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IN THE SUPREME COURT OF FLORIDA

CASE NO: 83,625

DERRICK A. POWELL and
EUGENIA POWELL,

Petitioners,

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Respondent,
_____/

ON DISCRETIONARY REVIEW OF A DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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STATEMENT OF THE INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union Foundation of Florida, Inc. is an affiliate of the American Civil Liberties Union, Inc. ("ACLU"), a nationwide, non-profit, non-partisan organization dedicated to the preservation and advancement of fundamental constitutional rights. The ACLU and its affiliates are committed to the fundamental right to a fair trial before an impartial jury and the equally basic due process and equal protection rights to governmental action free of racial bigotry and prejudice. This appeal presents an important question implicating each of these interests: whether an all-white jury whose members uttered numerous racially bigoted remarks throughout the course of their consideration of this case engaged in overt acts which may have prejudiced the verdict against the black plaintiffs, and in favor of the white defendants, or whether the making of racially prejudicial remarks may be said to inhere in a Florida jury verdict. Because the ACLU and its affiliates believe acts of racial bigotry are extrinsic to any jury verdict, this brief is filed in support of the Petitioners.

SUMMARY OF ARGUMENT

The test established and refined by this Court for determining whether a new trial should be granted due to juror misconduct is whether there have been "overt acts which might have prejudicially affected the jury in reaching their own verdict" State v. Hamilton, 574 So. 2d 124, 128 (Fla. 1991) (quoting § 90.607(2)(b) Fla. Stat. Ann. (1987) (Law Revision Council Note - 1976). This Court further explained this standard, and announced the test for granting motions for post-trial juror interviews in Baptist Hospital of Miami, Inc. v. Maler, 579 So. 2d 97 (Fla. 1991). This Court held that "an inquiry is never permissible unless the moving party has made

sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in Hamilton." Id. at 100.

Relying solely on its interpretation of this Court's opinion in Maler v. Baptist Hospital of Miami, Inc., 559 So. 2d 1157 (Fla. 3d DCA 1989), an en banc majority of the Fifth District ruled that no further juror interviews are warranted here because the jurors' utterance of truly appalling racially bigoted remarks throughout their deliberations must be deemed to "inhere within in the jury verdict." Powell v. Allstate Ins. Co., 634 So. 2d 787, 789 (Fla. 5th DCA 1994). Since the Court deemed racial epithets to inhere in Florida jury verdicts, no new trial could ever be granted on that ground, and consequently no further juror interviews will be permissible. Id.

The Fifth District majority is wholly mistaken in its understanding of Florida law. The Fifth District apparently overlooked the language of the Third District Court of Appeal's opinion in Maler v. Baptist Hospital, 559 So. 2d at 1162, which twice expressly holds that if "a juror makes vile racial, religious, or ethnic slurs against a party or witness during trial or jury deliberations," he has engaged in precisely the type of "objective act" which "compromised the integrity of the fact-finding process" thereby necessitating a new trial. This oversight is especially surprising since this Court's opinion affirming the Third District's holding repeatedly expresses approval of its analysis, particularly that portion of the Third District's opinion setting forth the taxonomy of "overt acts" which include juror statements of racial prejudice, Baptist Hospital v. Maler, 579 So. 2d at 101. The Fifth District majority either disregards or ignores the ample precedent contrary to its holding, and cites no precedent supporting it.

The en banc majority is wrong for two additional fundamental reasons. First, Baptist Hospital, and other relevant case law make it clear that the matters which inhere in the verdict are the internal motives, beliefs, understandings, and other mental processes of the jurors. Id. Actually making racially prejudiced statements is not internal to the jurors' minds. These are overt acts. The Court seems to have confused the question of whether the jurors "in their hearts" are bigots with the very different issue of whether they committed the overt acts of making bigoted statements. Perhaps even more fundamentally, racism or racist conduct is never constitutionally appropriate in deciding a civil or criminal action; therefore, it is always as a matter of constitutional law extrinsic to any verdict.

Finally, the Fifth District ignored the fact that the failure to address racial prejudice in our courtrooms is a constitutional violation. The public policies supporting Evidence Code restrictions on inquiries which can be made of jurors cannot override the basic constitutional due process and equal protection rights to a court system free of racial discrimination. Moreover, the policies upon which the evidence code provision is predicated are not undermined by permitting juror interviews and granting new trials when racial bigotry has infected the jury room. No one wants jury finality at the price of prejudice and the abandonment of due process and equal protection. There is no legitimate privacy interest in a jury room infected with racial prejudice. In fact, a prohibition on racist remarks in the jury room is not a "chill" on juror deliberations which our society need avoid.

Statement Of The Case And Facts

The ACLU Foundation adopts the statement of the case and facts submitted by Petitioners. The ACLU Foundation would note in particular that the statements made by the

jurors here cannot be dismissed as merely the remarks of "insensitive clods" or "ethnic humor." They are appallingly virulent racist comments. They are deeply offensive and not in the least humorous or witty. No person should have his trial conducted by jurors who would regard such remarks as light-hearted repartee appropriate to the awesome responsibility of sitting as a jury. With the greatest respect, amicus curiae would request this Court to make that point clear to the bench, bar, litigants, and public when it renders its opinion in this case.

ARGUMENT

I. JURORS WHO MAKE RACIALLY BIGOTED REMARKS DURING THE TRIAL OR AT THE TIME OF THEIR DELIBERATIONS HAVE ENGAGED IN OVERT ACTS OF JUROR MISCONDUCT PREJUDICING THE VERDICT, AND NOT IN CONDUCT WHICH INHERES IN THE VERDICT

The bare en banc majority opinion of the Fifth District Court of Appeal is wrong for three fundamental reasons: First, this Court's opinion in Baptist Hospital v. Maler, 579 So. 2d 97, repeatedly expressed approval of the Third District's opinion and Judge Hubbart's analysis and synthesis of precedential juror misconduct cases. Judge Hubbart's analysis, endorsed by this Court in its opinion, expressly states that vile racist remarks by jurors during trial or deliberations constitute overt acts of juror misconduct, not matters inhering in the verdict. Maler v. Baptist Hospital, 559 So. 2d 1157, 1162. The Fifth District majority opinion siimply overlooked this language and misunderstood this Court's opinion. Second, the Fifth District opinion in Powell v. Allstate Ins. Co., 634 So. 2d 787, misapprehended and misapplied the criteria for distinguishing between matters inhering in a verdict and overt acts extrinsic to the verdict. Matters which inhere in a verdict are those involving the "inner states" or mental processes of jurors. Racist remarks are not "inner states;" they are overt acts of misconduct

extrinsic to any deliberation of the facts of a case. Third, the public policies supporting the evidence code's prohibition on inquiries into matters which inhere in the verdict may not preclude juror interviews which establish juror misconduct in the form of racist remarks during the deliberation process. Those policies are not compromised by granting such interviews, and in any event they are not sufficient to overcome fundamental constitutional due process or equal protection rights.

A. The Opinion Of This Court in Baptist Hospital Expressly Approved The Third District's Analysis of Juror Misconduct Precedents Which Concluded Racially Bigoted Remarks By Jurors Do Not Inhere In Florida Jury Verdicts

Judge Hubbart's much-admired survey, analysis, and synthesis of the precedent relating to the granting or denying of juror interviews regarding juror misconduct in Maler v. Baptist Hospital, 559 So. 2d 1162, twice expressly states that "vile racial, religious, or ethnic slurs" directed at parties or witnesses by jurors during trial or deliberations constitute a species of "objective acts" which "compromised the integrity of the fact-finding process."

He stated first:

> In order to constitute juror misconduct and, therefore, a matter extrinsic to the verdict sufficient to set aside the verdict or for a post-trial jury inquiry, Florida and other courts have consistently held that some objective act must have been committed by or in the presence of the jury or a juror which compromised the integrity of the fact-finding process, as where
>
> > "[1] a juror was approached by a party, his agent or attorneys; [2] that witnesses or others conversed as to the facts and merits of the cause out of court and in the presence of jurors; [3] that the verdict was determined by aggregation and average or by lot, game or chance or other artifice or improper manner,"

> Russ, 95 So. 2d at 600; Marks, 69 So. 2d at 775 (Fla. 1954); see Fitzell v. Rama Indus., 416 So. 2d 1246, 1247 (Fla. 4th DCA 1982), or where: (a) a juror claims personal knowledge of the case tried and conveys this knowledge to the jury, Russ; (b) a juror lies about a material matter during jury selection, Sconyers v. State, 513 So. 2d 1113 (Fla. 2d DCA 1987); (c) a juror makes vile racial, religious, or ethnic slurs against a party or witness during trial or jury deliberations, United States v. Heller, 785 F.2d 1524, 1527-28 (11th Cir. 1986) (mistrial required); compare Evans v. Roth, 168 So. 2d 546 (Fla. 3d DCA 1964); or (d) a juror, inter alia, goes to scene of the property involved in the case and reports his observations to the other jurors. United States v. Posner, 644 F.Supp. 885 (S.D. Fla. 1986) (new trial granted).

Id. (emphasis added). He then added:

> In each of these cases, the integrity of the fact-finding process was compromised by some objective occurrence so as to "taint" the jury's deliberations, viz: third party contact or conversations about the case with or in the presence of a juror, Russ; Marks; total abandonment of any deliberative process as when the jury decides the case by quotient, lot or chance, Marks; a disqualifying act of a juror which brings the latter's fairness into serious question, as when the juror lies about a material matter during jury selection, Sconyers, or expresses vile racial, religious or ethnic slurs about a party or witness, Heller, or jury exposure to alleged facts about the case which were never introduced in evidence, as when a juror gives personal testimony in the jury room about the case, Russ, or visits a relevant scene in the case and reports his finds to the jury, Posner. Moreover, these cases all center around some type of objective act or occurrence that was relatively easy to ascertain - as opposed to probing, as here, into the gossamer mental processes, agreements, conclusions, and reasoning of the jury.

Id. (emphasis added)

This Court in Baptist Hospital v. Maler, 579 So. 2d at 99, 101, repeatedly cited Judge Hubbart's opinion with approval including the very page and case law analysis which sets forth the above-quoted language regarding a juror's vile racist remarks:

> As Judge Hubbart correctly suggested in the opinion under review, the case law on this topic allows inquiry only into objective acts

> committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact-finding process. Maler, 559 So. 2d at 1162 (citing Russ, Marks); accord Hamilton.

Id. at 101. This Court's Baptist Hospital v. Maler opinion also references its own opinion in Hamilton, 574 So. 2d 124, in this regard because, it too, cites Judge Hubbart's opinion as a "gloss" on the proper interpretation of Florida Statutes Section 90.607(2)(b) and the nature of "overt acts" which might prejudice a jury verdict. State v. Hamilton, 574 So. 2d at 128.

To have ignored the clear language of Judge Hubbart's opinion twice cited with approval by this Court is error enough, but without serious analysis the Fifth District also disregarded the opinion of the Third District Court of Appeal in Sanchez v. International Park Condominium Ass'n, Inc., 563 So. 2d 197 (Fla. 3d DCA 1990), and the holding of United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) which was heavily relied upon in Sanchez, supra. To have ignored the Heller opinion is especially disturbing since it was penned by the venerable Judge Elbert P. Tuttle, one of our nation's most distinguished jurists, in language that should long be remembered:

> Despite longstanding and continual efforts, both by legislative enactments and by judicial decision to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires. The religious prejudice displayed by the jurors in the case presently before us is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects on this appellant.

* * * *

> Upon this record, our affirming the judgment of conviction based upon the jury's verdict would be an affront to our system for the administration of justice. The people cannot be expected to respect their judicial system if its judges do not, first, do so.

Id. at 1527, 1529. The Fifth District opinion also ignores opinions of the First and Fourth District Courts of Appeals in Singletary v. Lewis, 584 So. 2d 634 (Fla. 1st DCA 1991) and Local 675 v. Kinder, 573 So. 2d 385 (Fla. 4th DCA 1991). As the First District stated in Singletary, Id. at 637, in holding evidence of racist comments by jurors during deliberations sufficient to warrant juror interviews:

> Prejudice against one of the parties or the making of prejudicial comments in the presence of the jury is evidence of improper considerations. International Union, supra; Sanchez, supra. This court finds the decision in United States v. Heller, 785 F.2d 1524 (11th Cir. 1986), to be persuasive.

See also Toblas v. Smith, 468 F. Supp. 1287 (W.D.N.Y. 1978). Amicus curiae has found no Florida case holding that juror expressions of race prejudice inhere in Florida verdicts, other than the Fifth District's opinion here.

B. Evidence Of Racially Bigoted Statements By Jurors Constitute Overt Acts of Juror Misconduct Under The Standard Adopted By This Court In Baptist Hospital, supra, and State v. Hamilton, supra.

In Baptist Hospital v. Maler, 579 So. 2d at 101, this Court made it clear that "overt acts" of juror misconduct do not inhere in a jury verdict. A racist statement is an "overt act". Moreover, racist slurs have no role to play in the decision of any case by any jury. They are always impermissible and extrinsic to any verdict as a matter of constitutional law. Therefore,

they cannot be said to constitute juror "deliberations," even though they may be uttered during the time true deliberations concerning the evidence should be occurring.

The confusion of the Fifth District opinion on this point is obvious: A racist remark is not a mental process, emotion, mistaken belief, inner state, or any other matter which "resides within the breast of a juror." A racist remark is a public, verifiable act; it is not a subjective impression or opinion harbored within the juror's mind or soul. The Fifth District confused (i) the acceptability of evidence showing jurors actually made racist remarks with (ii) the very different question of whether a court should entertain the claim that a juror was secretly, racially motivated, that is, whether a juror based his or her verdict on deeply-held but never ventilated racist opinions. The former are provable overt acts of misconduct; the latter, while despicable, we can never truly know. It is the overt act which may form the predicate for juror interviews and a new trial.

C. The Public Policies Supporting Florida Statute Section 90.607(2)(b) Are Not Compromised By Juror Interviews Which Establish That Racially Bigoted Remarks Infected Jury Deliberations, Nor Would Those Policies Be Sufficient to Overcome The Powells' Independent Constitutional Equal Protection And Due Process Rights

This Court and others have noted that Florida Statute Section 90.607(2)(b) serves several important public policies: (i) litigation "finality" is an important public goal and "litigation will be extended needlessly if the motives of jurors are subject to challenge," Hamilton, 514 So. 2d at 128; (ii) litigants should not be able to "invade the privacy of the jury room" Id.; (iii) jurors should not be harassed by litigants after a trial; (iv) open discussion in the jury room should be encouraged; and (v) incentives for jury tampering should be reduced. None of these interests

is truly compromised by allowing juror interviews to establish that racist statements infected the jury room. Establishing the fact that racist statements were actually made does not entail any inquiry into "motives," nor can such an inquiry be said to be "needless." "Finality" is too expensive a commodity if the tacit endorsement of bigotry is its price. Privacy does not entail the right to use the machinery of the state to discriminate. It does entail a respect for individual dignity and autonomy that racism denies. The privacy of the jury room cannot be coherently invoked to support the making of racist slurs during deliberations. Harassment is not an issue here because litigants must first obtain approval from the court to seek juror interviews. Free discussion in the jury room is to be encouraged, but only discussion relevant to the issues; racist speech has no place in the jury room and should be "chilled." Finally, the allowance of juror interviews to establish racially prejudiced statements does not encourage jury tampering; it reveals juries whose deliberations have been tampered with, and it poses no more risk of "tampering" than the other exceptions recognized by the evidence code's limitations on juror interviews.

Even were all of this not so, the public policy interests served by this evidence code provision cannot, and do not, outweigh constitutionally protected rights to a racially impartial jury, due process, and equal protection of the law, untainted by racism. Administrative convenience secured by finality and an opaque jury box, does not override fundamental rights secured by the Sixth and Fourteenth Amendments and the Florida Constitution. See Batson v. Kentucky, 476 U.S. 79 (1986); Lugar v. Edmondson Oil Company, Inc., 457 U.S. 2d 922 (1982).

Once again, the opinion of the Fifth District majority rather thoroughly missed the point. There is no dearth of state action in a court, pursuant to a state evidence code, declining to allow juror interviews which would establish overt acts of racial prejudice by jurors.

The Court is a state actor, the evidence code is state action, the verdict is state action, the denial of the motions for new trial or to conduct interviews is state action, and the jury is itself a state actor. Batson, 476 U.S. 79; Lugar, 457 U.S. 922. There is nothing in the evidence code which permits a court to ignore evidence of racial prejudice in the jury room.

Conclusion

For the foregoing reasons the en banc decision by the Fifth District should be reversed.

Respectfully submitted,

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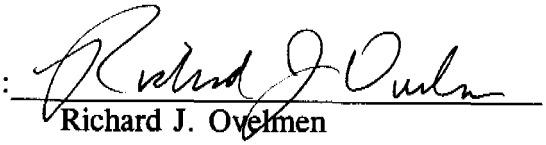
By: 
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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 22nd day of September, 1994 upon:

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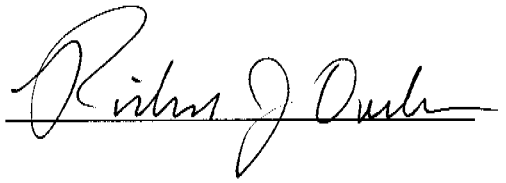

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Supreme Court of Florida

MONDAY, SEPTEMBER 12, 1994

DERRICK A. POWELL, ET UX.

Petitioners,

vs. Case No.83,625

ALLSTATE INSURANCE COMPANY

Respondent.

* * * * * * * * * * * *

Motion for Leave To Appear as Amicus Curiae filed by The American Civil Liberties Union Foundation Of Florida is hereby granted. Amicus Curiae may share oral argument time if permitted by counsel for the parties in the case.

Amicus Curiae may serve their brief on or before September 19, 1994. Please send to the Court, either in Word Perfect or ASCII text format, a 3-1/2 inch diskette of the briefs on the merits. This procedure is voluntary. Please label envelope to avoid erasure.

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court

bdm
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IN THE SUPREME COURT OF FLORIDA

CASE NO: 83,625

DERRICK A. POWELL and
EUGENIA POWELL,

Petitioners,

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Respondent,

_____/

MOTION OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA FOR EXTENSION OF TIME IN WHICH TO SERVE ITS MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF

Pursuant to Rule 9.300 of the Florida Rules of Appellate Procedure, Amicus Curiae The American Civil Liberties Union Foundation of Florida moves this Court for a seven day extension of time, until September 19, 1994, in which to serve its Motion for Leave to File Amicus Curiae Brief and the accompanying proposed Brief. The grounds for this Motion are:

1. The appellate counsel for both parties to this appeal have been contacted and consent to the granting of this motion.

2. This Brief is being done pro bono, and the undersigned counsel must prepare for and attend a previously scheduled pretrial conference in the Middle District of Florida, federal court in Orlando, and present argument on substantial motions to dismiss in two libel suits in Miami, all the week of September 12, 1994. Thus, the additional time requested is needed to properly prepare the Amicus Brief.

3. Counsel for the amicus curiae is in the process of working with attorneys for other amici, including the NAACP, who would like to join in the amicus curiae brief. The logistics of this collaboration require the additional time sought.

Respectfully submitted,

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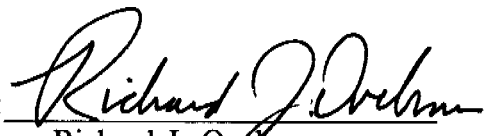
By: 
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