IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,362

THE STATE OF FLORIDA,

Petitioner/Appellant,

vs.

CHRISTINE HOLLY BARNES,

Respondent/Appellee.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

TABLE OF CITATIONS

PAGE

OTHER AUTHORITES

STATEMENT OF THE CASE AND FACTS

The Petitioner, THE STATE OF FLORIDA, hereby readopts, realleges and incorporates by reference as though fully set forth herein, the Statement of the Case and Facts set forth on pages 2-10 of its Initial Brief, which has been accepted by the Respondent (Brief of Respondent, 1).

It should be noted, however, that while the Respondent alleges that, "The record in this case indicates that of the 19 persons on the venire, four were black. (R. 5, T. 77)." (Brief of Respondent, 6). The fact is that, as pointed out in the Statement of the Case and Facts which the Respondent accepted (Brief of Respondent, 1; Initial Brief of Petitioner, 4, n. 3), the record will support no such allegation (See, R. 5; T. 77-80). What it does show is that four (4) of the first twelve (12) prospective jurors were black and that we have no idea of the race of the last seven (7) prospective jurors called. (R. 5, T. 77-80).

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. The defense not only attempted to use its peremptory challenges to remove every white person from the jury, but, when the State objected, its first response was, ". . . Neal Slappy does not apply to whites. . . ." (T. 75).

The Respondent, for the first time, now agrees that State v. Neil, 457 So.2d 481 (Fla. 1984) applies to the exclusion of white jurors (Brief of Respondent, 5), but contends that the burden of proof to show improper utilization of peremptory challenges changes, depending upon the race of the challenged juror. (Brief of Respondent, 5). Thus, it contends that, when the challenged juror is black, ". . . any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. . . ." pursuant to State v. Slapppy, 522 So.2d 18, 22 (Fla. 1988), but that when the challenged juror is white (in those counties in which there is a white majority) the initial burden to establish a racial motivation for peremptory challenges is "enormous." (Brief of Respondent, 5).

It is respectfully submitted that varying the burden of proof depending on the race of the challenged juror is an incorrect position, is unworkable and is a violation of equal protection.

Long before either State v. Neil, 457 So.2d 481 (Fla. 1984) or Batson v. Kentucky, 475 U.S. 79, 106 S.Ct. 171, 90 L.Ed.2d 69 (1986) were decided the United States Supreme Court severely criticized attempts to make it easier to deprive persons of a majority protected group of their rights than it is to deprive minority members. It stated, in Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978):

> . . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.
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> Id. at 289-290.
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> * * *
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> Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra,* the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing in the federal

law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 2586, 49 L.Ed.2d 493 (1976). . . .

Id. at 293.

* * *

. . . . It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'--that is, based upon differences between 'white' and 'Negro." *Hernandez*, 347 U.S., at 478, 74 S.Ct., at 670.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgements. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . .

Id. at 295.

* * *

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and

ethnic background may vary with the ebb and flow of political forces.

Id. at 298.

Batson, of course, did not indicate that the burden on eiher the movement or the respondent would change depending upon the race of the challenged jurors.

Additionally, the Third Circuit, in Government of Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989); cert. denied, ___U.S.___, 111 S.Ct. 2262, 114 L.Ed.2d 714 (1991), held that a defense attorney's failure to object to the prosecutor's use of peremptory challenges to excuse white prospective jurors in the prosecution of a white male for the rape of a black female was ineffective assistance of counsel.[1] White persons have been specifically found to be a cognizable group for Sixth Amendment purposes, so there is certainly no reason to believe that they are not such a group for Equal Protection purposes, whether they constitute a "majority" or not. Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987); cert. denied, 489 U.S. 1052, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989). Indeed, Justice Scalia, in his dissenting opinion in Edmonson v. Leesville Concrete Company, Inc., 111 S.Ct. 2077 at 2095 (1991), notes that, ". . . the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it

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[1] Although there are indications in the opinion that black persons outnumber whites in the Virgin Islands, there is no indication that the standard would be different if the jurors being improperly excluded were black.

is ordinarily more difficult to *prove* race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant. . . ."

Objections under Batson, of course, can be validly made by the prosecution, just as they can in Florida pursuant to Neil. United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990).

Therefore, the Respondent's position that this court should hold that the burden to be met in establishing the initial burden under Neil should vary, depending upon whether the challenged juror is of a majority or minority race within the jurisdiction (Respondent's Brief, 5-7) would certainly appear to be a violation of the Equal Protection Clause of the United States Constitution. It is respectfully submitted that, when the trial court sees a pattern of peremptory challenges exercised against jurors of a single race, as the court in this case found (T. 77), it may inquire for the reasons. See, Hall v. Daee, 17 F.L.W. S291 at S292 (Fla. May 14, 1992).

However, even if this were not the case, having different burdens depending upon whether the challenges concerned were against a "majority" or "minority" juror is unworkable. For example, we know that Batson applies to gender-based peremptory

challenges, pursuant to Dias v. Sky Chefs, Inc., 948 F.2d 532, 534 (9th Cir. 1991). Yet the Respondent's proposal provides us with no way to determine which is the "majority" gender and which is the "minority". The Batson limitations are also applicable to religion and national-origin-based peremptory challenges. See, United States v. Greer, 939 F.2d 1076, 1086 (5th Cir. 1991); United States v. Di Pasquale, 864 F.2d 271, 276, n. 9 (3rd Cir. 1988). Also, it presents us with the absurd situation that, in Leon County, a movant who was alleging that black potential jurors were being improperly challenged would have any doubt as to whether it had met its initial burden resolved in its favor, while next door in Gadsden County[2] the party complaining that black people were being improperly challenged would carry an "enormous" burden to establish invidious racial motivation. See also, Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) (in which Hildago County, Texas was found to have a population consisting of 79.1% Mexican-Americans). Indeed, the problem is underlined in Alen v. State, 17 F.L.W. D622 (Fla. 3d DCA March 3, 1992) in which the Third District extended Neil to apply to all cognizable ethnic groups, found Hispanics to be such a group and noted that Dade County is 49.2 percent Hispanic. Determining what a "majority" ethnic group is in Dade County as compared to

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[2] Where 51.2 percent of the registered votors are black, according to the Secretary of State, State of Florida, in Registered Voters, State of Florida, February 10, 1992.

a "minority" ethnic group could be extraordinarily interesting, especially given the changing demographics of the area.

The fact is that, even if the "shifting burden" approach proposed by the Respondent were legally justifiable, it is practically unworkable.

This is a case in which the defense attempted to peremptorily challenge every white juror from the panel (T. 75-79), announced that it believed that it had a right to challenge white jurors based solely upon their race (T. 75) and announced that the only jurors it was content with were the black persons. (T. 78-79). Nevertheless, the Respondent maintains that the trial court never even had a right to inquire what the Respondent's motivation was in challenging white jurors. (Respondent's Brief, 10, n. 8).

Florida law, however, indicates that the trial court judge is certainly in the best position to evaluate whether the required threshold has been met. Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA 1987); rev. denied, 509 So.2d 1119 (1987). It would seem that, when the defense challenged its third straight white juror, whose challenge would have resulted in their being only two (2) white jurors on the panel (T. 77), the trial court could properly inquire, as it did, what the reasons were. (T. 75-77). Further, it is respectfully

submitted that, even though the trial court permitted the defense to utilize its second peremptory challenge against Ms. Becker, it could take into account the fact that the first reason volunteered by the defense for the challenge implied that white jurors could be stricken based on their race (T. 75) and the second reason was flatly untrue (T. 21, 75) in determining that an inquiry was justified when the third such challenge was exercised. See, Reed v. State, 560 So.2d 203, 206 (Fla. 1990) (". . . . if it appeared from the prosecutor's explanations that his challenges were racially motivated, the trial judge would have been warranted in granting a mistrial despite not yet having ruled that the defense had made a prima facie showing. . . ."). This also appears to refute the defense position that a racial motivation is irrelevant if the initial burden to trigger an inquiry has not yet been met. (Respondent's Brief, 10, n. 8).

The Respondent's attack on the disallowed challenges is based upon the assumption that, if the challenging party states an arguably valid, race neutral reason for a challenge, even where it is mixed in, as it was in these cases, with various reasons which are untrue or invalid (T. 76-79, 123-124), then the reason given must be accepted at face value by the trial judge. (Respondent's Brief, 9-13). This, of course, is in direct contradiction to this court's holding in State v. Slappy, 522 So.2d 18 (Fla. 1988); cert. denied, 108 S.Ct. 2873 (1988), in which it stated:

> 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*, at 476 U.S. 98 n. 20, 106 S.Ct. at 1724 n. 20.
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> Id. at 22.

The deference to be paid to trial judges in this area, which the Respondent maintains is minimal (Respondent's Brief, 9-12) is more thoroughly analyzed in pages 24-27 of Petitioner's Initial Brief on the Merits. Thus, it is respectfully submitted that the trial court could properly take into account the fact that, before the defense even gave an arguably valid reason for striking Ms. Weber, they gave an occupational reason unrelated to the facts of the case ("This woman works for a bank . . .") and a reason not shown to be true by the record (crime victim). (T. 29, 76). The court could properly take into account that the defense gave a reason for striking Mr. Lawman that was equally applicable to every member of the venire. (T. 77-78, 123-124). The trial judge could properly take into account that the only reason given for striking Ms. Valetti was an occupational reason not shown to have any relationship to the case at hand and that the judge knew had been acceptable to the defense in prior cases (she was a letter carrier). (T. 78-79).

Indeed, the fallacies relied upon by the defense are underlined by the attempt by the defense to explain away the disparate treatment of Ms. Becker (challenged allegedly because her husband was a government worker, T. 75) and Ms. Brown, a black juror whose husband was a government worker who was a totally acceptable defense juror. (T. 28, 77, 79-80). The defense now tells us that, even though they previously said that they challenged Ms. Becker because her husband was a government worker (and also because Neil doesn't apply to white people and because she was in civil service, neither of which was true) (T. 75-76), that wasn't really the reason she was challenged. She was really challenged because her husband was an Air Force government worker, which is somehow different than a municipal truck driver (Ms. Brown's husband) even though, insofar as we know, Mr. Becker was an Air Force truck driver. (T. 22) (Respondent's Brief, 10, n. 8). The Respondent's new attempts to explain what were clearly racially motivated peremptory challenges simply underline that the trial court followed the correct path, in this case.

It is respectfully submitted that, despite the Respondent's contrary assertions, it is the defendant, not the State, who is attempting to obscure the reasons given for defense challenges. (Respondent's Brief, 10). The defense, just for example tells us that the defense counsel gave only

one, valid reason for the challenge of Ms. Weber, and that reason was that she works for a bank at Chase Federal, she has been the victim of a crime and somebody in her family has been the victim of a crime. (Respondent's Brief, 11-12; T. 76). The defense, however, informs us that this is only one, discrete reason. (Respondent's Brief, 11-12). Clarity and reasonableness do not appear to be of paramount importance to the Respondent.

The Respondent is also incorrect in arguing that this court is required to find that the trial court could not disallow the challenges concerned because it applied an erroneous standard. (Respondent's Brief, 13-14). The only case which the defense cites in support of that argument, Koenig v. State, 497 So.2d 875 (Fla. 1986), supports the State's position more strongly than that of the defense.

The court, in this case, determined that the State had shown a substantial likelihood that the defense was challenging jurors solely due to their race and inquired what the reasons for the suspect challenges were. (T. 76). The court found that the reasons given for challenging the first such juror (Ms. Weber) (somebody in her family had been a crime victim and drugs were involved in this case, after two invalid reasons had been given) were not sufficiently race neutral to dispel its determination that the primary motivation was race. (T. 76-77). The Court, subsequent to this, noted that it read Slappy as

applicable to excluding any group from the jury and noted that it was seeing a pattern (rather obviously, of excluding white jurors solely on the basis of their race). (T. 77). After the defense attempted to strike Mr. Lawman for a reason equally applicable to all of the jurors, the Court noted, "It's obvious you're striking the white jurors." (T. 78). The Court then noted that the defense had stricken a third white juror for a reason (she worked for the post office) that had been perfectly acceptable to the defense in the past. (T. 78-79), noted that the only jurors the defense found acceptable were black (T. 79) and disallowed the challenge to the third white juror. (T. 79).

The following morning, when the defense, once again, asked that Mr. Lawman be stricken, this time for cause, for a reason that was equally applicable to every juror on the panel (he didn't feel enough was being done in the drug war) (T. 123). The court noted that it interpreted the law to mean that the deliberate exclusion of any ethnic group was a violation and noted its opinion that the defense, by attempting to get it to strike the entire panel instead of simply disallowing improperly motivated challenges, was attacking the jury selection process of Dade County. (T. 124).

Compare that situation with the one in Koenig in which the court (at a time prior to Neil) made no finding as to whether the threshold substantial likelihood had been demonstrated, made no inquiry as to the reasons for challenges,

made no determination that the defense was challenging jurors solely due to their race and, indeed, implied that it found that the defense was not exercising challenges motivated by race, but ruled that it felt compelled to strike the jury, anyway, to insure that it contained a cross section of the community (a statement that the trial court made four times, in that case) Id. at 876-878. The District Court, in that case, made the following statement of law:

> In our view, *State v. Neil* defines the outer limits of interference with the exercise of peremptory challenges--their exercise may be enjoined through the device of dismissal of the pool only when the court concludes, after inquiry, that a party is challenging jurors solely on the basis of race. . . .
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> Id. at 879-880.

The court concluded that a fair reading of the record, in that case, suggested that none of these requirements were met, but rather that the trial court was more interested in insuring that at least one black person be included in the jury than determining whether any black people were improperly excluded. Id. at 880. It is respectfully submitted that a fair reading of the record in this case, by contrast, can only lead to the conclusion that the trial court concluded, after inquiry, that the defense was challenging white jurors solely due to their race, the precise requirements which were not met in Koenig. (T. 75-79.123-125).

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 of the defendant reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY 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 21st day of May, 1992.

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