D.A. 12-4-91

IN THE SUPREME COURT OF FLORIDA

Case No. 77,692

DORIS ELIZABETH BROOKS,
etc., et al.

Petitioners,

v.

MASOUD MAZAHERITEHRANI,

Respondent.

_____/

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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INTRODUCTORY STATEMENT

The Respondent, under telephonic instructions from the Court on September 19, 1991 Court files an Amended Brief which incorporates his answer to Briefs filed by both Amicus Curiae.

STATEMENT OF THE CASE AND THE FACTS

The Respondent has no objection to the Statement of the Case and the Facts which appear in the Petitioner's Brief or the Brief of Amicus Curiae the Academy of Florida Trial Lawyers. The Attorney General as Amicus Curiae simply accepts the Petitioner's Statement of the Case and Facts, to which the Respondent takes no exception.

SUMMARY OF ARGUMENT

Even if a racial basis for peremptory challenges is impermissible under constitutional "impartial jury" provisions, which has been questioned by a recent United States Supreme Court decision, we strongly deny that such was the basis of the challenges in question. The "impartial jury" provision of Florida's Constitution is the only basis for Petitioner'a position in the Record of this case. If there is any constitutional basis for the Petitioner's objections to the challenges the Respondent has an equally stong constitutional protection against being forced to proceed to trial with three jurors he considers unsuitable for reasons which are valid peremptory challenge reasons.

The Petitioner's argument to the effect that at most harmless error was committed by the trial judge has no mreit since harmless error cannot neutralize the infraction of a constitutional right.

None of the cases cited by the Attorney General, as Amicus Curiae, contain an expository statement on the propriety of allowing the trial judge an option of disallowing the peremptory challenge, improperly based on racial reasons; and none of them consider the mandate of the Constitutional principles which the Respondent asks this Court to consider.

ARGUMENT

I

WHETHER DISMISSAL OF THE JURY POOL AND RECOMMENCING OF VOIR DIRE WITH A NEW JURY POOL SHOULD BE THE ONLY REMEDY FOR RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES

If this Court accepts the position of the Petitioner and Amicus Curiae, it will seriously restrict, if not entirely remove the peremptory challenge from the jurisprudence of this State.

We wish to make it clear at the outset that the Respondent denies that the three peremptory challenges in this case were exercised in an attempt to eliminate from the jury persons of a distinct racial group. (R 95). Because the basis of the trial judge's ruling was the one upon which State v. Neil, 457 So. 2d 481 (Fla. 1984), was based, (i.e. the right to an impartial jury under Article I, Section 16 of the Florida Constitution) 1 even were we to admit, which we do not, that the basis of the peremptory challenges was racial discrimination, such would not constitute impermissible challenge. In Holland v. Illinois, 493 U.S. _____, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990), the United States Supreme Court held that the 6th Amendment to the United States Constitution (which is the federal counterpart of Article I, Section 16 of the Florida Constitution), is not violated by striking jurors on the basis of race. 2

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1 See R 96-98 where the Neil stenographically referred to in error as State v. Heath. The Petitioner tacitedly acknowledges the basis of the trial judges ruling on pages 9-12 of her Brief.

2 Such activity is certainly prohibited by the United States Constitution, but not under the "impartial jury" provision of the 6th Amendment.

Even if the Petitioner had taken the position that the peremptory challenges were impermissible on the basis of the United States Constitution's Fourteenth Amendment equal protection provision, the ruling of the trial judge would constitute error as violating the due process clause of that same constitutional provision. In Gray v. Mississippi, 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987) the United States Supreme Court held that the loss of peremptory challenges, does not equate with the violation of constitutional rights, under the Sixth and Fourteenth Amendments, but we submit that requiring a litigant to go to trial with a jury composed of persons he validly considers as unsuitable is a violation of the constitutional protection of not being deprived of one's property without due process of law.

Under the Fourteenth Amendment to the United States Constitution, as well as under Article I, Section 9 of the Florida Constitution, the Respondent cannot be deprived of his property without due process of law. Yet this is precisely what happened in this case. The Respondent was forced to go to trial before three persons he did not wish to serve on his jury because he believed that they would not make suitable jurors in his case. (R 95) If the trial judge is permitted to disallow peremptory challenges we will have a situation where under conditions which existed in this case, except in rare instances, litigants are going to be forced to go to trial with persons on the jury who are unacceptable to them, not because of their race, but for valid reasons. In this case the plaintiff, the plaintiff's

lawyer, and all three of the jurors attempted to be stricken by the defendant's trial counsel were of the same race. Under such facts it would be entirely reasonabe to conclude that the challeges were racially motivated. Most judges try to give effect to our Constitutions and statutes, and many of them remember the days when bigotry was accepted practice in many areas of our country. The statements of the trial judge in this case illustrate the point:

> "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. "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 a black client, and I am going to rule that you did it on a racial basis." (R 96).

No one can argue that such a ruling was an abuse of discretion, and the vast majority of judges faced with the same situation would find racial prejudice, because it seemed "apparent". We submit that by forcing a litigant to go to trial with a jury he finds unsuitable for valid reasons, simply because racial discrimination could <u>possibly</u> be the reason creates an additional wrong in its attempt to right the first wrong, i.e. a deprivation of his property without due process of law.

In Scull v. Florida, 569 So. 2d 1251 (Fla. 1990) this Court said:

> "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parites .... In this respect the term 'due process' embodies a fundermental conception of fairness that derives ultimately from the natural rights of all individuals".

Forcing a person to go to trial with a jury not of one's choosing for reasons upon which the peremptory challenge was formulated, (and not for impermissible reasons), certainly does not comport with the above definition of due process.

To the argument advanced that impaneling new juries is expensive, we cannot equate cost with the violation of a litigant's due process rights.

There is little discussion, either in opinions or treatises, of the question presented by this proceeding. On page 15 of her Brief the Petitioner cites some jurisdictions that allow the trial judge to deny the peremptory challenges. The opinions in those decisions do not discuss the procedure. The Petitioner cites cases which touch upon the method approved in Neil. People v. Wheeler, 583 P. 2d 748 (Cal. 1979), (page 15 of the Brief), was extensively considered by this Court in Neil. The Petitioner also cites (on page 15) Riley v. State, 496 A. 2d 997 (Del. App. 1985). The Second Circuit Court of Appeals in McCray v. Abrams, 759 F. 2d 1113 (2d Cir. 1984) said that the court should declare a mistrial and a new jury should be selected from a new panel. None of the cases, however, treat the subject in depth. The prevention of racial bias in Civil Jury selection was the subject

of an article in The Florida Bar Journal - Vol. LXIII No. 10 November, 1989, at page 69; and not one word was said in opposition to the method of rectification provided in the Neil case.

The Petitioner says that Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) and Clark v. City of Bridgeport, 645 F. Supp. 890, 894 (D.C. Conn. 1986) stand for the proposition that racial discrimination in the selection of jurors harms not only the parties to the action, but also the excluded juror who is denied the opportunity to participate in the judicial process. Whether or not those cases are authority for such propostion, we heartily agree that racial discrimination, in any context, is wrong, and should not be tolerated for the reasons set forth in Petitioner's Brief, those cases and reasons not expressed in either the Brief or the cases. We fail to see the relevance of that point to the question of whether this court should modify the method of righting that wrong which it has promulgated in Neil. The United Supreme Court in Batson, supra, moreover, made it very clear that it declined to formulate particular procedures to be followed in cases wherein discrimination is claimed in jury selection:

> "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges. [24]

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24 In light of the variety of jury selection practices in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason we express no view

> on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, See Booker v. Jabe, 775 F. 2d at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see United States v. Robinson, 471 F. Supp. 467, 474 (Conn. 1976), mandamus granted sub nom. United States v. Newman, 549 F. 2d 240 (C.A. 1977).
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> (See 106 S. Ct., page 1725).

The United States Supreme Court in Gray v. Mississippi, supra, at footnote 13, indicates that dismissing the venire and starting "afresh" is the acceptable method.

Clark v. City of Bridgeport, 645 F. Supp. 890 (D. CT, 1989), (cited on page 13 of Petitioner's Brief), is of no help to the Petitioner. There the court dismissed the juries, and placed the cases on the following month's trial callendar. It did not use the same venire.

The Petitioner cites Fludd v. Dykes, 863 F. 2d 822, 828 (11th Cir. 1989), on page 13 of her Brief, for the proposition that when people are discriminatorily excluded from jury service the discriminatory actor is the trial judge. Though the decision does contain wording from which Petitioner's conclusion is derived, the case in no way finds fault with dismissing the panel and staring over with a new one.

Powers v. Ohio, _____ U.S. ____, 111 S. Ct. 1364, (1991), cited on page 7 of the Brief of Amicus Curia, Academy, speaks of the harm done to the venireperson. We submit that in light of

Holland v. Illinois, supra, this reference must refer to the venire, rather than to the petit jury. The Court did not address the harm done to the litigant who is deprived of property without due process of law, because that issue was not before the Court. We submit, however, that the litigant's Fourteenth Amendment rights are of at least equal value to those of veniremen.

II

WHETHER THE JUDGMENT SHOULD BE AFFIRMED
BASED ON THE HARMLESS ERROR DOCTRINE

While the peremptory challenge is not of constitutional origin, the United States Supreme Court stated in Pointer v. United Stated, 151 U.S. 396. 14 S. Ct. 410, 38 L. Ed. 208 (1894), that the ability to exercise peremptory challenges is one of the most important of the rights of an accused. We submit that it is just as valuable to the defendant in a civil action. The United States Supreme Court stated in Ross v. Oklahoma, _____ U.S. _____, 108 Sup. Ct, 2273, 101 L. Ed. 2d 80 (1988), reh. den. _____ U.S. ____, 109 S. Ct. 11, 101 L. Ed. 2d 962 (1988) that denial or impairment of a peremptory challenge is reversible error without a showing of prejudice. The United States Supreme Court in Gray v. Mississippi, supra, held that a Sixth Amendment right is so basic that its infraction cannot be treated as harmless error. A violation of the due process clause must be treated equally.

ARGUMENT

III

WHETHER DISALLOWING RACIALLY MOTIVATED PEREMPTORY CHALLENGES IS A PROPER REMEDY FOR IMPROPER USE OF SUCH CHALLENGES AS ARGUED BY THE ATTORNEY GENERAL

While not stating so specifically, The Attorney General's Brief indicates that there is a trend in this country toward giving the trial judge the discretion to remedy the wrong of excluding jurors, peremptorily, on the basis of race. There is no such trend.

The case of Perez v. State, 16 F.L.W. 2211 (cited on page 9 of the Amicus Brief, is of no help, as it did not reach the issue before this Court.

Amicus offers four cases from Texas (on page 10) in his Brief: Sims v. State, 768 S.W. 2d 863 (Tex. App. 1983), rev. dism'd 792 S.W. 2d 81 (Tex. Cr. App. 1990), Keeton v. State, 724 S.W. 2d 58 (Tex. Cr. App. 1989), Henry v. State, 729 S.W. 2d 732 (Tex. Cr. App. 1987) and Chambers v. State, 750 S.W. 2d 264 (Tex. App. 1989). Only the Henry case appears to support the position that the trial judge has discretion to apply either remedy, e.g. dismissing the panel or overruling the challenge. In Sims it appears that there was agreement in the lower court as to the procedure used, since the appellant was not permitted to complain on appeal. In Keeton the case was merely remanded for an inquiry as to whether the challenge was racially oriented - the so-call "Batson" Inquiry. Chambers indicates that the statute, requiring a dismissal of the array, must be followed.

Amicus cites two New York cases in support of the position "disallowing improper challenge is considered an appropriate remedy by the New York courts .... ": People v. Davis, 537 N.Y.S. 2d 430 (Sup. Ct. 1988), and People v. Piermont, 542 N.Y.S. 2d 115 (Westchester Cnty, 1989). We not not believe that the Davis case stands for that proposition, but in candor, we must concede that the Piermont does support that position. Following the spirit, if not the letter of Rule of Professional Conduct 4-3.3 (a)(3), we feel constrained to point out that the New York Court of Appeals has indicated in People v. Kern, 75 N.Y. 2d 638, 554 N.E. 2d 1235, 555 N.Y.S. 2d 647 (1990), at page 658 of 555 N.Y.S. 2d that disallowing the peremptory challenge is acceptable practice in the New York courts.

Neither of the Massachusetts cases cited on page 10 of the Amicus Brief discusses the merits of allowing the trial judge to disallow the peremptory challenges; but they did permit that procedure.

The Maryland case of Chew v. State, 71 Md. App. 681, 527 A. 2d 332, stating the words quoted on page 10 of the Amicus Brief, noted that "There is the lurking danger, of course, that an unsuccessfully challenged juror may now bear an animus against the challenger arising from the challenge itself". See page 344.

We acknowledge the quote from the Alabama case, cited on page 11 of the Amicus Brief.

In addition to the lack of any exposition on the part of the courts, whose opinions have been cited by Amicus, not one of them appars to have considered the impact of the Constitutional pro-

hibition against the taking of property without due process of law, which the Respondent asks this Court to consider. See pages 5-7 of this Brief on the Merits. We submit that had those courts considered the constitutional point vis-a-vis the propriety of giving the trial judge an option of disallowing the peremptory challenges, those courts would have taken the view espoused by the Respondent herein, to the effect that the only constitutionally accepted method of handling the situation is to dismiss the panel and start anew, as this Court has already proclaimed in State v. Neil, 457 So. 2d 481 (Fla. 1984).

CONCLUSION

Since no valid reason has been offered for reversing the decision of the lower court, its judgment should be affirmed.

Respectfully submitted this 26th day of September, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on September 26, 1991 I mailed a copy of the foregoing Brief to Searcy, Denney, Scarola, Barnhart & Shipley, P.A. (Att'n Moses Baker, Jr., Esq.) P.O. Drawer 3626, West Palm Beach, FL, 33402 and to Edna L. Caruso, P.A. (att'n Philip M. Burlington, Esq.) Ste. 4-B/Barristers Bldg., 1615 Forum yPlace, West Palm Beach, FL, 33401, the attorneys of record for the Petitioner in this cause; and to Barbara Green, Esq., % Freidin, Hirsh, Green & Gerrard, P.A., Courthouse Tower, 44 W. Flagler St., Miami, FL, 33130, Ste. 2500 and Roy D. Wasson, Esq., 44 W. Flagler St.,, Ste. 402, Miami, FL, 33130, attorney for Amicus Curiae, The Academy of Florida Trial Lawyers, and Charles M. Fahlbusch, Esq., Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Ave., Ste. N 921, Miami, FL, 33128, attorney for Amicus Curia, The State of Florida.

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