IN THE SUPREME COURT OF FLORIDA

CASE NO. 90-1154

79,362

THE STATE OF FLORIDA,

Petitioner/Appellant,

vs.

CHRISTINE HOLLY BARNES,

Respondent/Appellee.

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ON PETITION FOR DISCRETIONARY REVIEW

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# INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Blvd.,
Suite 505-S
Hollywood, FL 33021
(305) 985-4788

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## PRELIMINARY STATEMENT

The Petitioner, THE STATE OF FLORIDA, was the appellee in the court below and the prosecution in the Circuit Court. The Respondent, CHRISTINE HOLLY BARNES, was the appellant in the District Court and the defendant in the trial court. The parties will be referred to, in this brief, as they stand before this court. The symbol "R" will be used, in this brief, to refer to the Record on Appeal before the District Court, the symbol "SR" will identify the Supplemental Record on Appeal before that court (the guidelines scoresheet submitted by the Respondent) and the symbol "T" will designate the transcript of lower court proceedings. The symbol "App." will refer to the Appendix to this brief. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The Respondent was charged by Information, on January 11, 1990 with Possession with Intent to Sell Cocaine Within One Thousand Feet of a School, Tampering With Physical Evidence and Resisting Arrest Without Violence. (R. 1-3). The jury, after a jury trial (SR. 1-315), found the defendant guilty of the possession and tampering charges, but not guilty of resisting arrest. (R. 56-60). The defendant was sentenced to seven (7) years imprisonment on each count, to run concurrently, which was within the permitted guidelines range. (R. 62-63; SR. 317).

A. Jury Selection:

The defense used its first peremptory challenge to exclude Mr. Breslin, a white juror whose mother and father had been murdered five (5) years previously in New York. (T.25-26, 74-75). No objection was made to this challenge. (T.75).

The second defense challenge was to Ms. Becker, a homemaker whose husband was a federal civil service worker at Homestead Air Force Base. (T.22, 75). The State asked for an inquiry and the defense responded that "... Neal Slappy does not apply to whites...." and "....this woman is in civil service...." (T.75). After the State pointed out that she was a housewife (T.75), the defense responded;

> **MR. DELEON:** Her husband works for the government. The State is part of the

government and this case is brought by the government against my client. I believe that's neutral ground.[1]

(T.75).

The Court permitted the challenge because, as it stated, "I don't see any pattern..." (T.76).

The defense then exercised its third peremptory challenge against Mr. Weber, at which time the following took place:

**MS. CAMPBELL:** I now ask for a Neal challenge. This is the third.

**THE COURT:** Why are you striking Ms. Weber?

**MR. DELEON:** What suspect ground does she have?

**MS. CAMPBELL:** Third white juror. Obviously you're striking for racial reasons.

**MR. DELEON:** This woman works for a bank at Chase Federal. She has been the victim of a crime.

**MS. CAMPBELL:** She hasn't been the victim. It was her mother's house.

**MR. DELEON:** Somebody in her family has been the victim of a crime. Thinking on this case which involves drugs. Drugs happen to be a major cause of crime in the community.[2]

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[1] Mrs. Brown's husband also worked for the government. He drives trucks for the City of Miami Public Works Department. (T.27-28). She is a black juror who served on the jury. (T.77, 79-80) that the defense specifically announced it was content with. (T.79). Therefore, the defense allegation that none of the spouses of black jurors were governmental civil service employees (Appellant's Brief, 6) may be somewhat misleading.

[2] Ms. Hollifield has a friend whose sister was murdered by her brother. (T.52). She is a black woman who was perfectly

**THE COURT:** That's not a neutral reason to me.

**MS. CAMPBELL:** For the record, I want to say Juror No. 7, Ms. Haynes is black, Ms. Brown is black, Ms. Hollifield is a black woman and when he strikes Ms. Weber--next person up is Ms. Weber-- and that's four out of the six, he has struck three white jurors.[3]

**THE COURT:** I read Slappy excluding any group. The jury is supposed to be a cross-section of the community. I believe what you're trying to do is--I don't see any good cause. I am seeking a pattern.

Ms. Weber stays on.

(T.76-77).

Then, with regard to the defense attempts to challenge Mr. Lawman and Ms. Valatti, the following took place:

**MR. DELEON:** Mr. Lawman is still on the jury?

**THE COURT:** Sure is.

**MR. DELEON:** Strike him.

**MS CAMPBELL:** Why are you striking him?

**MR. DELEON:** Judge--

**MS. CAMPBELL:** He is white and what else?

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acceptable to the defense and who served on the jury. (T.77, 79-80).

[3] The record does not reflect that there were only three (3) or four (4) black people on the venire as alleged by the Appellant (Appellant's Brief, 2). What it does reflect, is that, if the defense had been permitted to challenge Ms. Weber, four (4) of the six (6) jurors would have been black. (T.77). Thus, we know that Ms. Murphy, who served as the alternate, was also black. (T.79-80).

**MR. DELEON:** He has been the victim of a mugging in a different country. I didn't want a victim of a crime, someone that's been personally victimized, either here or somewhere else. The fact that I believe he is one of those folks who it's on the record, I don't know if I mentioned it, he thinks not enough has been done in the drug war.

**MS. CAMPBELL:** Every juror raised their hand when you asked that question.

**THE COURT:** I am not going to allow that strike. You got Mr. Lawman, you got Ms. Valatti, you got Ms. Haynes, Ms. Hollifield, Ms. Brown, Ms. Weber.

Any other backstrikes? I'm going to allow him in

Any other backstrikes?

**MR. DELEON:** One moment, Your Honor. Valatti.

**THE COURT:** It's obvious you're striking the white jurors.

**MR. DELEON:** I would move to strike Ms. Valatti. She has been a letter carrier for the government.

**THE COURT:** Post office? You all have picked post office in jurors, now they are objectionable?

**MR. DELEON:** Yes, sir.

**THE COURT:** No. I am not going to permit it. Anything else?

**MR. DELEON:** Note my objection for the record.

I am content with the three jurors, not the other ones.

**THE COURT:** What you're telling me is you're satisfied with Ms. Hollifield, Ms. Brown, Ms. Haynes; that's really what you're saying?

**MR. DELEON:** That's correct. They happen to be black.

**MS. CAMPBELL:** Not happen to be. That's the only reason.

**THE COURT:** We have an alternate, State, Ms. Murphy?

**MS. CAMPBELL:** Accept.

**THE COURT:** I think we have a jury.

(T.77-79).

The following morning, the defense attempted to challenge Mr. Lawman for cause (T.123), then again moved to strike all the white jurors from the panel (T.124) and then moved to strike the entire panel (T.125) as follows:

**MR. DELEON:** As to the jury, I would move at this time that the jury has not been sworn to strike Mr. Lawman for cause. He was one of the jurors who raised his hand when I asked the jury as a whole whether they felt not enough was being done in the drug war.

**MS. CAMPBELL:** Again, Judge, everybody in that whole jury venire raised their hand.

**THE COURT:** That's like asking a question of the panel, "Is there anybody here opposed to drugs?"

You're going to get everybody raising their hands. In other words, if you asked anybody if they were for drugs, nobody would raise their hands.

As long as you're making a record, I want it clear the way this Court interprets the Neal Slappy, the exclusion of any ethnic group, Hispanic, White, Chinese, is in fact a violation under the Neal Slappy rule.

**MR. DELEON:** I would like the record to reflect two folks who are challenged by the State were white and the person which

was challenged for cause was white. The State did exactly what I asked to do in their challenging the jurors.

I would move to again strike the jurors.

**THE COURT:** I want the record to reflect on Monday, yesterday afternoon, or Monday, we had to strike an entire panel. It was not on this case, it was on a different case, but when this panel was stricken based upon defense's pattern, we would be striking every jury panel that came down and basically what you're doing you're attacking the jury selection process of Dade County.

And I think that's been ruled upon by the Supreme Court.

And until you have had what you wanted on this panel, without regard to the Neal Slappy case, we would continue picking jury panels and never get a jury.

**MR. DELEON:** I didn't formally move, but I formally move to strike the panel.

**THE COURT:** I deny your motion.

(T.123-125).

B. The Facts:

Officer Preston Lucas, a member of the team involved in this arrest, pulled his vehicle off Homestead Avenue to the rear of the King Toot, parked, and got out of the car. (T.198-200). He saw the defendant turn right and move quickly toward a parked car. (T.200). He saw that she had a clear plastic bag in her hand which contained several small plastic bags that he suspected contained cocaine. (T.201). This suspicion was based on his training, experience and familiarity with narcotics operations

and the appearance and packaging of the items. (T.201). He identified the bag he saw her with in court. (T.201). He was thirty or forty feet away from the defendant when he saw her with the bag in her hand. (T.207).

Officer Laughlin first saw her when she was leaning into the rear passenger side of the car. (T.134-138). He was wearing plain clothes, but had on his badge, gun, radio and holster. (T.137).[4] After she saw Laughlin, she backed out of the car, putting a plastic bag in her mouth, and started to run west. (T.138, 203). While at the car, according to Detective Mizell, she appeared to be making a drug transaction, based on the officer's experience and the way the people were moving their hands, like one was giving something and the other was taking something. (T.183). She got about half the bag in her mouth (T.138) and Detective Thornton yelled something to the effect of, "She's putting it in her mouth." (T.168). Laughlin ran after her, yelling for her to stop and telling her, I'm going to catch you, Christine." (T.139-140). Laughlin caught her, after a fifty-three foot chase (T.139-140), grabbed her and put her in a bear hug as they tussled. (T.140). He was yelling for her to spit out the bag. (T.140). She was having a problem breathing, was trying to swallow and was choking somewhat. (T.185). No drugs were visible at this time. (T.169, 228), nor were any

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[4] Also, as the officer testified at the suppression hearing, he has been with the squad when she was previously arrested, he and the defendant have spoken on numerous occasions, and he believes she knows he is a police officer. (T.100).

baggies or anything else. (T.228). Mizell told her that it wasn't worth it, if she had something in her mouth, to just spit it out. (T.185). She spit the baggies of cocaine and two (2) or three (3) car keys out into Mizell's hand. (T.140-141, 170-171, 185-186, 205, 229-230).

The bag contained thirty-six (36), plastic bags, which were attached to each other with a safety pin, which contained crack cocaine. (T.176, 202, 231, 237, 242-243).

The distance from where the defendant was arrested to Officer Laughlin's car (which he was measuring from) was 53 feet (T. 147). The distance from the car to the property of R.R. Moulton Elementary School measured 433 feet. (T. 147-148). The distance from the car to the front door of the school was 889 feet. (T. 148).

The district court reversed and remanded this case for a new trial citing Wright v. State, ___So.2d___(Fla. 3d DCA, Case no. 89-2021), certifying the following question as one of great public importance, as the court did in Wright.

> WHERE THE TRIAL COURT FINDS THAT A PEREMPTORY CHALLENGE IS BASED UPON RACIAL BIAS, IS THE SOLE REMEDY TO DISMISS THE JURY POOL AND START VOIR DIRE OVER WITH A NEW JURY POOL, OR MAY THE TRIAL COURT EXERCISE ITS DISCRETION TO DENY THE PEREMPTORY CHALLENGE IF IT CURES THE DISCRIMINATORY TAINT; FOR EXAMPLE, MUST THE JURY PANEL BE STRICKEN IF THE DISCRIMINATORY CHALLENGE HAS BEEN MADE OUTSIDE ITS PRESENCE?
>
> (App. 1-2).

It should be noted that all the challenges concerned, and the court's disallowance of those that it found to be improper, took place outside of the hearing of the jury. (T. 71-80, 123-125).

The State reserves the right to set forth additional facts in the argument portion of this brief, as appropriate.

## ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN DISALLOWING THREE (3) PEREMPTORY CHALLENGES ON THE GROUND THAT THEY WERE EXERCISED SOLELY DUE TO THE JUROR'S RACE?

## SUMMARY OF THE ARGUMENT

The trial court was well within its discretion in finding that the defense was excluding jurors solely due to their membership in a distinct racial group. That is the test set forth by the Florida Supreme Court and the fact that the improperly excluded jurors were white, in this case, does not preclude the application of State v. Neil, 457 So.2d 481 (Fla. 1984).

The trial court properly found that the reasons given by the defense were pretextual where the defense gave reasons equally applicable to unchallenged black jurors, reasons not shown to apply to the facts of the case and reasons based on an assumed employment group bias not shown to apply to the specific juror. All of these are factors to be weighed heavily against the legitimacy of any race-neutral explanation, according to this court.

Further the defense announced that the only jurors it was content with were the black jurors, that it did not believe that the Florida Supreme Court precluded the exclusion of white jurors due to race and attempted to exclude a white juror for cause on grounds equally applicable to every juror on panel, white or black.

The remedy of disallowing racially motivated challenges was proper. It is a remedy designed to protect the right of citizens to participate in the system of justice while, at the same time, protecting the rights of parties to their properly exercised challenges. It also prevents unnecessary waste of judicial resources and provides a simple solution to what could otherwise be an insoluble problem.

Therefore, the district court erred in finding that the trial court committed error by failing to dismiss the entire jury venire. This court should inform the district court that disallowing improperly exercised peremptory challenges is a proper remedy and remand this case for further proceedings consistent with that opinion.

## ARGUMENT

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DISALLOWING THREE (3) PEREMPTORY CHALLENGES ON THE GROUND THAT THEY WERE EXERCISED SOLELY DUE TO THE JURORS' RACE.

The trial court was well within its discretion to disallow three (3) defense peremptory challenges on the ground that they were exercised solely because the jurors were white.

A. Neil[5] applies to white persons.

The Florida Supreme Court, in State v. Neil, 457 So.2d 481 (Fla. 1984) stated:

> Instead of *Swain*, trial courts should apply the following test. The initial presumption is that peremptories will be exercised in a nondiscriminatory 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 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

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5 State v. Neil, 457 So.2d 481 (Fla. 1984).

> 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.
>
> Although specifically dealing with blacks, both *Wheeler* and *Soares* speak generally of group bias based on racial, religious, ethnic, sexual, or other grounds. *Thompson*, on the other hand, appears to be limited solely to race, specifically blacks. We choose to limit the impact of this case also and do so to peremptory challenges of distinctive racial groups solely on the basis of race. The applicability to other groups will be left open and will be determined as such cases arise.
>
> *Thompson* speaks only of challenges exercised by the prosecution. *Wheeler* and *Soares,* on the other hand, recognize that the ability to challenge the use of peremptories should be given to the prosecution as well as to the defense. We agree with *Wheeler* and *Soares* on this point and hold that both the state and the defense may challenge the allegedly improper use of peremptories. The state, no less than a defendant, is entitled to an impartial jury. (footnotes omitted) (emphasis added).
>
> Id. at 486-487.

Thus, the Florida Supreme Court made a point of noting that it was not limiting the impact of Neil solely to blacks, but to "...peremptory challenges of distinctive racial groups solely

on the basis of race...." Id. at 487. There is therefore no logical reason to believe that it does not apply to "nonminority" racial groups.

It is therefore, understandable why the United States Second Circuit, using a similar analysis would find that white prospective jurors could not properly be peremptorily challenged solely on the basis of their race. See, Roman v. Abrams, 822 F.2d 214, 228-229 (2d Cir. 1987); cert. denied, 103 L.Ed.2d 580 (1989). It is also understandable why a Massachusetts' appellate court would uphold the actions of a trial court which ordered a white male juror to be seated after finding that attempts by both defendants to peremptorily challenge him were improper, after hearing their reasons. Commonwealth v. Perry, 444 N.E. 2d 1298, 1299-1300 (Mass. App. 1983); rev. denied, 448 N.E. 2d 766 (Mass. 1983).

Members of a distinct racial group may not be peremptorily challenged due to race whether their race is a minority or not.

B. The Remedy of Disallowing the Discriminatory Challenges was Appropriate.

First, it is the only remedy which adequately protects a citizen's right to serve on a jury. That there is such a right in this state cannot be doubted, where the Florida Supreme Court has stated;

> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws. (emphasis added).
>
> State v. Slappy, 522 So.2d 18, 22 (Fla. 1988); cert. denied, 108 S.Ct. 2873 (1988).

Indeed, New York courts, in addressing the issue [remembering that Neil, itself, adopted the test and reasoning of the New York case of People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S. 2d 739 (1981) have noted that jury service is a privilege of citizenship and is a civil right and that improper challenge of jurors by defense counsel on the basis of race deprives them of that right. People v. Davis, 537 N.Y.S. 2d 430, (N.Y. Sup.Ct. Bronx Cnty, 1988). Similarly, a federal court, in applying Swain v. Alabama, 380 U.S. 202 (1965), in a case cited with approval in Batson v. Kentucky, 476 U.S. 79 at 99 n. 24 (1986) stated that "... the issue turns primarily on the claim of Blacks to equal participation in the jury process...." United States v. Robinson, 421 F.Supp. 467, 471 (Conn. 1976); mandamus gnt'd sub nom, United States v. Newman, 549 F.2d 240 (2d Cir. 1977). See also, Swain v. Alabama, 380 U.S. 202, 203-205 (U.S. 1965). Thus, disallowing an improper peremptory challenge is the only protection of a juror's right to serve. Dismissing the venire,

while it may (under appropriate circumstances) protect the parties, leaves a juror's right to serve a right with no practical remedy to enforce it, if the juror is improperly challenged due to race. Disallowing challenges motivated solely by race provides protection of a citizen's right to jury service.

Second, disallowing an improper challenge prevents unnecessary waste of judicial resources. A New York court pointed this out in People v. Piermont, 542 N.Y.S. 2d 115 (Westchester Cnty.), where it stated:

> .... Discharging the whole panel would mean that the time of approximately three dozen jury panel members, two lawyers, one court reporter, several court officers and one judge would have been wasted. This is not necessary.
>
> The damage that would otherwise have been done by eliminating all three black jurors can be avoided by disallowing the challenge to #2 and encouraging the defense to reconsider as to #3. Then jury selection can be finished and the trial proper begun.

Id. at 118.

Third, reinstating improperly challenged jurors can provide a simple solution tailored to the problem. As the Fifth Circuit stated in discussing the reasons a timely objection is required, ".... Furthermore, prosecutorial misconduct is easily remedied prior to commencement of trial by simply seating the wrongfully struck venireperson...." United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987). Indeed, it permits improper

strikes to be targeted and remedied while preserving the rights of both parties to the peremptory challenges which were exercised properly.

Fourth, permitting improperly challenged jurors to be reinstated provides the only practical solution to the otherwise insoluble problem of a party who continues to exercise challenges on improper grounds. If the only solution were to dismiss the panel, the party striking jurors for improper reasons can just continue to do so in panel after panel until he obtains a panel which contains no members of the race that party wishes to exclude. A party who was improperly striking black persons, for example, could just continue to do so until a panel came up which didn't contain any black people at all. Then, he would have succeeded in obtaining a monochromatic panel without even having exercised an improper challenge against any person on that panel. Thus, if dismissing the jury pool and beginning voir dire again is the only possible remedy, it can easily lead to an unjust result which defeats the entire purpose of the decision in State v. Neil, 457 So.2d 481 (Fla. 1984). Indeed, this was an obvious concern of the trial court when it said, "And until you have had what you wanted on this panel, without regard to the Neal Slappy case [sic], we would continue picking jury panels and never get a jury." (T.124-125). Also, as pointed out in the Wright case, striking the entire panel rewards the party who has made the impermissibly motivated strike by giving him exactly what he

seeks, elimination of the juror he considers undesirable. It is respectfully submitted that the Florida Supreme Court could not have intended such a result.

Additionally, such a remedy is supported by the case law on the subject.

The United States Supreme Court certainly appears to consider reinstating improperly challenged jurors a viable remedy, where it states:

> In light of the variety of jury selection practices followed 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 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*, 421 F.Supp. 467, 474 (Conn. 1976), *mandamus granted sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977). (emphasis added).
>
> Batson v. Kentucky, 476 U.S. 79, 99, n. 24 (1986).

Indeed, the court cites with approval, United States v. Robinson, 421 F.Supp. 467 (Conn. 1976), a case in which the District Court

did precisely that, for a Swain violation (although, at the time, this was considered an improperly, "novel and drastic" remedy requiring mandamus.) See, United States v. Newman, 549 F.2d 240, 250 (2d Cir. 1977). Similarly, the Fifth Circuit has undisputedly indicated that they consider the seating of wrongfully struck venirepersons to be a proper remedy. United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1977).

Although the Florida Supreme Court, in State v. Neil, 457 So.2d 481 (Fla. 1984) does state that, ".... 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," Id. at 487, the use of the term "should" does not appear to preclude other remedies. Although the third district did state, in Carter v. State, 550 So.2d 1130, 1131 (Fla. 3d DCA 1989); rev. denied, 553 So.2d 1164 (Fla. 1989) that it felt the trial court had no choice but to dismiss the entire venire panel, that situation is certainly distinguishable where, in Carter the court was simply deciding if dismissal was a proper remedy, not whether it was the only proper remedy.

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 prospective jurors on the basis of race, the court shall call a new array in the case" (emphasis added) stating, despite the use of word "shall," that ".... we conclude that it does not require in all cases that new array be called, but that the trial judge has the discretion to apply either remedy...." [of the two remedies 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. 1987) (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 formulated the procedure for analyzing peremptory challenges in People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (1981) that the Florida Supreme Court adopted in State v. Neil, 457 So.2d 481, 485-487 (Fla. 1984). 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).

It is also an acceptable remedy in Massachusetts. Commonwealth v. DiMatteo, 427 N.E.2d 754, 757 (App.Ct. Middlesex 1981); rev. denied, 385 Mass. 1011; 440 N.E.2d 1173 (Mass. 1982); Commonwealth v. Reid, 424 N.E.2d 495, 498 (Mass. 1981). Indeed, Massachusetts has specifically held that an improperly challenged white juror may be ordered seated. Commonwealth v. Perry, 444 N.E.2d 1298, 1299-1300 (Mass.App. 1983); rev. denied, 448 N.E.2d 766 (Mass. 1983). Indeed, the State of Alabama, as well, although it notes that the dismissal of the jury pool may be an appropriate remedy, also states, ". . . .This remedy is not exclusive, however." Ex Parte Branch, 526 So.2d 609, 624 (Ala. 1987).

Disallowing peremptory challenges which were improperly utilized solely due to the juror's race is an appropriate remedy which should be permitted.

Additionally, in this case, the peremptory challenges were all exercised in one continuous process at sidebar, outside of the hearing of the jury. (T. 71-80). As pointed out in the partially dissenting opinion in Wright, under such circumstances nothing is to be gained by the dismissal of the entire pool, as distinguished from Neil where, evidently, prospective jurors were challenged in open court.

C. The Trial Court Could Properly Find That the Defense Challenged Jurors Solely Due to Race.

The Florida Supreme Court, in reviewing challenges for cause, has stated:

> The person in the best position to determine this actual bias is the trial judge. The trial judge hears and sees the prospective juror and has the unique ability to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him. This is why a trial court has broad discretion regarding juror bias, Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981), and his or her finding will not be disturbed "Unless error is manifest." Singer v. State, 109 So.2d 7, 22 (Fla. 1959).
>
> State v. Williams, 465 So.2d 1231 (Fla. 1985).

Thus, in such cases, "....Appellant has the heavy burden of showing an abuse of discretion... ." Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981); rvs'd on other grounds, 420 So.2d 877 (Fla. 1982), cert. denied, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

Further, the trial court's determination, in this area is a mixed question of law and fact which will not be disturbed unless manifest error is demonstrated. Ross v. State, 474 So.2d 1170 (Fla. 1985); Christopher v. State, 407 So.2d 198 (Fla. 1981) cert. denied, 456 U.S. 910, 72 L.Ed.2d 169 (1982).

Applying this to peremptory challenges, it has been held that broad discretion is vested in the trial to control the

manner in which peremptory challenges are to be exercised. Eastern Air Lines, Inc. v. Gellert, 438 So.2d 924 (Fla. 3d DCA 1983).

Further, in Batson v. Kentucky, 475 U.S. 79 (1986), the Court noted that, "....Since the trial judge's finding in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." id. at 98, n. 21.

This Court, in Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987); aff'd, 522 So.2d 18 (Fla. 1988); cert. denied, 108 S.Ct. 2873 (1988), held that, once the explanation for challenges has been received;

> ....The trial court must further evaluate the proffered explanations in light of the standards we recognize here, other circumtances of the case, and the judge's knowledge of trial tactics in order to make a reasoned determination that the prosecutor's facially innocuous explanations are not contrived to avoid admitting acts of group discrimination.
>
> Id. at 356.

In the case which affirmed that finding, State v. Slappy, 522 So.2d 18 (Fla. 1988); cert. denied, 108 S.Ct. 2873 (1988), the Supreme Court not only held that any doubt as to whether the complaining party has met its initial burden should be resolved in the party's favor, Id., at 22, but also found:

> ....Part of the trial judge's role is to evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. These must be weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.
>
> We agree with the district court below that a judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext. These two requirements are necessary to demonstrate "clear and reasonably specific ... legitimate reasons." *Batson,* 476 U.S. at 98 n. 20, 106 S.Ct. at 1724 n. 20.

Id. at 22.

Subsequent to Slappy, it has been held that it ".... is not the function or prerogative of an appellate court to substitute its judgment for that of the trial judge on the issue of the credibility of the state's reasons unless the record reflected a clear abuse discretion." McCloud v. State, 536 So.2d 1081, 1082 (Fla. 1st DCA 1988); See also, Schlanger v. State, 397 So.2d 1028 (Fla. 3d DCA 1981); rev. denied, 407 So.2d 1105 (Fla. 1981).

As the Florida Supreme Court found in Reed v. State, 560 So.2d 203,206 (Fla. 1990); cert denied, 111 S.Ct. 230 (1990);

> Within the limitations imposed by *State v. Neil,* the trial judge necessarily is

> vested with broad discretion in determining whether peremptory challenges are racially intended. *State v. Slappy*. Only one who is present at trial can discern the nuances of the spoken word and the demeanor of those involved....
>
> * * *
>
> ....In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

Id. at 116.

The trial court, in this case, could properly find that the defense was improperly challenging jurors solely due to their race, as it did. This is especially true when the reasons for the challenges are examined.

There was no objection to peremptory challenge of Mr. Breslin (T.74-75) whose parents had been murdered. (T.25-26).

The State did object, however, to the challenge of Ms. Becker, the second white juror stricken. (T.75). The defendant's reasons were. "I believe Neal Slappy does not apply to whites. Secondly, this woman is in civil service." (T.75). Ms. Becker, as the State pointed out, was a housewife who was not a civil service worker. (T.21, 75). The defense, then, came up with a third reason for the challenge. "Her husband works for the

government and this case is brought by the government against my client. I believe that's a neutral ground." The husband of Ms. Brown, a black juror who served on the jury, was also a government worker. (T.28, 77, 79-80). He drives a truck for the City of Miami Public Works Department. (T.28). That a challenge is based on reasons equally applicable to an unchallenged juror is a factor which tends to show that the reason is a pretext. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). Indeed, according to this court, "disparate treatment" will weigh heavily against the legitimacy of any race-neutral explanation, even if that explanation is accepted by the trial court. Slappy v. State, 503 So.2d 350, 355 (Fla. 3d DCA 1987); aff'd, 522 So.2d 18 (Fla. 1988). Indeed, Ms. Brown also had a daughter who was a driver's license instructor. (T.28). We don't know if this was a government position or not because the defense never asked. (T.54-71). Nevertheless, the court permitted the challenge, because it didn't see a pattern. (T.76).

Then, the defense struck Ms. Weber. (T.76). When the State objected, the court inquired for the reason. (T.76). The defense responded, "This woman works for a bank at Chase Federal. She has been the victim of a crime." (T.76). She had not said that she was a crime victim, as the State pointed out (T.29) and working at a bank is a fact unrelated to the facts of the case, another factor which, according to this court, should weigh heavily against the legitimacy of any race-neutral explanation.

Slappy v. State, 503 So.2d 350, 355 (Fla. 3d DCA 1987); aff'd, 522 So.2d 18 (Fla. 1988). Then, the defense, once again, came up with a third reason, "Somebody in her family has been the victim of a crime. Thinking on this case which involves drugs. Drugs happen to be a major cause of crime in the community." (T.76). Ms. Hollified, a black juror who served, (T. 77, 79-80) had a friend whose brother murdered her sister (T.52) and had recently had that brought to her attention because they called him a couple of days previously. (T.52). The Court responded to this reasons, stating, ".... I believe what your trying to do is-- I don't see any good cause. I am seeing a pattern." (T.77). The Court, then, disallowed the challenge. (T.77).

Then, the defense struck Mr. Lawman, another white juror, and the following took place:

> **MR. DELEON:** Strike him.
>
> **MS. CAMPBELL:** Why are you striking him?
>
> **MR. DELEON:** Judge--
>
> **MS. CAMPBELL:** He is white and what else?
>
> **MR. DELEON:** He has been the victim of a mugging in a different country. I didn't want a victim of a crime, someone that's been personally victimized, either here or somewhere else. The fact that I believe he is one of those folks who it's on the record, I don't know if I mentioned it, he thinks not enough has been done in the drug war.
>
> **MS. CAMPBELL:** Every juror raised their hand when you asked that question.

> **THE COURT:** I am not going to allow that strike. You got Mr. Lawman, you got Ms. Valatti, you got Ms. Haynes, Ms. Hollifield, Ms. Brown, Ms. Weber.
>
> Any other backstrikes? I'm going to allow him in.
>
> Any other backstrikes?
>
> (T.77-78).

A more obvious case of disparate treatment, with regard to "not enough has been done on the drug war" reason, can hardly be imagined. Nevertheless, the following morning, the defense counsel moved to exclude Lawman for cause because, "He was one of the jurors who raised his hand when I asked the jury as a whole whether they felt not enough was being done in the drug war." (T.123). The following then took place:

> **MS. CAMPBELL:** Again, Judge, everybody in that whole jury venire raised their hand.
>
> **THE COURT:** That's like asking a question of the panel, "Is there anybody here opposed to drugs?"
>
> You're going to get everybody raising their hands. In other words, if you asked anybody if they were for drugs, nobody would raise their hands.
>
> (T.123-124).

Again, a more obvious attempt to treat a juror disparately than other jurors who gave the same response would be hard to imagine. This must be weighed heavily against the legitimacy of any race-neutral explanation, even if the reason were accepted by the trial judge. Slappy v. State at 355.

Then, the defense attempted to exclude another white juror, and the following took place:

> **MR. DELEON:** One moment, Your Honor. Valatti.
>
> **THE COURT:** It's obvious you're striking the white jurors.
>
> **MR. DELEON:** I would move to strike Ms. Valatti. She has been a letter carrier for the government.
>
> **THE COURT:** Post office? You all have picked post office in jurors, now they are objectionable?
>
> **MR. DELEON:** Yes, sir.
>
> **THE COURT:** No. I am not going to permit it.
>
> Anything else?
>
> **MR. DELEON:** Note my objection for the record.
>
> I am content with the three jurors, not the other ones.
>
> **THE COURT:** What you're telling me is you're satisfied with Ms. Hollifield, Ms. Brown, Ms. Haynes; that's really what you're saying?
>
> **MR. DELEON:** That's correct. They happen to be black.
>
> **MS. CAMPBELL:** Not happen to be. That's the only reason.
>
> (T.78-79).

This court has held that, among the factors which must weigh heavily against any race-neutral explanation are, "... an

explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically...." and "...the reason given for the challenge is unrelated to the facts of the case...." Slappy v. State, 503 So.2d 350, 355 (Fla. 3d DCA 1987); aff'd, 522 So.2d 18 (Fla. 1988). The defense failed to show any reason why postal workers would be biased against the defendant or, even if they were, that this applied to Ms. Valatti. Indeed, this court specifically upheld the reversal of a trial court determination that challenging persons who were teachers aides was valid, even where upheld by the trial court, where such challenges were, "... based on an assumed employment group bias, which was not shown to apply to either juror specifically or to the facts of the particular case...." Id. at 355. This factor was equally applicable to reasons given for the challenges of Ms. Becker and Ms. Weber. (T.75-76).

Additionally, the defense never examined venire persons Becker, Weber, Lawman or Valatti concerning the reasons he gave for challenging them, another factor weighing against the reasons given. See, Id. at 355.

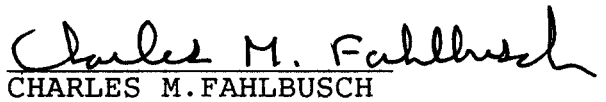
The trial court was within its discretion in determining that the defense was excluding white jurors solely due to their race and in disallowing three defense challenges, as a result.

## CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, the opinion of the Third District Court of Appeal should be reversed and the conviction and sentence reinstated.

Respectfully submitted,

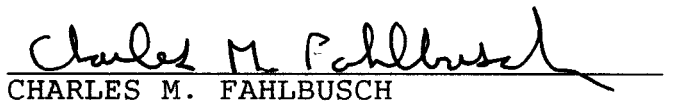
ROBERT A. BUTTERWORTH
Attorney General



CHARLES M.FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Blvd.,
Suite 505-S
Hollywood, FL 33021
(305) 985-4788

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER ON THE MERITS was furnished to BETH C. WEITZNER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 17th day of February, 1992.



CHARLES M. FAHLBUSCH
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner/Appellant,

vs.

CHRISTINE HOLLY BARNES,

Respondent/Appellee.

---

ON PETITION FOR DISCRETIONARY REVIEW

---

APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

Barnes v. State, case number 90-1154 (Fla.3 DCA January 28, 1992).

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Florida Bar No. 0191948
Department of Legal Affairs
4000 Hollywood Blvd.,
Suite 505-S
Hollywood, FL 33021
(305) 985-4788

90-1316-C

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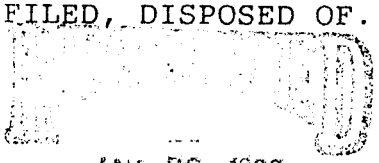
IF FILED, DISPOSED OF.




IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1992

CHRISTINE HOLLY BARNES, **

Appellant, **

vs. ** CASE NO. 90-1154

THE STATE OF FLORIDA, ** #89-49112

Appellee. **

Opinion filed January 28, 1992.

An Appeal from the Circuit Court of Dade County, David Tobin, Judge.

Bennett H. Brummer, Public Defender and Beth C. Weitzner, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Charles M. Fahlbusch, Assistant Attorney General, for appellee.

Before FERGUSON, LEVY and GODERICH, JJ.

PER CURIAM.

We reverse and remand for a new trial based on the authority of Wright v. State, ____ So.2d ____ (Fla. 3d DCA, Case no. 89-2021, opinion filed December 17, 1991) [____ FLW ____]. We

certify the following question, as stated in Jefferson v. State, 584 So.2d 123 (Fla. 4th DCA 1991), and Wright, as one of great public importance:

> WHERE THE TRIAL COURT FINDS THAT A PEREMPTORY CHALLENGE IS BASED UPON RACIAL BIAS, IS THE SOLE REMEDY TO DISMISS THE JURY POOL AND START VOIR DIRE OVER WITH A NEW JURY POOL, OR MAY THE TRIAL COURT EXERCISE ITS DISCRETION TO DENY THE PEREMPTORY CHALLENGE IF IT CURES THE DISCRIMINATORY TAINT; FOR EXAMPLE, MUST THE JURY PANEL BE STRICKEN IF THE DISCRIMINATORY CHALLENGE HAS BEEN MADE OUTSIDE ITS PRESENCE?

In light of our decision, we do not need to reach the remaining points raised on appeal by the defendant.

Reversed and remanded for a new trial.

LEVY and GODERICH, JJ., concur.

FERGUSON, J. (concurring)

In Carter v. State, 550 So.2d 1130 (Fla. 3d DCA), rev. denied, 553 So.2d 1164 (1989), this court gave an impractical "yes" answer to the second part of the certified question relying, purportedly, on State v. Neil, 457 So.2d 481 (Fla. 1984). The fourth district followed Carter without an independent analysis. Mazaheritehrani v. Brooks, 573 So.2d 925 (Fla. 4th DCA 1990).

We applied Carter in the heralded case of Lozano v. State, 584 So.2d 19 (Fla. 3d DCA 1991). In Wright v. State, cited in the majority opinion, we again dutifully followed Carter, with an otherwise thoughtful observation by Judge Nesbitt that Carter may be impractical and legally indefensible. It was noted, correctly, that Carter is distinguishable from Neil on the procedural facts. Federal opinions uniformly hold contrary to Carter. See Hernandez v. New York, ___U.S.___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987); United States v. Robinson, 421 F.Supp 467 (D. Conn. 1976), mandamus granted sub nom., United States v. Newman, 549 F.2d 240 (2d Cir. 1977).

Review was granted in Mazaheritehrani, which was argued to the Supreme Court of Florida on December 4, 1991. A decision in that case will answer the question certified.

# OFFICE OF THE ATTORNEY GENERAL

**DEPARTMENT OF LEGAL AFFAIRS**

**THE CAPITOL**

**TALLAHASSEE, FLORIDA 32399-1050**

**ROBERT A. BUTTERWORTH**
*Attorney General*
*State of Florida*

Criminal Division
401 N.W. 2nd Avenue
Suite N921
Miami, Florida 33128
(305) 377-5441


January 31, 1992

The Honorable Janet Reno
State Attorney
Metro Justice Building
11th Judicial Circuit of Florida
1351 N. W. 12th Street
Miami, Florida 33125

Attention: Cris Arias

Dear Ms. Reno:

Please be advised that the following cases have recently been decided by the Third District Court of Appeals. Copies of these opinions are enclosed herewith for your information. These opinions will become final upon expiration of the time period for rehearing and issuance of mandate.

The following cases have been affirmed:

| NAME OF CASE | DCA NO. | 11th JCCt. NO. | DATE FILED |
|---|---|---|---|
| Miguel Cardenas | 92-48 | 83-5116 | 01/28/92 |
| Guillermo Penalver | 91-2368 | 89-40073 | 01/28/92 |
| Raymond Attley | 91-2182 | 91-10658 | 01/28/92 |
| Jermaine Crawford | 90-2884 | 90-19771 | 01/28/92 |
| Kenneth Strausser | 90-2104 | 86-1949 | 01/28/92 |
| Elissa Stein | 91-784 | 90-44336 | 01/28/92 |
| Mohammed Nofal | 91-1310 | 90-24346-B | 01/28/92 |
| Milton Earl McFarlane | 90-1506 | 89-6295 | 01/28/92 |

The following case has been remanded, convictions affirmed, and sentence vacated:

| NAME OF CASE | DCA NO. | 11th JCCt. NO. | DATE FILED |
|---|---|---|---|
| Victor Alvarez | 91-313 | 90-34622 | 01/28/92 |

The following case has been reversed and remanded with directions: