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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,507

TONY JEFFERSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

****

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the Appellee and the prosecution, respectively, in the lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's Appendix, which contains a conformed copy of the appellate court's opinion.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts, as it appears at pages 2 through 5 of his initial brief, to the extent the statement represents an accurate, non-arugmentative recitation of the proceedings below, and only to the extent necessary for the resolution of the issues raised on appeal. The State accepts the statement subject to the following emphasis and clarifications:

1. At one point during voir dire the trial court explained to the jury panel that a matter of law had come up that must be resolved. He then dismissed the jury panel for a 15 minute recess. (R 37-38). The Neil/Slappy inquiry began and ended outside the presence of the jury.

SUMMARY OF ARGUMENT

The Petitioner suffered no prejudice when the trial court refused to dismiss the entire venire after having denied the State's peremptory challenge to the sole black juror because he was a pastor. Petitioner's Sixth Amendment rights to an impartial jury and a representative cross section of the county was not violated by the denial of the peremptory challenge. Petitioner's Equal Protection rights under the Fourteenth Amendment have not been violated since the peremptory challenge was denied. The dismissal of the entire venire, under the facts of this case, is not warranted since no prejudice inured to the Petitioner and the Petitioner can identify no consitutional rights of his that have been violated.

ARGUMENT

WHERE THE TRIAL COURT FINDS THAT A PEREMPTORY CHALLENGE IS BASED UPON RACIAL BIAS AND DENIES THE PEREMPTORY CHALLENGE THE TRIAL COURT SOLE REMEDY IS NOT TO DISMISS THE JURY POOL AND TO START VOIR DIRE OVER WITH A NEW JURY POOL IF THE DISCRIMINATORY TAINT IS CURED.

In the instant case three jury panels were called before a jury was actually picked. (SR 82-86,88, R 10,55-56). Voir dire was conducted over a two day period, February 15-16. Reverend Gaskins was called in the second panel on February 15. (R 88). The State prosecutor did not move to strike Reverend Gaskins on the first day. On February 16, after the vior dire of the third panel, but before either party moved to use their peremptory challenges the trial judge advised the jury panel as follows:

> COURT: Alright ladies and gentlemen, we're going to get into the actual selection of this jury. We will be selecting six of you and one alternate. The rest of you, of course, will be excused and those that are not selected, that will complete your jury service and of course you do not have to report back. Some of you may be excused and if you are excused please obviously don't take any offense of being excused by the attorneys. Your honesty and your integrity is not being questioned. Each side has a certain number of what we call peremptory challenges. They can challenge anyone of you and they do not have to give me any reason. I don't have any control over it and that's governed under our Criminal Rules of Procedure. (R 35-36).

The trial court then discussed peremptory challenges outside the hearing of the jury. After a full discussion the trial court then called out the names of those potential jurors who

had been dismissed. Those potential jurors never knew who actually had moved to strike them from the jury. In the instant case, a discussion was held between the parties regarding peremptory challenges. The trial court then informed the jury panel that "[a] matter has been presented to the Court on a matter of law that I've got to resolve out of your presence." The trial court then recessed for 15 minutes. (SR 37-38). After the jury left the courtroom the trial court conducted a Neil inquiry into why the State was asking the trial court to excuse Reverend Gaskins. See State v. Neil, 457 So.2d 481 (Fla. 1984).

The trial court noted for the record that Mr. Gaskins was the only black on the panel and the defendant is black. (R 38). Under a properly held Neil hearing the trial court should have had the Petitioner demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. Only if the trial court decides there is a substantial likelihood that peremptory challenges are being exercised solely on the basis of race does the burden shift to the State to show that the questioned challenges were not exercised solely because of the prospective jurors' race. This proceedure was not followed in the present case.

Sub judice, the trial court felt that it was enough that Reverend Gaskins was the only black on the panel. The State gave the following reason for excusing Reverend Gaskins:

> State: Your Honor, the reason the State is asking to excuse Reverend Gaskins is because of the fact that he is a full-time minister. If it were a white man that was a minister, I would feel --- have the same feelings towards him because of their feelings dealing with the church and forgiveness and knowing how they think about parishioners and so forth. The --- the thing that bothers me is that in fact the Defendant's father is a Bishop and is also a minister and has his own church. Apparently he has testified to that in the past. And I would anticipate that at some point in time, that may come out in his testimony and that might influence Mr. or Reverend Gaskins' opinion as well. It's not because of race but because of the fact that his occupation is a full - time minister. He made it very clear that he was a full - time minister. That he does the bus driving as a part-time profession for Head Start. There has been testimony by the Defendant about his religious upbringing, uh, where he has testified before and his, you know, religious connections. And it is for those reasons and not the fact that he is the only black. If it were any other minister, I would probably have the same feelings because of their profession and -- and just their whole being. I mean that's the reason they go into that field.

(SR 38-35). The Fourth District Court of Appeals in McKinnon v. State, 547 So.2d 1254 (Fla. 4th DCA 1989) approved of such a reason for excusing a potential juror. Nevertheless, the trial judge in this case could not "conceive" that the State would excuse a prospective juror for that reason and ruled that the State must be striking Reverend Gaskins for a racially motivated reason. (R 40-41). The trial court then denied the peremptory strike by the State. The defense attorney then moved to dismiss the jury venire and start all

over. The trial court denied this request. The State pointed out for the record that the potential jurors on the jury panel were ignorant that a motion to excuse Reverend Gaskins has been made. (SR 41).

The jury panel was returned to the court room. The tria judge announced that it was ready to proceed with the selection of the jury and would take the challenges as to the next six potential juros -- Mrs. Scott, Mrs. Marcel, Reverend Gaskins, Mrs. Rodgers, Mrs. Lien and Mr. Giodona. (R 42). In other words the trial court continued as if nothing had happened.

The Petitioner alleges that State v. Neil, supra set forth the only remedy permissible when a challenge has been determined to be racially motivated. That is the trial judge must dismiss the jury pool and start voir dire over with a new pool. State v. Neil, 457 So.2d at 487. Petitioner maintains that the trial court's failure to comply with the mandate of Neil violated the Sixth Amendment of the United State's Constitution, Article I, Section 16 of the Florida Constitution, the Equal Protection Clauses of the Fourteenth Amendment and Article I, Section 2 of the Florida Constitution.

Respondent maintains that Neil does not mandate a dimissal of the jury venire when the defendant's constitutional rights have not been violated. For the reasons stated below, the Respondent alleges that the Petitioner's constitutional rights have not been violated.

Therefore, the trial court was correct in denying his request for the dismissal of the jury venire and to begin vior dire with a new venire.

Well over a century ago the Supreme Court of the United States decided Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed 664 (1880). The Supreme Court held that a statute barring blacks from service on grand or petit juries denied equal protection of the laws to a black man convicted of murder by an all-white jury. Since that time the Supreme Court has reversed numerous conviction on equal protection grounds where state laws or practices excluded potential jurors from service on the basis of race. See Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L.Ed 2d 598 (1986); Castaneda v. Partida, 430 U.S. 482, 97 S.Ct 1272, 51 L.Ed 2d 498 (1977); Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed 2d 536 (1972); Sims v. Georgia, 389 U.S. 404, 88 S.Ct 523, 19 L.Ed 2d 634 (1967) (per curiam); Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed 2d 25 (1967) (per curium); Coleman v. Alabama, 377 U.S. 129, 84 S.Ct. 1152, 12 L.Ed 2d 190 (1964) -just to name a few. In all of these cases the defendant's equal protection rights were violated because blacks had been excluded from the jury and the defendant was black. In 1965 the Supreme Court in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed 2d 759 (1965) considered an equal protection claim against peremptory challenges by the prosecution for the first time. In that case the prosecutor used his peremptory challenges to strike

six prospective black jurors from the venire. The defendant was convicted and sentenced to death by an all-white jury. Nevertheless, the Supreme Court of the United States rejected the defendant's equal protection claim.

Despite Swain various States began to pave the way for the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986). For example in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the California Supreme Court held that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the defendant's right to trial by a jury drawn from a representative cross section of the community. In Wheeler the defense attorney became aware that the state was using its peremptory challenges in a systematic effort to exclude any and all qualified blacks from serving on the petit jury. The Defendant objected and moved for a mistrial so that they could try to get a fair cross section of the community. Seven black potential jurors were struck. The defendant felt that he had presented a "prima facia case of abuse." The trial court did not require the prosecutor to give his reasons for excusing the black jurors. The defendant was eventually tried and convicted by an all white jury.

In Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499 cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed 2d 110 (1979) the Massachusett's Supreme Court was faced with a similar situation. In Soares the prosecuting attorney used

his peremptory challenges to excuse 12 of 13 potential black jurors from the jury venire. One black man was not challenged and was seated. The defendant claimed that he was deprived of a fair trial and the right to be tried by an impartial jury. The Massachusett's Supreme Court reasoned that the systemtic exclusion of identifiable segments of the community from the jury venire deprived the defendant of his constitutional right to a jury drawn from a fair and representative cross-section of the community via the Sixth Amendment to the United States Constitution. The court in Soares noted that a minority defendant is unable to prevent the elimination of members of his minority from the jury through the use of peremptory challenges. On the other hand the minority defendant is also powerless to exclude the majority members of the venire since the members exceed the number of peremptory challenges available. The result is a jury in which the subtle group bias of the majority are permitted to operate, while those of the minority have been silenced. Thus, the defendant's Sixth Amendment right to a jury drawn from a representative cross-section of the community is violated when the prosecution is permitted to use peremptory challenges to exclude members of the defendant's miniority from serving on the jury.

In both Wheeler and Soares the defendant must first establish a "prima facie case" of invidious discrimination, after which the burden shifts to the State to come forward with a neutral explanation of challenging black jurors.

Thus, the challenge must be so flagrant as to establish a prima facie case. This is not so easy as the Petitioner in this case would like to believe. See Commonwealth v. Robinson, 383 Mass. 189, 195, 415 N.E. 2d 805, 809-810 (1981) (No prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); People v. Rousseau, 129 Cal. App. 3d 526, 536-537, 179 Cal Rptr 892, 897-898 (1982) (no prima facie case where prosecutor peremptorily strikes the only two blacks on jury panel.)

This Court in State v. Neil, supra, did not fully embrace either Wheeler or Soares, choosing, instead, to go along with New York in People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S. 2d 739 (1981). In Thompson the prosecutor used a substantial number of peremptory challenges to exclude at least ten blacks from the jury and no blacks sat on the defendant's jury. In Neil the prosecutor used his peremptory challenges to excuse three blacks from the jury venire. The defense then used all of its peremptory challenges in an effort to reach the remaining black prospective juror, who eventually served as an alternate juror. State v. Neil, at 482-483.

This Court stated in Neil the following rule to be followed:

> Instead of Swain, the trial courts should apply the following test. The initial presumption is that peremptories will be exercised in a non-discriminatory manner. A party concerned about the other side's

> use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained - about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

State v. Neil, 457 So.2d at 487. This Court noted that in some cases it may be that no member of a distinct group could be impartial. In those cases the attorney must be able to state with particularity that the peremptories are being exercised because of empathy or bias. State v. Neil, 457 So.2d at 487. It appears that this Court in Neil is also basing its decision on the Sixth Amendment right to a representative cross-section of the community and the Sixth Amendment guarantee of an impartial jury.

Five years after the Supreme Court of the United States decided Swain it revisited the issue, and overruled Swain, in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986). In Batson the prosecutor once again used his peremptory challenges to excuse all four of the black persons on the venire, so that a jury composed only of white persons was selected. Defense counsel moved to discharge the jury because of the discriminatory exercise of peremptory challenges violate the defendant's Sixth Amendment rights. Id., at 112-115, 90 L.Ed 2d at 98, (Burger, C.J., dissenting). The Supreme Court nonetheless declined to decide the question on the Sixth Amendment question, Id., at 85, n. 4, 106 S.Ct 1712, 90 L.Ed 2d at 79, and rested the decision in the defendant's favor entirely on the Equal Protection Clause. In doing so the Supreme Court rejected the fair-cross-section principle analysis on which the courts in Wheeler, Soares, Thompson and Neil relied upon in reaching those decisions. Indeed the rejection of the Sixth Amendment analysis to the impermissible use of peremptory challenge to eliminate members of a racial minority is made perfectly clear in the Supreme Court's recent decision in Holland v. Illinois, 493 U.S. ___, 110 S.Ct. __, 107 L.Ed 2d 905 (1990).

Holland involved a white defendant. A venire of 30 potential jurors, two of whom were black, had been assembled for Holland's trial. The prosecution used his peremptory challenges to strike the only two black venire members from the petit jury. The defense objected citing to Batson. The

trial judge overruled the objections. The defendant in Holland asserted that the prosecutor intentionally used his peremptory challenges to strike all black prosepective jurors solely on the basis of their race, thereby preventing a fair cross section of the community from being represented on his jury in violation of his Sixth Amendment right. Holland, 107 L.Ed 2d at 914. The Supreme Court explicitly held that the Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on innumerable other generalized characteristics." Holland, 107 L.Ed 2d at 921. Thus, Petitioner's reliance on the Sixth Amendment right to be tried by a fair and impartial jury drawn from a representative cross section of the county is misplaced. Holland makes it clear that the prosecutor's use of peremptory challenges to exclude members of a racial minority solely on the basis of their race is not prohibited by the Sixth Amendment.

In Batson the Supreme Court held that the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race. Batson v. Kentucky, 476 U.S. at 86, 90 L.Ed 2d at 431. Batson emphasized the necessity of racial identity between the defendant and the excluded jurors. Id., at 96, 90 L.Ed 2d 87. The Supreme Court in Peters v. Kiff, 407 U.S. 493, 33 L.Ed 2d 83, 92 S.Ct 2163 (1972) noted that "the Court has never intimated that a defendant is the victim of unconsitutional discrimination if he does not claim that

members of his own race have been excluded." Id., at 509, 33 L.Ed 83, 92 S.Ct 2163. See also Alexander v. Louisana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed 2d 536 (1972) (Black defendant cannot claim that he himself has been denied equal protection by alleging exclusion of women from grand jury service.)

It is clear that a black defendant's equal protection rights are not violated unless black jurors are dismissed from the jury venire for racially motivated reasons and the black defendant is forced to go to trial minus the excluded jurors. Not one case cited in the Petitioner's brief involve a situation where the minority juror was not dismissed although a peremptory challenge had been lodged against the minority juror without the potential juror's knowledge. Again looking at the pertinent language in Neil this Court stated, "...if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool." State v. Neil, 457 So.2d at 487. This Court stated that the proper remedy in a situation where prospective jurors have been dismissed solely on the basis of race is to dismiss the jury pool and begin all over again. Exclusion of minority jurors from the venire through racially motivated peremptory challenges depletes the venire of a fair representative cross section of the community. This reasoning is based on this Court reliance on Wheeler and Soares, in part, and Thompson, completely. Neil does not

speak to a situation where a potential violation has been averted by the denial of the peremptory challenge -- especially where the potential jurors were ignorant of any problem.

The Supreme Court of the United States announced in Batson a principle which was to be narrowly applied. It announced an equal protection right of defendants not to be tried by juries from which members of their race have been intentionally excluded. In fact the striking of a single black juror for a racial reason violates the equal protection guarantee, even if other black jurors are seated, and even if there are valid reasons for striking other black jurors. See State v. Slappy, 522 So.2d 18 (Fla. 1988) (Six peremptory challenges were used to exclude blacks from the panel, although all four had indicated an ability to serve as fair and impartial jurors); Blackshear v. State, 521 So.2d 1083 (Fla. 1988) (Prosecutor used eight of ten peremptory challenges to exclude black from the jury resulting in a jury comprised entirely of whites, with one black alternate); Thompson v. State, 548 So.2d 198 (Fla. 1989) (Prosecutor used his peremptory challenges to excuse all eight blacks sitting on the initial panel at voir dire, four of which were allegedly contrary to Neil; Roundtree v. State, 546 So.2d 1042 (Fla. 1989) (The State struck ten black jurors); Reed v. State, 560 So.2d 203 (Fla. 1990) (Prosecutor used eight of his ten peremptory strikes to excuse blacks from the jury); Floyd v. State, 569 So.2d 1225 (Fla. 1990) (Defendant

contended that the state exercised a peremptory challenge to excuse the sole black propsective juror remaining on the panel solely for racial reasons); Williams v. State, 574 So.2d 136 (Fla. 1991) (State used peremptory challenges to strike four blacks from the venire); Reynolds v. State, 576 So.2d 1300 (Fla. 1991) (The sole black venire member available for service was peremptorily stricken by the state for no valid reason); Wright v. State, 16 F.L.W. S595 (Fla. August 29, 1991) (Defendant objected after the State peremptorily excused three blacks members of the venire); Green v. State, 16 F.L.W. S437 (Fla. June 6, 1991) (State sucessfully challenged three black jurors peremptorily over defense objections); Carter v. State, 550 So.2d 1130 (Fla. 3rd DCA 1989) (The state exercised peremptory challenges to excuse two black venire-members and the trial court found that the potential jurors had been wrongfully excluded on the basis of race. Thus, the trial court should have dismissed the jury pool and started voir dire over with a new jury pool); Palmer v. State, 572 So.2d 1012 (Fla. 4th DCA 1991) (The defendant objected to the voir dire selection of his jury on violations of State v. Neil. The defendant argued that a new panel was not necessary had the trial court disallowed the challenged strikes. In that case it appears that strikes were firest disallowed and then allowed, thus, tainting the jury's impartiality).

Moreover, a citizen has a long standing right to particiapte in the administration of justice. In State v.

Slappy, 522 So.2d 18,22 (Fla. 1988); cert. denied, 108 S.Ct. 2873 (1988) this Court stated that "jury duty constitutes the most direct way citizens participate in the application of our laws." Recently, the Supreme Court of the United States held that a white defendant, who has no equal protection claim under Batson, has standing to raise an equal protection objection on behalf of the jurors who are excluded by the use of a race-based exercise of peremptory challenges. The Supreme Court now holds that a juror has an equal protection right not to be excluded from a particular case through peremptory challenge and that the right of the juror may be raised by a party in the case. Powers v. Ohio, 499 U.S. __, 111 S.Ct. ___, L.Ed 2d 411 (April 1, 1991). The Supreme Court in Powers states that, "... a member of the community may not be excluded from jury service on account of his or her race..." and, "...An individual juror does not have the right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." Id. at 423-424. Without going into the far-reaching ramifications of Powers, it is now certain that the Supreme Court considers the violations of a jurors right not be excluded from a jury on account of race such a paramount right that it has granted third-party standing to litgants who wish to contest the use of racially based peremptory challenges.

The Petitioner approves of the Powers decision. (AB 7-8). Nevertheless, the rememdy the Petitioner asks this Court

to grant in order to redress a potential but averted violation of his equal protection ironically violates the jurors equal protection in violation of the recent Supreme Court ruling in Powers. The Sixth Amendment guarantees the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community. Petitioner has never argued that Reverend Gaskins and the remaining members of the jury venire were biased, prejudiced and incapable of being an impartial jury. Petitioner has never claimed the jury venire was not composed of persons representing a fair croms section of the community. Indeed, he objected to the peremptory challenge by the State of Reverend Gaskins on the grounds that he was the only black potential juror and that if he was struck for racially motivated reasons the jury venire would no longer be a representative cross section of the community. The trial court denied the peremptory challenge and Reverend Gaskins remained on the jury. The Petitioner cannot now say that since Reverend Gaskins sat on the jury that the jury venire was not composed of persons representing a fair cross section of the community. In sum, Petitioner's Sixth Amendment rights have not been violated because the trial judge allowed Reverend Gaskins to remain on the jury panel.

The Equal Protection Clause guarantees the defendant that the State will not exclude members of a minority from the jury venire on account of race. The whole purpose of inquiring into the reasons for a peremptory strike of a

racial minority is to prevent the equal protection violation from occurring in the first place. If, after inquiry, the peremptory strike is denied prior to the exclusion of the challenged juror then no equal protection violation occurred. For an equal protection violation to occur the juror must be "excluded." Thus, the Petitioner's equal protection rights certainly have not been violated by the trial judges actions in allowing Reverend Gaskins to remain on the jury.

The remedy that the Petitioner now seeks this Court to assert actually violates the jurors' equal protection rights. If the defendant's Sixth Amendment and Fourteenth Amendment rights have not been violated, then there is no reason for asking for this extraordinary rememdy. To acquiscent to the Petitioner's remedial demands would be to allow the jury venire to be struck on the very grounds the United States Supreme Court finds so deplorable in Batson and Powers. Surely he is asking that the jury venire be dismissed solely on account of race.

The Supreme Court's decision in Powers indicates that the appropriate rememdy in a particular case, upon a finding of discrimination against jurors, is to disallow the challenge and keep the juror on the panel. Certainly, the majority of the state jurisdictions which have considered the issue have found that disallowing improper challenges and reinstating improperly challenged jurors is an appropriate remedy.

It is particularly interesting to note that Texas Courts

hold that disallowing improper challenges may be a proper remedy even where the state statute on the subject says; "If the court determines that the attorney representing the state challenged propsective jurors on the basis of race, the court shall cal a new array in the case," that ".... we conclude that it does not require in all cases that a new array be called, but that the trial judge has the discretion to apply either remedy. ...." [of the two rememdies mentioned in note 24 of Batson]. Sims v. State, 768 S.W.2d 863 (Tex.App. - Texarkana 1989); rev. dismissed, 792 S.W.2d 81 (Tex.Cr.App. 1990); see also, Keeton v. State, 724 S.W.2d 58 (Tex.Cr.App. 1989) (en banc); Henry v. State, 729 S.W.2d 732, 734 (Tex.Cr.App. 1987); Chambers v. State, 750 S.W.2d 264,266 (Tex.App. - Houston 1988).

It is also particularly interesting to note that disallowing improper challenges is considered an appropriate remedy by the New York courts, where they formulate the procedure for analyzing peremptory challenges in People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 793 (1981) that the Florida Supreme Court adopted in State v. Neil, supra. See, People v. Davis, 537 N.Y.S.2d 430, 443-444 (Sup.Ct. Bronx Cnty, 1988); People v. Piermont, 542 N.Y.S.2d 115, 117 (Westchester Cnty, 1989).

In light of Petitioner's reliance on Soares, it is also interesting to note that it is an acceptable remedy in Massachusetts. Commonwealth v. DiMatteo, 427 N.E.2d 754, 757 (App.Ct. Middlesex 1981); rev. denied, 385 Mass. 1101;

440 N.E.2d 1173 (Mass. 1982); Commonwealth v. Reid, 427 N.E.2d 495, 498 (Mass. 1981). It certainly appears to be acceptable to Maryland courts, which stated,, "Fashioning an appropriate remedy would appear to fall within the broad discretionary range necessary for the trial judge's effective management of a trial. ..." and "If a single prospective juror has been unconstitutionally challenged it may be adequate to reinstate the juror on the venire. ..." Chew v. State, 71 Md.App. 681; 6527 A.2d 332, 343-344 (Ct.Spec.App.Md. 1987). Indeed, the State of Alabama, as well, although it notes that dismissal of the jury pool may be an appropriate remedy, also staes, "...This remedy is not exclusive, however," Ex Parte Branch, 526 So.2d 609, 624 (Ala. 1987).

In light of the United States Supreme Court's ruling in Powers v. Ohio, 499 U.S. ___, 111 St.Ct. 1364, 113 L.Ed.2d 411 (1991), which recognizes that jurors have a constitutionally protected right not to be excluded from jury duty on account of his or her race, the remedy of disallowing improper challenges is, therefore, reasonable and appropriate. Furthermore, the denial of the Petitioner's motion to dismiss the venire and begin voir dire with a new venire is appropriate where there was no prejudice to the Petitioner. This is especially so where the dismissal of the venire may well have violated the jurors' equal protection rights. Accordingly, the Fourth District Court of Appeal's decision and the Petitioner's conviction should be affirmed.

The certified questions should be answered in such a way as to grant to the trial courts discretion in fashioning a cure for the discriminatory taint caused by a peremptory challenge made in violation of the Equal Protection Clause.

CONCLUSION

Respondent, based on the foregoing arguments and authorities cited herein, requests this Honorable Court to affirm the decision of the Fourth District Court of Appeals and to answer the certified question to allow trial courts to use their discretionary powers in fashioning the appropriate remedy in order to cure the discriminatory jurors for racial reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/courier to: **ANTHONY CALVELLO**, Assistant Public Defender, Fifteenth Judicial Circuit, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401, this 16th day of October, 1991.

Of Counsel