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BACK TO THE LABORATORY WITH PEREMPTORY CHALLENGES: A FLORIDA RESPONSE

JAMES R. JORGENSEN*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. Const. amend. VI.

I. INTRODUCTION

With its denial of certiorari in McCray v. New York, Miller v. Illinois, and Perry v. Louisiana, the United States Supreme Court, in a 4-3-2 decision, declined to revisit the issues which Swain v. Alabama first presented to the Court. In Swain the Court considered two questions relating to the exercise of peremptory challenges: one, will a prosecutor's exercise of peremptory challenges be subjected to scrutiny under the equal protection clause of the fourteenth amendment; and two, if so, how can a defendant make out a prima facie case of invidious discrimination. The Court held that, while a prosecutor's exercise of peremptories could be successfully attacked under the equal protection clause, a defendant must, in order to make out a prima facie case of invidious discrimination, show more than that the prosecutor exercised his peremptory challenges to strike all blacks from the jury venire in a particular defendant's case. The Court stated that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." The Court held that this burden was not met by showing that no blacks had served on juries over a period of years in the absence of evidence showing "when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in [the county]."

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3. Alabama utilized the struck-jury system. Id. at 210. Under this system, the venire is first reduced by excuses and removals for cause. The attorneys then exercise their peremptory challenges or strikes to remove veniremen until only the number needed to constitute a full panel remains.
4. Id. at 227.
5. Id. at 224.
Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari in McCray, Miller, and Perry and suggested that Swain should be reexamined in light of sixth amendment standards. Justice Stevens, joined by Justices Blackmun and Powell, agreed with Justice Marshall's appraisal of the importance of the underlying issue of "whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group." Noting that "further consideration of the substantive and procedural ramifications of the problem by other courts [would] enable [the Supreme Court] to deal with the issue more wisely at a later date," Justice Stevens concluded that "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."

Florida is one of those "laboratory" states which is presently confronting the peremptory challenge issue. In Neil v. State, the Third District Court of Appeal certified to the Florida Supreme Court a question of great public importance: "Absent the criteria established in Swain v. Alabama . . . may a party be required to state the basis for the exercise of a peremptory challenge?" Subsequent to the Neil decision the district court certified the identical question in Andrews v. State. The supreme court answered the certified question with a qualified affirmative and, relying upon state constitutional grounds, rejected Swain.

The district court in Neil specifically rejected the constitutional analysis advanced by the California Supreme Court in People v. Wheeler and the similar reasoning of the Massachusetts court in Commonwealth v. Soares. In both Wheeler and Soares the courts, relying upon state constitutional provisions guaranteeing the right to a trial by jury, held that a defendant did not have to

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7. McCray, 103 S. Ct. at 2438 (opinion of Stevens, J.).
8. Id. at 2438-39.
9. 433 So. 2d 51 (Fla. 3d DCA 1983), quashed and remanded, 457 So. 2d 481 (Fla. 1984).
10. Id. at 52 (citation omitted).
11. 438 So. 2d 480, 480 (Fla. 3d DCA 1983), quashed and remanded, 459 So. 2d 1018 (Fla. 1984).
12. Neil, 457 So. 2d at 482, 486.
meet Swain’s “systematic use” burden-of-proof criteria to establish a prima facie case of impermissible discrimination in the prosecutor’s exercise of peremptory challenges. According to these two courts, a defendant makes out a prima facie case and shifts the burden to the prosecutor to show his peremptory challenges were not being exercised solely on the basis of the prospective jurors’ race if he establishes: (1) that several members of a “discrete” or “cognizable” group have been excluded; and (2) that there is a substantial likelihood that these persons were excluded by the prosecutor solely because of their group membership. The Wheeler-Soares analysis derives from principles announced in Duncan v. Louisiana and Taylor v. Louisiana. These principles are discussed below.

The Florida Supreme Court declined to fully embrace Wheeler or Soares but found an alternative to Swain was needed. Relying principally on People v. Thompson, the court established a new test for trial judges to apply when confronted with an alleged misuse of peremptory challenges. Similar to the Wheeler-Soares scheme, the test employs a burden-shifting construct. However, a heavier burden is placed on a party who seeks to challenge his adversary’s use of peremptories under the Neil-Thompson test than that placed on a party who seeks to challenge his adversary under the Wheeler-Soares scheme.

This article will reexamine Swain and attempt to point out some of the factors which are relevant to a consideration of this difficult issue. It is submitted that the Wheeler-Soares courts, by focusing on the effect of peremptories upon jury demographics rather than on the number of peremptory challenges, have confused intangible issues of group bias with Taylor cross-section requirements. The

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15. Both courts concluded that the state was equally entitled to a trial by an impartial and representative jury and could, therefore, attack the defendant’s exercise of his peremptory challenges if such challenges were likely to have been based on group membership criteria. Wheeler, 583 P.2d at 765 n.29; Soares, 387 N.E.2d at 517 n.35.
17. 391 U.S. 145 (1968) (applying sixth amendment provision for jury trial to the states by virtue of the fourteenth amendment).
21. See infra text accompanying note 60.
22. See infra text accompanying notes 64-65.
Wheeler-Soares courts gutted the peremptory challenge system without giving thought to alternative methods which would enhance minority participation on trial juries.23 The Neil-Thompson courts softened the impact of Wheeler-Soares but nevertheless have taken a significant step in changing the role of peremptory challenges in our system of justice.

A strong state policy of ensuring minorities the opportunity to serve on juries does not necessarily require a total abandonment of the peremptory challenge system.24 Because Florida uses a six-person jury in all noncapital cases,25 consideration should be given to the number of peremptory challenges available to the parties.26 It

23. Both the California and the Massachusetts courts relied upon their state constitutions to avoid collision with the rule established in Swain. See Wheeler, 583 P.2d at 767; Soares, 387 N.E.2d at 515-16; see also State v. Crespin, 612 P.2d 716 (N.M. Ct. App. 1980) (adopting the Wheeler-Soares rationale).


25. FLA. STAT. § 913.10 (1983) and FLA. R. CRIM. P. 3.270 provide: "Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."

In a memorandum dated May 9, 1984, from M. David McGriff, Director of Research and Systems Division, Administrative Office of the Courts, 11th Judicial Circuit, to Ignatius Carroll, Criminal Justice Coordinator, Metro-Miami Action Plan, Mr. McGriff reports a number of statistics relating to jury composition. Mr. McGriff concludes that minorities are more likely to be represented on juries of 12 than on juries of 6. For a 6-man jury, given an estimated panel size of 30 (panels vary by judge between 25 and 35) and assuming that the panel reflects the racial breakdown of the 80,000 pull (19.7% black, 80.3% white), the probability of selecting, by random selection, an all-white jury is 21%. For a 12-man jury (there were only 8 in the study, none of which were all white), given an estimated panel of 50 (they vary between 45 and 55) and again assuming that the panel reflects the same black membership (19.7%), the probability of selecting an all-white 12-man jury, by random selection, is 4%.


26. FLA. STAT. § 913.08 (1983) provides:

(1) The state and the defendant shall each be allowed the following number of peremptory challenges:

(a) Ten, if the offense charged is punishable by death or imprisonment for life;
(b) Six, if the offense charged is punishable by imprisonment for more than 12 months but is not punishable by death or imprisonment for life;
(c) Three, for all other offenses.

(2) If two or more defendants are tried jointly, each defendant shall be allowed the number of peremptory challenges specified in subsection (1), and the state shall be allowed as many challenges as are allowed to all of the defendants.

is submitted that Neil should be augmented with a reduction in the number of peremptories, the introduction of certain reporting requirements, and a renewed recognition by trial courts of appropriate challenges for cause. If these additional steps are taken, minority participation will be enhanced without the necessity of invoking an awkward burden-shifting test. Neil would serve as a safety net, but, for the most part, peremptory challenges would remain peremptory and thus continue to serve their traditional and most useful role—assuring the parties that their jury is fair and impartial.

II. Swain and Its Aftermath

Criticism of Swain was immediate and forceful. Despite its critics, Swain remains, if not the popular view, at least the prevailing view in the majority of jurisdictions. In Swain the Court acknowledged that a defendant is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him. Nor is there any constitutional imperative requiring the federal or state governments to grant peremptory challenges. Nevertheless, the Court described the peremptory challenge as "one of the most important of the rights secured to the accused" and described its use by the prosecutor as necessary so that "[b]etween [the accused] and the state the scales are . . . evenly held." Regarding the nature of the peremptory challenge, the Court observed that its essential nature "is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." The Court went on to state that "[i]t is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury


30. Id. at 219.

31. Id. (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

32. Swain, 380 U.S. at 220 (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

33. Swain, 380 U.S. at 220.
duty." The question for trial counsel "is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." In order to make that determination the voir dire in jury selection is wide-ranging.

The dissent in Swain, filed by Justice Goldberg, is frequently overlooked. A fair reading of this dissent compels the conclusion that the basic disagreement between the majority and the dissent related to the state of the record with respect to the historic discrimination against blacks on jury panels in Talladega County. Justice Goldberg noted that "[o]nly where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection." The dissent concluded that in an individual case a prosecutor's motives in exercising peremptories are not subject to question or judicial inquiry nor is a minority defendant entitled to proportionate representation on a jury. These are the same conclusions reached by the majority.

Subsequent to the Swain decision, the United States Supreme Court considered Duncan v. Louisiana, which applied, for the first time, the sixth amendment right to jury trial to the states under the due process clause of the fourteenth amendment. Writing for the Court, Justice White stated, "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." The proposition that a fair cross section of a community must be represented on a jury venire was forcefully driven home by the Court in Taylor v. Louisiana. In Taylor, the Court imposed the sixth amendment requirement that jury venires be selected from a representative cross section of the community. The fair cross-section requirement was qualified by Justice White when he stated that

34. Id. (emphasis added).
35. Id. at 221.
38. Swain, 380 U.S. at 245 (Goldberg, J., dissenting).
39. Id.
41. Id. at 156 (emphasis added).
42. 419 U.S. 522, 530 (1975).
[i]t should also be emphasized that in holding that petit juries
must be drawn from a source fairly representative of the commu-
nity we impose no requirement that petit juries actually chosen
must mirror the community and reflect the various distinctive
groups in the population. Defendants are not entitled to a jury of
any particular composition . . . . 43

In an effort to avoid the alleged harshness of the Swain rule,
state supreme courts developed various alternative theories which
require a prosecutor to explain his use of the peremptory challenge
in certain instances. The first of these theories, developed in the
California case of People v. Wheeler, 44 relied primarily on a Taylor
analysis and required a party to explain the use of its peremptory
challenges when the effect of the challenges was to exclude pro-
spective jurors based upon a presumed bias. 45 A similar approach
was taken by the Massachusetts Supreme Judicial Court in Com-
monwealth v. Soares, 46 wherein the court, relying extensively on
Wheeler, held that "exercise of peremptory challenges to exclude
members of discrete groups, solely on the basis of bias presumed to
derive from that individual's membership in the group, contra-
venes the requirement[s] [of the Massachusetts] Declaration of
Rights." 47 Thereafter the court adopted the Wheeler burden-shift-
ing remedy which requires the alleged offending party to demon-
strate that members of the disproportionally excluded group were
not struck from panels on the basis of their group affiliation. The
force of the Soares opinion is magnified by the fact that the jury
foreman in that case was of the same race as the defendant.

Perhaps the best critical analysis of the impact of Wheeler and
Soares was made by Saltzburg and Powers, who stated:

These decisions differ from Swain in several important respects.
First, they assume that the peremptory challenge is intended to
be used only to eliminate specific bias from the jury. This as-
sumption signals a significant departure from the traditional un-
derstanding of the challenge as one exercised for any reason or for
no reason. Second, they assume that a jury from which some
ranges of presumed bias have been excluded is no longer impar-
tial, while Swain assumed that permitting unrestricted peremp-

43. Id. at 538 (citations omitted).
44. 583 P.2d 748 (Cal. 1978).
45. Id. at 764-65.
47. Id. at 516.
tory challenges furthered impartiality. Third, they presume that
the peremptory challenge can be subject to judicial control with-
out compromising its essential purpose—a proposition that Swain
rejected.48

There is an obvious tension between the constitutional goal of an
impartial jury, enforced by the Taylor cross-section requirement,
and the use of peremptories by litigants which may result in the
dimination or disappearance of minority participants on trial ju-
ries. As noted above, the Wheeler and Soares courts addressed
that problem by requiring a party to explain the use of the pe-
remptory challenge when it appears that a cognizable group is be-
ing eliminated from the jury.49 In State v. Grady,50 the Wisconsin
Court of Appeals rejected the Wheeler analysis, stating:

We refuse to adopt Wheeler on the ground that the test proposed
by the California court is vague and uncertain, and severely limits
the scope of peremptory challenges. If peremptory strikes can
only be exercised in a certain way, dependent on circumstances,
and subject to judicial scrutiny, they will no longer be perem-
ptory. We refuse to undertake such an alteration of the very nature
of the peremptory system.51

Most federal courts have refused to extend Taylor's sixth
amendment cross-section analysis from the venire to petit juries.52

49. Both courts point out that both the defendant and the prosecutor may require an
adversary to explain a peremptory challenge. This may be a hollow benefit for the prosecu-
tor in the event of an adverse ruling by the trial court because of its inherent un-
reviewability in the event of an acquittal. Nor does either court address fifth amendment
implications which might occur in the event the defendant were representing himself.
51. Id. at 612; see also Commonwealth v. Henderson, 438 A.2d 951 (Pa. 1981) (also re-
jecting Wheeler-Soares test as unworkable).
52. See, e.g., Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983); United States v. Childress,

Following the denial of certiorari in McCray, 103 S. Ct. 2438 (1983), McCray filed for a
writ of habeas corpus in the United States District Court for the Eastern District of New
York. The district court granted his petition, concluding that Swain should be modified in
light of Duncan and Taylor. Applying the Wheeler analysis, the court held that McCray
had made out a prima facie case of discrimination and that the state trial court's failure to
require the prosecutor to offer some reason for his challenges, other than race alone, necessi-
tated that McCray be afforded a new trial. McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y.
1983). This decision was affirmed by the Second Circuit Court of Appeals. McCray v.
Abrams, No. 84-2026 (2d Cir. Dec. 4, 1984). The Second Circuit is apparently the only fed-
eral circuit that has departed from Swain. In so doing, the court ignored comity and re-
jected Justice Steven's direction that the states should serve as laboratories in which the
In *United States v. Childress*, the Eighth Circuit Court of Appeals, while acknowledging that such an extension "has much logical and practical appeal," concluded that *Taylor* and its sixth amendment analysis had not in effect overruled *Swain*. The court determined that "the Supreme Court in *Taylor* expressly limited the fair cross section of the community holding to the venire . . . ." At least one commentator has suggested that *Wheeler* and *Soares* were wrongly decided because the courts that decided those cases failed to interpret *Taylor* properly. The commentator states that

the principle of jury representation should be understood to mean that certain characteristics of society that profoundly affect a jury’s verdict should not be distorted in the jury selection process. The crucial aspect of the community that must be represented is not the subgroup proportion, but the community’s mean verdict impact—the mean tendency of its members to influence a verdict toward conviction or acquittal.

The theory of mean verdict impact, however, while undoubtedly sound both in its logic and scientific rationale, does nothing to satisfy a perceived community need for minority participation. The need for increased minority participation on trial juries seems clear. How courts obtain this important societal goal is the question that remains.

peremptory challenge issue receives further study. See *supra* text accompanying note 8.

53. *Childress*, 715 F.2d at 1319.
54. *Id.* at 1320.
55. *Id.* at 1319-20; see also *Willis v. Zant*, 720 F.2d at 1219 n.14, wherein the court, citing *Childress*, stated: "[W]e decline petitioner's invitation to extend the sixth amendment's cross-section analysis under *Taylor* . . . to the traverse jury itself. *Taylor* remains limited to venires. The United States Court of Appeals for the Eighth Circuit recently considered the issue in depth and was unwilling to read the sixth amendment so broadly."


58. See *Neil v. State*, 433 So. 2d 51 (Fla. 3d DCA 1983), *quashed and remanded*, 457 So. 2d 481 (Fla. 1984); Saltzburg & Powers, *supra* note 24, at 339; see also articles cited *supra* note 57 and *infra* note 141.
III. FLORIDA'S INITIAL RESPONSE: Neil v. State

In answer to the certified question posed by the Third District Court of Appeal in Neil, the Florida Supreme Court rejected Swain and found that an alternative was needed. The court explicitly held "that the test set out in Swain is no longer to be used by this state's courts when confronted with the allegedly discriminatory use of peremptory challenges."\(^{59}\) Borrowing heavily from People v. Thompson, the court established a new test for the guidance of trial courts:

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 party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.\(^{60}\)

To the extent that Neil and Thompson require parties to explain the use of their peremptories, they are subject to the same criticism to which Wheeler and Soares are subject.\(^{61}\) Having established the test to be used by trial courts, the court limited the scope of its decision to distinctive racial groups rather than the broad group categorizations found in Wheeler and

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59. Neil, 457 So. 2d at 486.
60. Id. at 486-87 (footnotes omitted).
61. See supra text accompanying note 48.
Soares. The applicability of the decision to religious, ethnic, sexual, or other grounds of group bias is left open to be determined on a case-by-case basis. The court departed from Thompson, and followed Wheeler and Soares, by holding that both the state and the defense may challenge the allegedly improper use of peremptories. However, the court agreed with Thompson that

the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories. It may well be that the challenges were properly exercised but that that fact would not be apparent to someone not in attendance at the trial. The propriety of the challenge, however, might be readily apparent to the judge presiding over the voir dire. We emphasize that the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion.

Although Neil represents a significant departure from prior Florida practice and invests the trial courts with broad (and perhaps unreviewable) discretion in matters regarding alleged abuse of peremptory challenges, several questions remain unanswered. Given the court's acceptance of the proposition that the exclusion of a number of members of a distinct racial group by itself is insufficient to trigger an inquiry regarding peremptory challenges, the question then becomes what must an aggrieved party show to satisfy a trial court there is sufficient evidence to trigger a Neil inquiry. Under Wheeler and Soares the mere fact that a number of persons of a distinct group have been excluded seems sufficient; however, both Neil and Thompson require that something more be shown.

Also left unanswered is the question of the appropriate response once the trial court has concluded that the burden shifts to the opposing party to explain the questioned challenges. Although the court states that the reasons given in response need not be equivalent to those for a challenge for cause, a mere showing that the challenges were based on (1) the particular case on trial, (2) the parties or witnesses, or (3) characteristics of the challenged persons other than race, would not be efficacious. In addition, no standards are provided in Neil which would guide the trial court in

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62. Neil, 457 So. 2d at 487.
63. Id. But see supra note 49.
64. Neil, 457 So. 2d at 487 n.10.
66. Neil, 457 So. 2d at 487.
the exercise of its discretion regarding the burden of proof to be met by a challenged party. The court did not indicate whether the evidentiary standard would be a mere preponderance, more likely than not, or clear and convincing. An absence of effective standards will virtually preclude appellate review by the district courts.

It is clear that Neil has vested trial judges with broad discretion when dealing with the alleged abuse of peremptory challenges. The unanswered questions in Neil will need to be fleshed out by subsequent decisions. Indeed the court invited further refinement when it stated, “It may even be possible that, on the peculiar facts of a particular case, no member of some distinct group could be impartial. If this occurs, an attorney should be able to state with certainty that this is so and that peremptories have been exercised because of empathy or bias.”

This observation by the court seems to run counter to its express rejection of Swain and the jurisprudential theories implicit in Wheeler and Soares.

Neil squarely rejects Swain and provides new methods for trial courts to employ when addressing the difficult issue of peremptory challenge abuse. The discussion which follows will suggest that the court, through its rulemaking power, can further reduce the tension between the goals of minority participation on trial juries and the ability of trial counsel to select juries with a minimum of interference by the courts.

IV. Peremptory Challenges in Florida

Jury trials in Florida are governed by constitutional mandate, statutory provisions, and rules of court. The exercise and number of peremptory challenges in both civil and criminal cases are controlled by statute and rule of court. The use of the pe-

67. Id. (footnote omitted).
68. FLA. CONST. art. I, § 16 provides: “In all criminal prosecutions the accused shall . . . have the right . . . to have a speedy and public trial by impartial jury in the county where the crime was committed.” Id. art. I, § 22 provides: “The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.” Id. art. III, § 11(a)(5) provides: “There shall be no special or general law of local application pertaining to . . . petit juries, including compensation of jurors, except establishment of jury commissions . . . .”
70. See FLA. R. CRIM. P. 3.251-360.
71. FLA. R. CIV. P. 1.431(d).
72. See FLA. STAT. § 913.08 (1983); FLA. R. CRIM. P. 3.350.
73. Although the focus of this article is primarily on criminal cases, the exercise of peremptory challenges in civil cases is also a significant issue. See City of Miami v. Cornett, No. 81-85 (Fla. 3d DCA opinion filed Jan. 29, 1985); Ober, How Peremptory Is a Peremp-
remptory challenge is well rooted in Florida jurisprudence.\textsuperscript{74} The control of the voir dire examination is exclusively a judicial responsibility.\textsuperscript{75} The time and extent of voir dire is properly supervised by the trial judge,\textsuperscript{76} who is the arbiter of a juror’s fitness to serve\textsuperscript{77} and the superintendent of the construction of the jury panel.\textsuperscript{78} As the Florida Supreme Court stated in Cross v. State,\textsuperscript{79} “selection of a jury to try a case is a work which devolves upon the court. [Its] purpose is to secure such jurors as are qualified for jury service and who are without bias or prejudice for or against the parties in the cause.”\textsuperscript{80} The trial court’s discretion with respect to the latitude given the parties in examining jurors is quite broad.\textsuperscript{81} It is clear, however, that a failure to permit inquiry of a prospective juror regarding racial bias is error.\textsuperscript{82}

While the manner in which peremptory challenges are made has remained consistent,\textsuperscript{82} the number of peremptory challenges allowed has not been so firmly fixed. Early Florida law permitted a defendant twenty peremptory challenges in capital cases and the state, five; in noncapital felonies a defendant had five peremptory challenges and the state, two. In misdemeanor cases the defendant had three peremptory challenges and the state, two.\textsuperscript{84} The statutory number of peremptories remained the same until 1891 when, pursuant to legislative direction, a revision commission submitted comprehensive revisions which, among other changes, materially affected the number of peremptory challenges.\textsuperscript{85} The revisers, acknowledging their charge to simplify, arrange, and consolidate the statutes, while abstaining from making changes in statutes which concern matters of public policy, nevertheless reduced the number of challenges to ten for each side in capital cases, five for each side

74. Mann v. State, 3 So. 207 (Fla. 1887).
77. Singer v. State, 109 So. 2d 7 (Fla. 1959).
78. Walsingham v. State, 56 So. 195 (Fla. 1911).
79. 103 So. 636 (Fla. 1925).
80. \textit{Id.} at 637.
82. Pinder v. State, 8 So. 837 (Fla. 1891); see Ham v. South Carolina, 409 U.S. 524 (1973).
83. Grant v. State, 429 So. 2d 758, 759-60 (Fla. 4th DCA 1983); see also Edge v. State, 455 So. 2d 626, 627 (Fla. 5th DCA 1984) (Cowart, J., concurring).
85. See Letter from Governor Francis P. Fleming to the Florida State Legislature (May 14, 1891), \textit{reprinted in Fla. H.R. Jour.} 635 (1891) (transmitting revised statutes).
in all other felonies, and three for each side in misdemeanors. In making these dramatic changes in the number of allowed peremptory challenges, the revisers went beyond their charge. The legislature nevertheless accepted the revisions and published them as part of the revised statutes of 1892. No explanation for these revisions can be found in the legislative history. A subsequent amendment occurred in 1939 providing for ten peremptory challenges for each side in capital and life felonies and increasing by one for each side the number of peremptories for all other felonies.

As a consequence of Florida's selection as a pilot state to implement the American Bar Association (ABA) standards for the administration of criminal justice, both the Florida legislature and the Florida Supreme Court have engaged in substantial revisions of the statutes and rules of criminal procedure. The Florida legislature recognized that the statutory provisions regarding the number of peremptories available to the parties in criminal cases were redundant in light of court rule.

Pursuant to its constitutional authority, the Florida Supreme Court, in furtherance of the ABA standards, published new and amended rules of criminal procedure. Justice Adkins filed a special concurrence outlining the difference between substance and procedure. Noting that "[t]he entire area of substance and procedure may be described as a 'twilight zone,'" Justice Adkins stated, "Practice and procedure encompass the course, form, manner,

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86. See Letter from Revisers to Governor Francis P. Fleming (May 14, 1891), reprinted in Fla. H.R. Jour. 635-38 (1891).
87. Ch. 19554, § 189, 1939 Fla. Laws 1300, 1347.
90. Ch. 70-339, § 87, 1970 Fla. Laws 989, 1034 (drafter's comment: "Although the subject of the proposed section is covered by the Rules of Criminal Procedure (1.270), it can be argued that this is a substantive right and should be retained as a statute."). But see Wilson v. State, 304 So. 2d 119 (Fla. 1974) (holding number of peremptory challenges allowed is procedural in nature).
91. Fla. Const. art. V, § 2(a) provides:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.
means, method, mode, order, process or steps by which a party en-
forces substantive rights or obtains redress for their invasion.
'Practice and procedure' may be described as the machinery of the
judicial process as opposed to the product thereof." This definition
is not easy to apply, and the line between legislative and judi-
cial authority remains difficult to draw. Justice Adkins' charac-
terization of the difference between substance and procedure was
approved without dissent when the court construed the constitu-
tionality of legislation bearing upon the regulation of voir dire ex-
amination during civil trials. In its clarification opinion the court
stated, "The adoption as rules of the Court of all statutes which
have not been superseded or may be in conflict with the rules is
primarily a matter of convenience or administrative expediency.
Such adoption avoids the question of whether a matter lies within
the field of substantive law or procedural law." The court went
on to state:

The fact that this Court may adopt a statute as a rule does not
vest the Legislature with any authority to amend the rule indi-
rectly by amending the statute. In other words, an attempt by
the Legislature to amend a statute which has become a part of
rules of practice and procedure would be a nullity.

Other statutes impinging on the court's rulemaking power have
been dealt with similarly. The court has not, however, used its
rulemaking power in a manner which would engender discord be-
tween it and the legislature. Following its holding that the legisla-
tion relating to civil voir dire was a nullity, the court approved a
change in the rules of civil procedure which effectively accompl-
ished the purpose of the legislation. The legislature, in turn,
repealed all the legislation regarding peremptory challenges, chal-
lenges for cause, and oral examination of jurors during voir dire in

93. Id. at 66 (Adkins, J., concurring).
94. See Note, The Rulemaking Power of the Florida Supreme Court: The Twilight Zone
95. See In re Clarification of Florida Rules of Practice & Procedure, 281 So. 2d 204 (Fla.
1973).
96. Id. at 205.
97. Id. (emphasis added).
98. See, e.g., Avila South Condo. Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977); Hunt-
ley v. State, 339 So. 2d 194 (Fla. 1976); Swan v. State, 322 So. 2d 485 (Fla. 1975); Benyard v.
Wainwright, 322 So. 2d 473 (Fla. 1975).
civil cases.\textsuperscript{100} It is clear that, although legislation affecting the method and manner by which trial jurors are examined and challenged would be a nullity,\textsuperscript{101} the court will pay close attention to the public policy declarations of the lawmakers:

\textit{[C]ommentators have recognized that both court and legislature can make necessary contributions towards fair and efficient court procedure: the court can better regulate the details of rules and change them more easily to fit changing conditions; the legislature can establish general policy and act as a check upon the court.}\textsuperscript{102} 

\section*{V. JURIES OF SIX AND THE PEREMPTORY CHALLENGE}

It is not the function of this section to revisit the debate generated by the Supreme Court's approval of six-person juries in \textit{Williams v. Florida}.\textsuperscript{103} The use of six jurors to decide serious cases is hardly a novel approach in Florida. \textit{Williams} merely reaffirmed law that had existed in Florida since 1877\textsuperscript{104} and was approved by the Florida Supreme Court in the same year in which it was passed.\textsuperscript{105} The genesis of Florida's use of a six-person jury was undoubtedly its sparse population and rural economy, compounded by the fact that women were not allowed to serve on juries.\textsuperscript{106} Although Florida is no longer sparsely populated, nor its economy agrarian, it continues to use a six-person jury in cases affecting both property and liberty interests.\textsuperscript{107} The discussion which follows will suggest that the \textit{Wheeler-Soares} rationale focuses on the wrong critical issue: It is not the manner in which peremptories are exercised, but the number of peremptories available, which affects the cross-section requirement imposed by \textit{Taylor}. Specifically, an overabundance of peremptory challenges permits the parties to defeat the cross-section goal of \textit{Taylor}.\textsuperscript{108}

\textsuperscript{100} See ch. 73-333, § 24, 1973 Fla. Laws 828, 840 (repealing Fla. Stat. §§ 53.011, .021, .031, .051 (1971)).
\textsuperscript{101} See \textit{supra} text accompanying notes 71-82.
\textsuperscript{102} Note, \textit{supra} note 94, at 102 n.158 (quoting 43 N.Y.U. L. Rev. 776, 786 (1968)).
\textsuperscript{103} 399 U.S. 78 (1970); see also Ballew v. Georgia, 435 U.S. 223 (1978), and the authorities collected id. at 231 n.10.
\textsuperscript{104} Ch. 3010, § 6, 1877 Fla. Laws 52, 54.
\textsuperscript{105} See Gibson v. State, 16 Fla. 291 (1877).
\textsuperscript{106} See Comment, \textit{Florida's Six-Member Criminal Juries: Constitutional, but Are They Fair?}, 23 U. Fla. L. Rev. 402 (1971).
\textsuperscript{107} See Fla. Stat. § 913.10 (1983). \textit{But see id.} § 73.071 (12-person jury required in condemnation cases).
\textsuperscript{108} See 3 ABA \textit{STANDARDS FOR CRIMINAL JUSTICE} § 15-2.6(a) & commentary at 62-63.
Selection of an unbiased trial jury is a function of the court and is not the function of trial counsel. Belli suggests that

[trial counsel] has no duty to select a panel which is the most objective. Indeed, he selects the panel which he thinks is the most unobjective, the most favorable to his side. (In the long run, however, this gives an objective jury as the other side will strike jurors who are not favorable to it and eventually a good jury is chosen.)

In most jurisdictions, including Florida, prospective jurors are initially challenged for cause. If the voir dire has been as wide-ranging and probing as that suggested in Swain, trial counsel will be able to employ appropriate challenges for cause upon which trial courts can make rational rulings. Given a substantially unbiased venire the need for a large number of peremptory challenges is considerably reduced.

Florida presently permits the exercise of ten peremptory challenges for each party in a capital or life felony case and six peremptories for each party in all other felonies. Thus, in a prosecution for a noncapital life felony, a party, through the use of all available peremptories, can affect jury composition by striking up to one and two-thirds panels. Neither the state nor the defense should have the power to erode the demographics of a panel to this extent. Although it is true that liberty interests are generally (and rightfully) regarded as more important than the interests of civil litigants, the civil bar continues to successfully try exceedingly complex cases involving large sums of money to juries of six persons with the benefit of only three peremptory challenges per side.

Florida courts have not been reluctant to examine the competency of a juror challenged for cause. In announcing a standard for weighing the potential partiality of a juror, the Florida Supreme

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110. M. Belli, supra note 36, at 428.
112. J. Van Dyke, supra note 27, at 139-45.
115. See J. Van Dyke, supra note 27, at 160.
Court stated in Singer v. State\textsuperscript{117} that

the true test to be applied should be not whether the juror will yield his opinion, bias or prejudice to the evidence, but should be that whether he is free of such opinion, prejudice or bias or, whether he is infected by opinion, bias or prejudice, he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon the evidence given at the trial.\textsuperscript{118}

Other Florida appellate courts have indicated a willingness to make a thorough search of the voir dire record in an effort to insure the proper disposition of trial court rulings regarding challenges for cause. In Leon v. State,\textsuperscript{119} the court reversed a burglary conviction, restated the Singer test, and then noted that "[w]here there is any reasonable doubt as to a juror's possessing the requisite state of mind so as to render an impartial verdict, the juror should be excused, . . . and the defendant given the benefit of the doubt . . . ."\textsuperscript{120} The court went on to hold that it is error for a trial court to force a party to exhaust its peremptory challenges on persons who should be excused for cause.\textsuperscript{121} The willingness of Florida's appellate courts to comb voir dire records\textsuperscript{122} should be a sufficient basis to protect the interests of the litigants and at the same time permit the Florida Supreme Court to reduce the number of available peremptory challenges.

A reduction in the number of peremptory challenges would not only avoid the necessity of invoking the awkward burden-shifting criteria found in Neil but would also have the salutary effect of preventing litigants from materially altering the jury demography. Challenges, whether peremptory or for cause, are a vindication of a right to reject, not to select, a juror.\textsuperscript{123} No party has a right to insist upon a jury of a particular composition.\textsuperscript{124} Focusing on real

\textsuperscript{117} 109 So. 2d 7 (Fla. 1959).
\textsuperscript{118} Id. at 24.
\textsuperscript{119} 396 So. 2d 203 (Fla. 3d DCA 1981).
\textsuperscript{120} Id. at 205 (citations omitted).
\textsuperscript{121} Id.
\textsuperscript{122} See, e.g., Anderson v. State, 9 Fla. L.W. 2468 (3d DCA Nov. 20, 1984); Plair v. State, 453 So. 2d 917 (Fla. 1st DCA 1984); Skipper v. State, 400 So. 2d 797 (Fla. 1st DCA 1981), rev'd on other grounds, 420 So. 2d 877 (Fla. 1982); Ashley v. State, 370 So. 2d 1191 (Fla. 3d DCA 1979).
\textsuperscript{123} See Hayes v. Missouri, 120 U.S. 68 (1887); see also Young v. State, 96 So. 381, 382 (Fla. 1923); Comment, Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law, 44 U. Pitt. L. Rev. 673, 681 (1983).
bias through the challenge for cause, coupled with a corresponding reduction in peremptory challenges, will have the additional benefit of giving the courts issues with which they can deal instead of leaving them to tread into lofty areas of statistical decision theory.\textsuperscript{125} If the “laboratory” states are going to generate the discussion and data that the United States Supreme Court will use when it revisits the issues presented in Swain, the issue for consideration should be real, rather than imagined, bias.

There will always be cases in which a lawyer or a litigant concludes that a particular venire person who cannot be eliminated by means of a challenge for cause will not be fair when considering his case. That fear, whether ill-founded or not, is the proper reason for the exercise of a peremptory challenge.\textsuperscript{126} A reduction in the number of peremptory challenges available would make them more valuable in the hands of the parties, and their use would be accordingly husbanded.\textsuperscript{127}

VI. OTHER FACTORS AFFECTING PEREMPTORY CHALLENGES

Sections II and V of this article have identified the misplaced focus of the Wheeler-Soares rationale and have suggested that a reduction in peremptory challenges, coupled with a strict compliance with the Taylor cross-section requirements, would enhance minority participation on juries. Such a proposal contemplates that trial courts will be sensitive to challenges for cause.\textsuperscript{128} Little guidance is available from other jurisdictions which would be helpful in determining the appropriate number of peremptory challenges.\textsuperscript{129} The federal rules currently provide for twenty challenges for each side in capital cases, six challenges for the government in felonies, and ten challenges for the defendant in felonies.\textsuperscript{130} An effort to amend the federal rules has been rejected by Congress.\textsuperscript{131} The alternative of an affirmative action program for juries destroys ran-

\begin{enumerate}
\item[127.] See J. Van Dyke, supra note 27, at 169 (recommending reduction in number of available peremptory challenges).
\item[128.] See supra text accompanying note 113.
\item[129.] See J. Van Dyke, supra note 27, at 281-84 (app. D, Number of Peremptory Challenges and Method of Voir Dire).
\item[130.] See Fed. R. Crim. P. 24(b).
\item[131.] See Note, The Defendant's Right To Object to Prosecutorial Misuse of the Peremptory Challenge, 92 Harv. L. Rev. 1770, 1774 n.37 (1979).
\end{enumerate}
domness and, in any event, is unconstitutional.132

Although this article recommends a substantial reduction in the number of peremptory challenges available to the parties, in criminal cases the trial courts should be vested with discretion to grant additional peremptory challenges in exceptional cases. The granting of extra peremptory challenges on motion of the state was held to be reversible error per se by the First District Court of Appeal.133 The Florida Supreme Court subsequently amended the Florida Rules of Criminal Procedure to provide for additional challenges on motion of either party.134 If the court accepts the recommendations made herein, the court should make it clear that the effect of the rule is to include single-count as well as multi-count trials.135 The timing of such a request should be in advance of trial so that the parties will know the exact number of challenges available. The discretion to grant additional peremptories seems particularly appropriate in highly publicized cases.136

With the exception of isolated cases, there is an apparent absence of data regarding jury demographics.137 Although there are discrete studies regarding minority participation on trial juries,138 there is no systematic collection of data at the state or national levels regarding the inclusion of minorities on jury venires or jury panels. We simply do not know with any degree of precision the

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133. See Sanders v. State, 328 So. 2d 268 (Fla. 1st DCA), cert. denied, 336 So. 2d 1184 (Fla. 1976).

134. See In re Florida Rules of Criminal Procedure, 343 So. 2d 1247, 1261 (Fla. 1977); see also 3 ABA Standards for Criminal Justice, supra note 108, § 15-2.6(a) ("the trial judge should be authorized to allow additional peremptory challenges when special circumstances justify doing so").

135. See Moore v. State, 335 So. 2d 877 (Fla. 4th DCA 1976).


extent of the perceived problem. If there is indeed institutional discrimination, the institution should act to prevent it.139

The need to refocus on the peremptory challenge and minority juror participation is perhaps best illustrated by a recent trial in Miami, Florida. In State v. Alvarez,140 an all-white jury found the defendant, a white Hispanic police officer, not guilty of manslaughter by culpable negligence in an incident resulting in the death of a young black male. The thirty-person venire included four blacks. Two of the potential black jurors were excused for cause, and two were peremptorily challenged by the defendant, resulting in an all-white jury. Community concern focused upon the peremptory challenge issue.141 Appeals to local legislative bodies manifested the community concern.142 The Dade County Commission responded by approving a resolution calling upon the state legislature to enact legislation which would change the jury selection process so as to make jury panels more representative of community structure.143 Editorial support for reexamination or abolition of the peremptory challenge was an additional consequence of the Alvarez trial.144 Although the first legislative expression of dissatisfaction

139. See generally Benokraitis & Griffin-Keene, Prejudice and Jury Selection, 12 J. BLACK STUD. 427 (1982).
141. See supra note 57; Baird, Practice of excluding minorities from juries is put on trial at FIU, Miami Herald, Feb. 9, 1984, at 6D, col. 1; Fabricio, Blacks deserve to be a part of judicial process, Miami Herald, Mar. 17, 1984, at 1B, col. 1; Kennedy, In the eye of the storm: Priest struggles to keep lid on Miami tension, The Voice, Vol. XXXI, No. 54, Mar. 9, 1984, at 1. Other communities have expressed identical concerns. See Frantz, Many blacks kept off juries here, Chicago Tribune, Aug. 5, 1984, § 1, at 1, col. 3.
142. See Letter from Msgr. Bryan O. Walsh, Chairperson, Metropolitan Dade County Community Relations Board, to the Dade County Commission (Mar. 5, 1984) (calling for Commission support for a change in jury selection process that would result in juries more representative of the multi-ethnic and multi-cultural community).
143. See Metropolitan Dade County Commission Resolution No. R-237-84 (adopted Mar. 6, 1984). Statistics gathered in the 11th Judicial Circuit from January through June of 1984 indicate that 23% of all jurors were black and 81% of all juries during that period included at least one black juror. Memorandum from M. David McGriff, Director of Research and Systems Division of the Administrative Office of the Courts, 11th Judicial Circuit, to Ignatius Carroll, Criminal Justice Coordinator, Metro-Miami Action Plan (July 25, 1984); see also supra note 25.
144. See The Challenge, Miami Herald, Mar. 17, 1984, at 32A, col. 1 (calling for reexamination of the use of peremptory challenges by lawyers); Hampton, Abolish Peremptory Challenges, Miami Herald, Mar. 18, 1984, at 2E, col. 3 (calling for the abolition of the peremptory challenge). But see Freedberg & Macari, Circuit Court jury system is racially balanced, Miami Herald, July 15, 1984, at 1A, col. 2; Bias on the Jury, Miami Herald, July 21, 1984, at 30A, col. 1 (computerized study showing that Dade County's circuit court jury system is racially balanced as discriminatory practices by prosecutors tend to be offset by defense attorneys excluding a highly disproportionate number of whites).
with the peremptory challenge system, which focused primarily upon challenges exercised by the state, failed, additional legislation will undoubtedly be offered during the 1985 session of the Florida legislature.

VII. CONCLUSION

It is clear that the Florida Supreme Court has partially addressed the peremptory challenge issue. Additional attention with respect to the method and manner in which peremptory challenges are exercised will serve the cause of justice and satisfy the litigants and the populace that their cases are being fairly tried. Whether the impetus for change in the system is legislatively or judicially initiated is of little consequence. This article has noted that there is only limited data available regarding venire and trial jury demographics. The court, through its vast rulemaking power, should act to cure this defect by requiring the respective circuits to report on jury demographics both for petit juries and for venires. Such a procedure will have the additional benefit of satisfying the court that the Taylor cross-section requirements are being met in Florida.

There appears to be a substantial difference between the reality and public perception regarding minority participation on trial juries. The limited data suggests that blacks are serving on trial juries to a larger degree than expected. The media bears some responsibility for educating minority segments of the public regarding the realities of the criminal justice system. The problems generated by the exceptional cases, such as Alvarez and other highly visible trials, will be minimized by the effect of Neil

145. Fla. SB 748 (1984) and a companion bill, Fla. HB 91 (1984), which would have created Fla. Stat. § 913.18, provided:

(1) A presumption of discrimination is created if any identifiable minority, ethnic, social, or gender group is excluded from jury service by three-fourths of the preemntory [sic] challenges used by the state attorney or assistant state attorney. Such presumption may be overcome by the showing by the state of an over-riding state interest.

(2) If the state fails to meet its burden in overcoming the presumption of discrimination, the court may disallow a challenge or take other appropriate action.

146. See supra notes 143-44.

147. See Circuit Court jury system is racially balanced, supra note 144; Bias on the Jury, supra note 144.

148. See supra text accompanying notes 140-45; Brief of Amici Curiae, The Florida State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and Common Cause of Florida at 4-12, Neil v. State, 457 So. 2d 481 (Fla. 1984).
and by following the recommendations contained in this article.

A substantial reduction in the number of peremptory challenges available to the parties and renewed recognition by trial courts of appropriate challenges for cause would enhance minority participation without the necessity of completely eliminating peremptory challenges. The courts, as well as commentators, recognize that "[a]ll people have biases and opinions that will inevitably influence their decisions and perceptions, including those on jury duty. The Supreme Court has recognized this in cases in which it finds that jury selection procedures must assure a 'fair possibility for obtaining a representative cross section of the community.'" Professor Babcock states, "The ideal that the peremptory serves is that the jury not only should be fair and impartial but should seem to be so to those whose fortunes are at issue." In the search for an impartial jury the wisdom of Mr. Justice Cardozo seems particularly appropriate: "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Florida courts, when addressing the peremptory challenge issue, must continue to "keep the balance true."

149. Among the recommendations made by the Dade County Bar Association Task Force On Jury Selection (the task force was created as a result of public concern about the selection of all-white juries in several well-publicized trials) is the recommendation that the number of peremptory challenges be reduced for both the state and the defense. Two other recommendations are that the state be given fewer challenges than the defense and that a multiple number of challenges in multi-defendant cases should not be allowed. See Dade urged to overhaul jury system, Miami News, Sept. 18, 1984, at 1A, col. 1.


151. Babcock, supra note 150, at 552.
