedure which only pays lip service to it and results in the same harm of the juror being excluded from participation! For the sake of the rights of the jurors and for the sake of social order which is built on the foundation of equality in participation, this Court should approve the procedure of disallowing racially discriminatory peremptory strikes.

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CONCLUSION

WHEREFORE, the decision of the District Court being in direct conflict with the decisions of this Court which recognize the right of jury panel members not to be discriminated against by reason of their race, the decision under review should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies hereof were served by mail, upon Moses Baker, Jr., Esq., SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A., P.O. Drawer 3626, West Palm Beach, FL 33402; Philip M. Burlington, Esq., EDNA L. CARUSO, P.A., Suite 4-B, Barristers Bldg., 1615 Forum Place, West Palm Beach, FL 33401; William E. Hoey, Esq., VERNIS & BOWLING, 204 River Plaza, 900 South U.S. Highway One, Jupiter, FL 33477; and Richard H.W. Maloy, Esq., 605 Ocean Drive, Suite 4M, Key Biscayne, FL 33149, on this, the 5th day of August, 1991.

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