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SUPREME COURT OF FLORIDA

CASE NO. 83,625

DERRICK A. POWELL and
EUGENIA POWELL,

Plaintiffs/Petitioners,

vs.

ALLSTATE INSURANCE COMPANY,

Defendant/Respondent.
_____/

BRIEF OF AMICI CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS AND FLORIDA ASSOCIATION FOR WOMEN LAWYERS

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STATEMENT OF INTEREST OF AMICI

Amici, the Florida Association for Women Lawyers and the Academy of Florida Trial Lawyers, are both groups of attorneys who are members of the Florida Bar.

The Florida Association for Women Lawyers is a large voluntary statewide association of attorneys of both genders involved in all areas of the law. Its purposes include improvement of the administration of justice and the promotion of women's legal rights. FAWL, its members and its clients are vitally concerned with the elimination of abuses that diminish the integrity of the individual or affect the fairness of the judicial process.

FAWL and its chapters have been involved as amicus curiae in cases in the Florida appellate courts and Supreme Court.

The Academy of Florida Trial Lawyers is a large voluntary statewide association of trial lawyers specializing in litigation in all areas of the law, including personal injury litigation. The lawyer members of the Academy are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

The Academy has been involved as amicus curiae in cases in the Florida appellate courts and Supreme Court involving access to court, the right to a fair trial before an impartial jury, and the right to equal protection under the law, as well as all other aspects of the tort system.

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Both organizations strongly believe in and support the honorable tradition of the Florida Courts of eliminating the insidious effects of bigotry and prejudice from our system of justice. We appear here to urge the Court to follow that great tradition in this case.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts appearing in the opinion below, as supplemented by the dissenting opinion.

SUMMARY OF THE ARGUMENT

The elimination of racial prejudice in all aspects of the legal system is a vital part of the administration of justice, which this Court has taken great pains to safeguard. The right to a fair trial before an impartial jury requires that the jury be free, as far as possible, from prejudice against one of the parties to a litigation. The jurors' verdict must be based solely on the evidence.

It may be impossible to ensure that prejudice never enters the jury room. The court cannot delve into the secret heart of each juror. However, where prejudice manifests itself in open statements by jurors demonstrating clear racial bias, the court can and should act.

Such open statements constitute "overt acts" of misconduct, objectively verifiable, which do not inhere in the verdict. Where such statements are alleged in accordance with Rule 1.431, the court must conduct an inquiry. Where such statements are proved, the court must grant a new trial.

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This rule should apply to all "cognizable" groups, as that term has been defined in the cases involving discrimination in the exercise of peremptory challenges. The inquiry should be limited to whether the misconduct occurred, and not to any effect that it might have had on the jurors. This kind of misconduct is so antithetical to the fair administration of justice -- and to the public's perception of it -- that it can never be harmless.

ARGUMENT

OVERT STATEMENTS OF PREJUDICE AGAINST A COGNIZABLE CLASS JUSTIFY A JURY INTERVIEW AND, IF PROVED, REQUIRE A NEW TRIAL.

A. Florida's policy of eliminating bigotry and prejudice from all aspects of our legal system

The courts of this State, and this Court in particular, have been leaders in rooting out prejudice and bigotry from all aspects of our legal system. This principle is such a vital part of the administration of justice in this state that last year, this Court enacted a rule of professional conduct prohibiting, in connection with the practice of law, conduct prejudicial to the administration of justice, including discrimination against any participant in legal proceedings on the basis of race, gender, ethnicity and a number of other grounds. Rule 4-8.4(d), Rules Regulating the Florida Bar (1993).

The rule is consistent with the established policy of this Court to eliminate any kind of invidious discrimination that affects the administration of justice.

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For example, in State v. Neil, 457 So.2d 481 (Fla. 1984), well before the United States Supreme Court overruled Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), this Court was one of the first to hold that racial prejudice must be eliminated from the exercise of peremptory challenges. In subsequent decisions, this Court refined the procedures outlined in Neil to make them more effective, and expanded the holding to include prejudice based on gender and ethnicity. See, e.g., State v. Johans, 613 So.2d 1319 (Fla. 1993) (strengthening requirement for holding hearing); Jefferson v. State, 595 So.2d 38 (Fla. 1992) (upholding right of jurors to be seated without regard to race); Abshire v. State, 19 Fla. L. Wkly. S353 (Fla. 1994) (prohibiting discrimination based on gender); State v. Alen, 616 So.2d 452 (Fla. 1993) (prohibiting discrimination based on hispanic ethnicity).

Following this Court's example, the lower appellate courts usually have not hesitated to act to prevent prejudice from affecting court proceedings, no matter what its source -- counsel, judge or jury. Thus, in Sanchez v. International Park Condominium Assoc., 563 So.2d 197 (Fla. 3d DCA 1990), the court held that a juror's alleged anti-Cuban remarks entitled the plaintiff to a new trial, even though the jurors denied being influenced by any such remarks. In Reynolds v. State, 580 So.2d 254 (Fla. 1st DCA 1991), the court held that it was fundamental error for the prosecutor in a rape case to refer to the defendant's race on the issue of consent. And in Hernandez v. State, 538 So.2d 521 (Fla. 3d DCA 1989) and Saintjour v. State, 534 So.2d 874 (Fla. 3d DCA 1988), the

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court reversed because of disparaging remarks made by the judge regarding the defendant's inability to speak English.

The courts have done this because of the fundamental principles of fairness underlying the concepts of due process and equal protection, and because the right to a fair trial before an impartial jury is the heart that gives life to those concepts in our judicial system.

B. The Constitutional right to a fair trial before an impartial jury

The right to a fair trial by a fair, unbiased and impartial jury is guaranteed by the 6th and 7th Amendments to the United States Constitution and Art. I §§ 12, 16 and 22 of the Florida Constitution.

The Constitutional standard of fairness requires that a state defendant have a panel of impartial, "indifferent" jurors. See Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, 366 U.S. 717 (1961). The 6th Amendment guarantee of a fair trial by an impartial jury is extended to the states through the 14th Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). Principles of due process also guarantee a defendant an impartial, indifferent jury. Irvin v. Dowd, 366 U.S. 717 (1961), as the right to a fair trial is really the very essence of due process of law. Cappetta v. State, 204 So.2d 913 (1967); Carter v. State, 332 So.2d 120 (1967).[1]

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[1] The requirement of impartiality as mandated by the 6th and 14th Amendments and the Florida Constitution inheres in any provision granting the right to a jury trial. City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985). Thus, the cases

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The jurors' verdict must be based solely on the evidence developed at trial. The public trial by a fair and impartial jury is the most sacred right to our institution of democracy.

> A "fair and impartial trial" contemplates a trial before a jury of twelve impartial and unbiased men, neither more nor less, in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect to the facts, and to have his guilt established by a unanimous verdict of that jury. Patton v. United States, 281 U.S. 276. "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests, and procedure is not chained to any ancient and artificial formula." United States v. Wood, 299 U.S. 123. But, deeply embedded in the right to a fair and impartial trial is the requirement that the jury of twelve men, chosen to sit in judgment, shall have no fixed opinion concerning the guilt or innocence of the one on trial, and that their ultimate verdict shall be based upon the facts as they are submitted to them by the court, under its instructions and superintendence. Anything less is a farce and a travesty upon justice.

Baker v. Hudpeth, 129 F.2d 779 (10th Cir. 1942).

As this Court has done by its actions so many times, the Eleventh Circuit Court of Appeals in United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) recognized the obligation of the judiciary to eliminate racial prejudice from the administration of justice:

> 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 6th 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

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addressing jury impartiality in a criminal matter are similarly applicable in a civil case.

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him or her from making decisions based solely on the facts and law that our jury system requires.

785 F.2d at 1527.

C. Express racist remarks and jokes constitute objective misconduct which does not inhere in a verdict

The Florida Rules of Civil Procedure specifically provide a procedure for legally challenging a jury verdict, where it is believed that there have been extraneous influences on the jury. Rule 1.431(h) provides that a party who "believes that grounds for legal challenge to a verdict exist...may move for an order to determine whether the verdict is subject to challenge." Fla. R. Civ. P. 1.431(h) (1993). This Court has construed the rule to allow challenges only to matters that do not "inhere in the verdict". Baptist Hospital of Miami v. Maler, 579 So.2d 97 (Fla. 1991). Under the Florida Evidence Code, a juror "is not competent to testify as to any matter which essentially inheres in the verdict". §90.607(2)(b), Florida Statutes.

The racist jokes and remarks allegedly made in this case cannot inhere in the verdict. Such jokes and remarks are objective events of jury misconduct so severe as to necessitate a new trial. They are distinct from the subjective prejudice which must dwell in the hearts of the jurors who made them, and from the prejudice--if any--that such communications had on the deliberative process of the other jurors who heard them. In a nutshell, the inherency doctrine does not apply to the present case because the objective fact that racially prejudicial statements were made requires a new

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trial, whether or not the jurors' personal prejudices contributed to the puny verdict.

Stated bluntly, quiet racism underlying a verdict would appear to fall within the modern definition of a matter which inheres in the verdict and is inadmissible to negate the verdict, but express racist comments, susceptible to objective evidence not requiring inquiry into the deliberative process, do not inhere in the verdict. As this Court stated in Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 99 (Fla. 1991), "The distinction ... is between overt prejudicial acts, and subjective impressions or opinions of jurors. To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed".[2]

To better see the bright line which distinguishes objective facts and events constituting curable jury misconduct from the subjective belief system of the jurors which may have spawned those facts and events (but which inhere in the verdict), it is useful to review the development of the law on obtaining evidence from jurors to establish grounds to avoid verdicts. Marks v. State Road Dept., 69 So. 2d 771 (Fla. 1954) contains a good introduction to the historical development of the law in this area.

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[2] This is not to say that quiet racism is preferable or even permissible. It is only to acknowledge the difficulty of making a correct determination of the real feelings of each juror -- feelings which the jurors may not even realize they have -- and the risk to the jury system of trying to do so after the verdict.

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In Marks, this Court quoted Professor Wigmore's discussion of early law, which permitted virtually any form of proof of alleged jury misconduct to impeach verdicts:

> "Up to Lord Mansfield's time, and within half a decade of his decision in Vaise v. Delaval, the unquestioned practice had been to receive jurors' testimony or affidavits without scruple. There were of course variances of ruling as to the sufficiency of this or that misconduct to invalidate a verdict; but the proof of it was received equally from jurors and others, without discrimination."

Marks, supra, 69 So. 2d at 774 (quoting VIII Wigmore on Evidence 3d ed. at 684-85)(quotation appearing in McNaughton Revised Edition at 696).

As indicated by Professor Wigmore, the more recent prohibition against receiving jurors' affidavits in evidence to impeach their verdicts originated in 1785 in the case of Vaise v. Delaval, 1 Term. R. 11 (K.B. 1785), in which two jurors' affidavits that the verdict was reached by game of chance were rejected. Lord Chief Justice Mansfield held in Vaise: "'The Court cannot receive such an affidavit from any of the jury-men themselves, in all of whom such conduct is a very high misdemeanor; but in every case the Court must derive such knowledge from some other source, such as some person having seen the transaction through a window or by some such other means.'" Id. (quoted in VIII Wigmore on Evidence, Revised McNaughton Ed. § 2352 at 686 n.1 (hereinafter "Wigmore")).

It must be noted that Lord Mansfield's rule was not intended to apply to preclude the use of an affidavit of one juror as to

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misconduct by another juror, only to prevent proof of a juror's own participation in misconduct. "The question, it is to be remembered, is not whether certain conduct constituting misconduct constitutes a fatal irregularity or whether it can be proved at all, but whether a juror alone is to be forbidden to prove it."[3] Wigmore, supra, at 698.

Professor Wigmore asked rhetorically what doctrine would prevent the use of a juror's testimony establishing his own misconduct, and answered: "Nothing, except a curious doctrine of evidence once and temporarily in vogue, long ago discarded in every other relation, and now here persisting through the sponsorship of Lord Mansfield's great name, the doctrine that a witness shall not be heard to allege his own turpitude ...." Id. at 695-96 (emphasis in original).

Professor Wigmore notes the absence of both precedent and policy for Lord Mansfield's rule: "The odd feature of this doctrine is that it came ... as an innovation upon the prior practice. Having no sound basis of policy (as its modern reputation now testifies), it had also no basis in precedent." Id. Notwithstanding those fundamental weaknesses underlying its controlling principle, however, "Vaise v. Delaval, with the prestige of the Great Chief Justice, soon prevailed in England, and its authority came to receive in the United States an adherence

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[3] The case at bar involves the affidavit of a juror other than the ones accused of the racist remarks. The affidavit of a juror other than the one accused of misconduct would not have been excluded under Lord Mansfield's original rule.

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almost unquestioned." VIII Wigmore, supra, at 697 (footnote omitted).

Professor Wigmore assembled the cases which began to question Lord Mansfield's rule, which recognized the illogic of welcoming the testimony of bailiffs or other eavesdroppers on deliberation to prove juror misconduct, while excluding evidence from the jurors themselves, pointing out that:

> A bailiff or other court officer, who may have been present at the jury's deliberations, may by universal concession prove their misconduct though it is a gross breach of duty (except in one or two jurisdictions) for him to attend or overhear. Thus, not only does the rule tempt the parties to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings, but the law, while with one hand it sanctimoniously puts away the juryman who reports his own misconduct done during the privacy of retirement, yet with the other hand it inconsistently invites to the same witness stand the bailiff whose shameless disregard of his duty in intruding upon that privacy forms his only qualification as a witness and the sole tenor of his testimony. If there cannot be any principle in this rule, it should at least possess logic.

Wigmore, supra at 698-99.

The two leading cases receding from Lord Mansfield's rule were Wright v. Illinois & Mississippi Tel. Co., 10 Iowa 195 (1866) and Perry v. Bailey, 12 Kan. 539 (1874)[4], both of which hold that the testimony of jurors is admissible to establish grounds to overturn their verdicts, except insofar as the testimony pertains to matters which, in the words of Kansas Supreme Court Justice Brewer, "inhere

[4] The Perry case is found beginning at page 415 of the more readily-available Second Edition of the Kansas Reports, still at volume 12.

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in the verdict." See Perry, supra, at 419. Both Wright and Perry have been followed by this Court and adopted as Florida law.

Perry held that the affidavit of a juror was properly admitted to show that he had reached his verdict while intoxicated. Justice Brewer explained the difference in proof of such intoxication and proof of something which inheres in a verdict:

> Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to induce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. . . . Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict,--an overt act, open to the knowledge of all the jury and not alone within the personal consciousness of one. If one juror was drunk while the jury were in their room deliberating, it was a fact he could hardly keep to himself; it was a matter not resting wholly in his own consciousness.

Perry, supra, 12 Kan. at 545 (at 419, 2d ed.)(emphasis added).

In adopting the Kansas approach set forth in Perry, this Court has similarly described the line of demarcation between matters which do not inhere in the verdict, and those which do as follows:

> The rule announced in the Kansas case seems to us to be a salutary one and more consistent with reason and sound policy. That rule, as announced by Mr. Justice Brewer, is that all those matters lying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing and, therefore, accessible to the testimony of others and subject to contradiction; the interest of justice will

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> be promoted and no sound public policy will be disturbed, if the secrecy of the jury box is not permitted to be the safe cover of wrongs upon parties litigant. . . . [B]ut matters resting in the personal consciousness of one juror should not be received to overthrow the verdict, because, being personal, it is not accessible to other testimony.

Linsley v. State, 88 Fla. 135, 101 So. 273, quoted in City of Miami v. Bopp, supra, 117 Fla. at 535-36, 158 So. 89, 90 (1934) (emphasis added).

This Court has followed Wright, the other leading case on the point, holding that:

> "[A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; [or] the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matters resting alone in the juror's breast. . . . But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury room, thereby rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. . . ."

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Marks, supra, 69 So. 2d at 774 (quoting Wright, supra, at 210-211)(emphasis added). Thus, there is a simple bright-line test for those matters which inhere in the verdict and those which do not. The racial remarks and statements assumedly made by jurors in the present case did not inhere in the verdict because they are "overt acts, they are accessible to the knowledge of all the jurors," within the meaning of provable misconduct under Perry, supra, not a matter "resting alone in the juror's breast" and incapable of disproof, as inherency is defined under Wright, supra.

The only state case we have found outside of Florida approving of the use of jurors' affidavits as sufficient to require a hearing to establish whether racial or ethnic bigotry contributed to the verdict was that of the Supreme Court of Wisconsin in After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686 (Wis. 1982)[5]. In After Hour, the affidavit of a juror established that other jurors referred to the corporate representative of the losing party as "a cheap Jew." Id. at 688.

In reversing the intermediate appellate court's affirmance of denial of a motion for new trial, the Supreme Court of Wisconsin in After Hour remanded for a hearing on the issue of juror prejudice, holding: "Whenever it comes to a trial court's attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender, or national origin, judges should be especially sensitive to such allegations and

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[5] But see State v. Shillcutt, 350 N.W.2d 686 (Wis. 1984) (dissenters argue that majority has ignored After Hour).

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conduct an investigation to 'ferret out the truth.'" Id. at 690, quoting Morgan v. United States, 399 F.2d 93, 97 (5th Cir. 1968).

Cases which may be cited by Respondent in support the position that racism during deliberations is a matter inhering the verdict do not really involve any overt acts of misconduct, such as telling racist jokes or making bigoted comments. Therefore, there is not necessarily any real conflict between the holdings of those cases and the position we urge here.

For example, Metropolitan Dade County v. McKenzie, 555 So. 2d 885 at 885-86 (Fla. 3d DCA 1990) quashed "a post-trial order permitting interview of jurors ostensibly because the jury discriminated against the plaintiffs because of their foreign citizenship . . . [,] hold[ing] that any such discrimination is inherent in the verdict." The court did not indicate that there were any objective acts of discrimination by the jurors during trial or deliberations, so to the extent that the case can be read as involving only subjective application of prejudices within the jurors' minds, McKenzie does not suggest a different demarcation of the boundaries of inherency than that offered here and supported by existing law.

Singletary v. Lewis, 619 So. 2d 351 (Fla. 1st DCA 1993) also involved an allegation that the verdict "was based upon alleged juror misconduct evidencing racial bias," but there was no overtly racist remark made. See id. at 1302. One juror was supposed to have said about the Plaintiff (a black female): "They ought to have sewed her up. She was a fool for having so many babies." Id.

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The trial court conducted juror interviews in which the jurors exhibited conflicting recollections concerning the remark. The First District noted that the remark--if made and if directed toward the Plaintiff--implied only disapproval of Plaintiff's reproductive choices, but concluded that "it was not a racial or ethnic slur." Id. at 354, 355.

Thus, Singletary does not support a contention that actual statements of racial prejudice made in the jury room necessarily inhere in the verdict. What is really important about this decision in Singletary, is that the inquiry was conducted at all. In fact, it was conducted pursuant to the remand in an earlier appeal. Singletary v. Lewis, 584 So.2d 634 (Fla. 1st DCA 1991). In the first appeal, the appellate court remanded the case to the trial court to conduct interviews of all the jurors, to determine whether the misconduct alleged by one juror actually took place. The court held that "the making of prejudicial comments in the presence of the jury is evidence of improper considerations." 584 So.2d at 637.

Singletary is therefore consistent with our position here, and with Sanchez v. International Park Condo. Assn., 563 So.2d 197 (Fla. 3d DCA 1990). In Sanchez, the Third District held that the Cuban plaintiff was entitled to a new trial because of derogatory remarks made about Cubans and their litigiousness by one of the jurors.

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The en banc Fifth District below acknowledged conflict with Sanchez,[6] opining that the Third District in Sanchez "ignored the supreme court's decision in Maler." See Powell v. Allstate Ins. Co., 634 So. 2d 787, 789 (Fla. 5th DCA 1994)(en banc). However, there was no conflict between Sanchez and this Court's decision in Baptist Hospital v. Maler, 579 So. 2d 97 (Fla. 1991), because in Maler, no overt act of jury misconduct occurred, in contrast to Sanchez and the present case.

A misunderstanding of the law, or any of the jury's "emotions, mental processes, or mistaken beliefs" are wholly matters which inhere in the verdict. 579 So.2d at 99. However, "to the extent an inquiry will elicit information about overt prejudicial acts, it is permissible" to make such an inquiry. In fact, as the Third District pointed out in its opinion in Maler, which the Supreme Court affirmed, if "a juror makes vile racial, religious or ethnic slurs against a party or witness during trial or jury deliberations", an inquiry is required. Maler v. Baptist Hospital of Miami, Inc., 559 So.2d 1157, 1162 (Fla. 3d DCA 1989), aff'd, 579 So.2d 97 (Fla. 1991).

There were no racially discriminatory statements or jokes in the Maler jury's deliberations, as there were in the Sanchez case and here. There was only the subjective opinion of two jurors about the reasons why the jury as a whole reached its verdict. The

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[6] The en banc decision erroneously cites that case as Sanchez v. State. See Powell v. Allstate Ins. Co., 634 So. 2d 787, 789 (Fla. 5th DCA 1994)(en banc).

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overt, bigoted conduct of jurors alleged in this case is objectively provable by the testimony of jurors witnessing the facts, or disprovable if it did not occur. Therefore, it cannot be held to inhere in the verdict and is a proper subject of a jury interview.

In analogous circumstances, courts have allowed the use of jurors' affidavits to show overt misconduct. Courts of several other states have held that jurors' affidavits concerning statements made in deliberations are admissible to establish that the jurors making them falsely represented during voir dire the absence of their bias or prejudice, which -- had it been disclosed before trial -- would have disqualified them from serving as jurors. In Department of Public Works v. Christensen, 184 N.E.2d 884, 887 (Ill. 1962), while the Supreme Court of Illinois held that an affidavit was insufficient to have disqualified an allegedly biased juror, it cited several other Illinois cases and held that the rule against use of jurors' affidavits to impeach a verdict "is subject to an exception when it is charged that a juror has answered falsely on voir dire about a matter of potential bias or prejudice."

Similarly, the Minnesota Supreme Court has indicated that it would permit proof of jurors' statements in deliberations which evidence racial bigotry denied in voir dire. See State v. Hayden Miller Co., 116 N.W.2d 535, 539 (Minn. 1962) ("privilege which protects the deliberations of the jury from exposure does not extend to statements of jurors who may have on voir dire concealed

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prejudice or bias which would have disqualified them"). See also McNally v. Walkowski, 462 P.2d 1016, 1019 (Nev. 1969). The Nevada Supreme Court for the first time recognized an exception to Lord Mansfield's rule where the affidavits of jurors showed "concealment of actual bias by several of the jurors on their voir dire examination"); Williams v. Bridges, 35 P.2d 407 (Cal. App. 1934)(bar against use of jurors' affidavits does not apply to an affidavit which demonstrates a previous positive misconduct in concealing actual bias on voir dire).

Statements of racial bigotry in the jury room, like false statements in voir dire concealing bigotry, are overt acts of misconduct. They do not inhere in the verdict. The court can and must inquire into whether they occurred.

D. Scope of the inquiry

Since an inquiry must be held on the facts of this case, we ask the Court to clarify the scope of such an inquiry. We ask the Court to address two issues. First, since there are all kinds of prejudice, the Court should address the kinds of prejudice against which protection will be afforded. Second, the Court should address the limits of the matters into which the court may inquire. Amici urge the court to fashion a rule that will protect all "cognizable" groups, as that term has been explained in the peremptory challenge cases. Further, Amici ask the court to limit the scope of the inquiry to whether the misconduct actually occurred.

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1. All cognizable classes should be protected

The majority below expressed concern that if racial prejudice exhibited by jurors is ground to overturn a verdict in this case, it would open the door to overturning verdicts on the basis of "prejudice based on gender, ethnicity, religion (or lack thereof), sexual orientation, wealth, pity or any other classification or consideration that might influence" a jury verdict. 19 Fla.L.Wkly. at D736. Though verdicts should not be based on anything but the evidence and the law, Florida law does not support such an expansive list of grounds for overturning jury verdicts. However, decisions about prejudice or discrimination in other areas provide some guidance as to what kinds of prejudice might properly be subject to inquiry.

The courts of this State have already held that parties are entitled to a jury which is not the result of a systematic exclusion of persons on the basis of race, State v. Neil, 457 So.2d 481 (Fla. 1984); sex, Abshire v. State, 19 Fla. L. Wkly. S353 (Fla. 1994); religion, Joseph v. State, 19 Fla.L.Wkly. D861 (Fla. 3d DCA 1994); or ethnic group, State v. Alen, 616 So.2d 452 (Fla. 1993). Parties are equally entitled to a jury which is free of prejudices and biases against those same classes. As this Court said in Neil,

> Neither the state nor the defendant is entitled to an unfair juror whose interest, biases or prejudices will determine his or her resolution of the issue regardless of the law and regardless of the facts.

Id. at 437, quoting Smith v. Balkcom, 660 F.2d 573, 533 (5th Cir. 1981).

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In Neil, the Court noted that peremptory challenges were intended to aid in the selection of an impartial jury, not to permit the exclusion of a distinct racial group from the jury or "to encroach upon the constitutional guarantee of an impartial jury." Id. at 486. That same obeisance to an impartial jury requires overturning a jury verdict which is tainted by a demonstrable racial bias or prejudice.

While noting that cases from other jurisdictions on impermissible peremptory challenges speak generally of prejudice or bias based on racial, religious, ethnic, sexual and other grounds, the Court in Neil limited its holding to peremptory challenges of distinctive racial groups solely on the basis of race, leaving the applicability to other groups open for appropriate cases raising the issue.

After Neil, the Court extended its holding to peremptory challenges based solely on ethnicity in State v. Alen, supra. The Court held that a "cognizable class," to which the prohibition against group-based peremptory challenges applies, requires that the group be objectively discernible from the rest of the community.

> First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.

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Id. at 454. These same criteria are appropriate for limiting the types of prejudices which, when exhibited by a juror during trial or jury deliberations, and when applicable to one or more of the parties or witnesses in the trial, require overturning the jury verdict.

The United States Supreme Court originally defined cognizability in terms of whether a group had been singled out for distinctive treatment in the past, and historical discrimination remains an important factor in the definition of a cognizable class. Fields v. People, 732 P.2d 1145, 1153 (Colo. 1987). The extension of Neil to women in Abshire, supra., was thus particularly appropriate, in light of the historic exclusion of women from juries.

The Third District Court of Appeal has also extended Neil to protect Jews against systematic exclusion from juries, holding them to be a cognizable class under Alen.

Additional groups may be held in the future to be protected from peremptory challenges based solely upon the potential juror's membership in the class. Their recognition as a cognizable class under the Alen criteria will generally mandate the concomitant condemnation of juries composed of one or more persons exhibiting a bias or prejudice toward members of that class. As this Court recognized in Neil:

> A cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased.

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Neil, 457 So.2d at 487. At the very least, demonstrable, expressed prejudices on the part of jurors on the basis of race, sex, religion or ethnicity, in trials with parties or witnesses who are members of that class, must result in a new trial.

Public confidence in the fairness of our system of justice can not be sustained in the face of jury verdicts resulting from deliberations including one or more jurors with an outwardly manifested bias or prejudice against persons on the basis of their race, sex, ethnicity or religion.

2. No inquiry into effect of statements on jurors

When allegations of juror misconduct are sufficient under Rule 1.431 and the principles we discuss here are sufficient to justify a jury interview, the interview should be limited to whether the misconduct occurred, and not to any effect which it may or may not have had on the jurors involved in the case.

Any inquiry into whether the error were harmless would most likely require an inquiry into the jury's subjective reasoning -- exactly the kind of inquiry prohibited by the inherency doctrine. As this Court observed in Maler, "the inquiry may not be expanded to ask jurors whether they actually relied on the non-record information in reaching their verdict".

Moreover, proof of actual prejudice should be held to be unnecessary in certain classes of cases, including this one. To give an example of one situation in which no reasonable mind could hold that proof of actual harm is required, suppose that the uncontroverted facts established that a juror was threatened by a

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man holding a gun who said he would harm him unless party "A" received a verdict. Should "A" as the beneficiary of the resulting verdict be permitted to attempt to prove that the juror was not subjectively afraid of the threat, or that the juror was disposed to have found for "A" in any event? We hope that the law would conclusively presume such harm as would warrant a new trial, without regard to the subjective effect on the juror.

This should be the presumption where racially-prejudiced comments and jokes are made in the jury room. As the First District noted in the second Singletary appeal:

> Indeed, one could legitimately maintain that the participation of a juror whose bias has been demonstrated by racial, ethnic or religious comments, precludes the court from finding that the comments did not affect the verdict; thus, where juror misconduct is in the form of biased comments, a new trial will be necessary despite any subsequent showing of "harmlessness" by the nonmovant.

619 So.2d at 354, n.1 (emphasis added).

Finally, as a matter of policy, harmless error analysis cannot apply where the juror misconduct consists of the kind of biased statements at issue here. This kind of bigotry is so inimical to the administration of justice that, even if the error were harmless to the party, it could never be harmless to the legal system itself.

CONCLUSION

This Court has well served the people of this State in taking steps to eliminate unfair discrimination and prejudice from the administration of justice. No great innovation is required here.

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We ask the Court only to allow inquiry into overtly prejudicial statements against a cognizable class made by a juror in the course of his service on the jury. Where an inquiry reveals that such a statement has been made, a new trial must be required.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy hereof has been furnished by mail this 12 day of September, 1994 to: Donna C. Watt, Esquire, P.O. Box 948600, Maitland, Florida 32794-8600; Robert C. Gray, Esquire, Alpizar & Gray, P.A., 1528 Palm Bay Road, N.E., Palm Bay, Florida 32905 and Sharon Lee Stedman, Esquire, Sharon Lee Stedman, P.A., 1516 East Hillcrest Street, Suite 108, Orlando, Florida 32803.

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