

1992

## Utah v. Macial : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LOUIS LEE MACIAL,	:	Case No. 920316-CA
Defendant/Appellant.	:	Priority No. 2

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**REPLY BRIEF OF APPELLANT**

Appeal from a judgment and conviction for three counts of "Unlawful Distribution, Offering, Agreeing, Consenting, or Arranging to Distribute a Controlled Substance," all second degree felonies, in violation of Utah Code Ann. sections 58-37-8(1)(a)(ii), - (8)(1)(b)(i) (1991), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding.

**UTAH COURT OF APPEALS  
BRIEF**

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DEC 7 1992

May T. Noonan  
Clerk of the Court  
Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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INTRODUCTION

Defendant/Appellant Louis Lee Macial relies on his opening brief and also refers this Court to that brief for the statements of jurisdiction, the issues, the case, and the facts. Appellant replies to the State's brief as follows.

SUMMARY OF THE ARGUMENT

The State has acknowledged that its explanation for the use of a peremptory challenge did not demonstrate a particular bias of Ms. English, the female black juror. Since a showing of bias must be part of the prosecutor's explanation as it "relate[s] to the case being tried," the cited justification was legally insufficient.

Regardless of whether Ms. English was characterized as "whiny" or "unwilling to speak [about her discrimination lawsuit]," both explanations failed to satisfy the requirements of applicable case law. The prosecution's speculative concern that Ms. English "would [not] be a good juror with the other jurors" could have been cleared up with a simple inquiry, questions not asked by the State.

## ARGUMENT

### POINT

#### THE STATE FAILED TO PROVIDE A LEGALLY ADEQUATE EXPLANATION FOR ITS PEREMPTORY CHALLENGE

(Reply to Appellee's Brief)

Mr. Macial and the State both agree that the four criteria cited by the Utah Supreme Court in State v. Cantu, 778 P.2d 517, 518 (Utah 1989) ("Cantu II"), provides a useful framework for analyzing the adequacy of the prosecutor's rebuttal explanation of a peremptory challenge. Opening Brief of Appellant Macial, page 10; Appellee's Brief, page 9. "[A]n explanation given by a prosecutor for the exercise of a peremptory challenge must be (1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate.'" Cantu II, 778 P.2d at 518 (quoting State v. Butler, 731 S.W.2d 265, 268 (Mo. App. 1987)). However, as recognized by the Cantu II opinion, the list is not exhaustive and may include other circumstances. See Cantu II, 778 P.2d at 518-19 (citing People v. Wheeler, 583 P.2d 748, 764 (1978) and State v. Slappy, 522 So.2d 18, 22 (Fla. 1988)).

Contrary to the State's contention, see Appellee's brief at 12, other relevant factors include (1) the failure to demonstrate a juror's specific bias, and (2) the fact that similarly situated jurors were treated differently. Opening Brief of Appellant Macial, Points B & C.1; cf. Cantu II, 778 P.2d at 519 (construing People v. Hall, 35 Cal.3d 161, 197 Cal. Rptr. 71, 74, 672 P.2d 854, 857 (1983) (peremptories must be based on grounds reasonably related to case on

trial or for reasons of specific bias)).<sup>1</sup>

Because the State has conceded that "[t]he prosecution did not demonstrate that Ms. English had a particular bias[,] . . ." see Appellee's brief at 12, the prosecutor's explanation must fail. The trial court clearly erred<sup>2</sup> in accepting the State's "justification" that because the black juror, Ms. English, was "[unwilling] to speak before the rest of the group about a matter [the discrimination lawsuit] that I [the prosecutor] didn't find . . . was so personal, . . . I [did not] think she would be a good juror with the other jurors." (R 216).

the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a "specific bias" of the juror, which may justify the peremptory challenge:

"The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as "a bias relating to the particular case on trial or the parties or witnesses thereto." Wheeler, 22 Cal.3d at 276, 148 Cal. Rptr., at 902, 583 P.2d at 760.

Floyd v. State, 539 So.2d 357, 361 (Ala. Crim. App. 1987) (emphasis

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1 See also State v. Cantu, 750 P.2d 591, 595 (Utah 1988) (Cantu I) ("we will examine the record to determine if all the 'facts and circumstances' raise the inference that the prosecution used its peremptory challenges in a racially discriminatory manner"); Slappy, 522 So.2d at 22 (asserted reasons weighed in light of the total course of the voir dire).

2 Appellant continues to maintain that the appropriate standard of review is a bifurcated approach, with deference given to the trial court's subsidiary findings and a correction of error standard accorded its ultimate legal conclusion. See Opening Brief  
-[footnote continued on next page]-



added). As alluded to by the above authorities, not only is "specific bias" an appropriate consideration, such a showing is actually subsumed by definition within the "related to the case being tried" criterion of Cantu II. See Floyd, 539 So.2d at 361; Cantu II, 778 P.2d at 518 (second requirement); see also 778 P.2d at 519 (emphasis added) ("The [prosecutor's] question was both desultory and insufficient to establish any specific bias on the part of the jurors").

Interestingly, the State on appeal has discounted the prosecutor's "whiny" explanation, the justification immediately preceding its "bottom line" rationale: "I [the prosecutor] don't think she would be a good juror with the other jurors." (R 216). But see Salt Lake City v. Salt Lake County, 568 P.2d 738, 740 (Utah 1977) (under the "last antecedent" rule of construction, "qualifying words and phrases are generally regarded as applying to the immediately preceding words, rather than to more remote ones"). Instead, the State has emphasized Ms. English's alleged

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2 -[footnote cont'd]-  
of Appellant Macial, pages 2-3; State v. Ramirez, 817 P.2d 774, 781-82 n.3 (Utah 1991). Mr. Macial disputes on appeal, as he did at trial, the court's assessment of Ms. English's demeanor. (R 216-17). He realizes, however, that the court's finding on this is entitled to deference. Nevertheless, under either the "clearly erroneous" or the "question of law" standard, the court's ultimate ruling was in error. See, e.g., State v. Cantu, 778 P.2d 517, 518 (Utah 1989) (the trial court may have found that the prosecution exercised its peremptory challenge because it was angry at defense counsel, but the court improperly concluded that such a reason constituted a valid, legal basis); Williams v. State, 548 So.2d 501 (Ala. Crim. App. 1988) (although the trial court's factual findings were not disputed, the legal conclusions premised upon those findings were "clearly erroneous"); Hill v. State, 787 S.W.2d 74 (Tex. App. 1990).

"unwillingness to speak up before the other jurors, which was evident in both her reluctance to openly state that she had attempted to sue the Board of Education for job discrimination and her question about whether she should vocally tell what her daughter did for the FBI." Appellee's brief at 10 (citations omitted).

For reasons similar to the whininess contention (which has already been discussed and does not require repetition, see Opening Brief of Appellant Macial, pages 10-19), the "unwillingness" argument also failed to satisfy the four considerations of Cantu II. See 778 P.2d at 518.

In addition, the FBI related argument is inadequate. First, the prosecutor below made no reference to the FBI when asked by the trial court to explain its peremptory. (R 216). Consequently, such a contention was not specifically preserved and cannot now be raised by the State on appeal. People v. Turner, 726 P.2d 102, 108 n.7 (Cal. 1986) ("our concern is with the explanation the prosecutor gave to the trial court, not with a theory subsequently devised by the Attorney General for consumption on appeal"); State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989).

Secondly, almost immediately before the FBI response, another juror told the court about a relative in the CIA. (R 163) ("I [Mr. Harris] have an uncle that worked in the CIA and I have a cousin that is chief of police in Roosevelt"). Although informed about the CIA, the court said only, "All right. Anyone else?" (R 163). Just a few moments (one other juror) later, however, (R 163), when Ms. English told the court that "[m]y daughter works

concerns. Cf. Cantu II, 778 P.2d at 518 (quoting Slappy, 522 So.2d at 22 (a factor casting doubt upon the legitimacy of a purportedly race-neutral explanation includes the "failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror"))).

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4 -[footnote cont'd]-

your hand and say, "Stop, I might have missed this, it's important"?

MS. LEWIS: Yes.

THE COURT: Nobody is going to hold that against you. I would rather -- everybody would rather have you hear everything and make sure that you're there.

MS. LEWIS: Okay. Yes.

THE COURT: Okay.

MS. LEWIS: It makes me feel better that you guys let me know that, that I can -- I'm just -- like I said, a little bit shy and it's hard for me to speak up. But I could raise my hand.

(R 177).

Ms. Lewis expressly admitted that "it's hard for me to speak up." (R 177). For Ms. English, however, the prosecutor simply assumed that because she was "[unwilling] to speak before the rest of the group about [her lawsuit] . . . she would [not] be a good juror with the other jurors." (R 216); Appellee's brief at 11.

In fairness to the State, Ms. Lewis' shyness may not have been evident because the above inquiry had focused initially on her hearing difficulties. However, once Ms. Lewis' reluctance to speak was revealed, as opposed to the assumed "unwillingness" of Ms. English, the prosecution displayed its ability to ask a follow-up question (albeit redundant). In fact, the verifying remarks proved comforting to Ms. Lewis. (R 177). Nothing was said to make Ms. English "feel better." Ms. English's capacity to deliberate with the other jurors was summarily discounted and presumed because of her demeanor. (R 216). Further, the court's defense of

-[footnote continued on next page]-

Finally, the State's preservation argument is inapplicable here. Since the trial court requested an explanation for the peremptory, the burden shifted to the prosecutor to "come forward with a racially neutral reason related to the particular case to be tried to explain the challenge." Cantu I, 750 P.2d at 595; Wheeler, 583 P.2d at 765; Slappy, 522 So.2d at 22; Williams v. State, 548 So.2d 501, 504 (Ala. Crim. App. 1988) (citation omitted) ("Where the trial court requires the prosecution to explain its peremptory challenges without first finding the existence of a prima facie showing of discrimination, we may fairly conclude that 'the enquiry implied such a finding, and shifted the burden of justification to the prosecutor'"); Opening Brief of Appellant Macial, page 9.

The prosecution bears the burden of specifically articulating its justification; the credibility of the reason is then "weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record." Slappy, 522 So.2d at 22; State v. Harrison, 805 P.2d 769, 778 (Utah App. 1991) ("it remained proper for the court to consider all relevant facts and circumstances surrounding the State's

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4 -[footnote cont'd]-

Ms. Lewis, who relied in part on reading lips, (R 175), should have been extended to Ms. English, who had no physical impediments interfering with her ability to understand the proceedings. See (R 191a-192) (the trial court: "people with disabilities ought to do things that the rest of the people do that don't have disabilities to the extent they can and, obviously, we're very, very concerned in any jury case, particularly a criminal case, as to whether or not those disabilities interfere with that person acting as a juror").

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Mary T. Noonan  
Clerk of the Court

February 5, 1993

Ms. Mary Noonan  
Utah Court of Appeals  
400 Midtown Plaza  
230 South 500 East  
Salt Lake City, Utah 84102

Dear Ms. Noonan:

Re: State v. Macial  
Case No. 920316-CA

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure, Defendant/Appellant Louis Lee Macial cites the following supplemental authority, State v. Pharris, 204 Utah Adv. Rep. 39 (Utah App. 1993), for the criteria pertinent to judging a peremptory challenge:

the party exercising the challenge must explain, in a clear, reasonably specific manner, legitimate, neutral reasons for his or her challenges that are related to the specific case about to be tried.

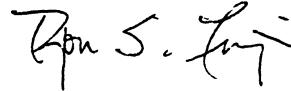
Utah has adopted additional criteria by which to judge the adequacy of a party's explanation of an allegedly racially motivated peremptory challenge. The trial court must discount justifications if the prospective juror was (1) not shown to share an alleged bias, (2) not examined or subjected only to perfunctory examination by the prosecutor when neither the trial court nor the defense had questioned him or her, (3) singled out for questioning to evoke a

Ms. Mary Noonan  
February 5, 1993  
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specific response, (4) challenged for a reason unrelated to the trial, or (5) challenged for reasons equally applicable to other jurors not similarly challenged.

Pharris, 204 Utah Adv. Rep. at 44 (emphasis added by the court and citations omitted).

Respectfully,

A handwritten signature in cursive script, appearing to read "Ron S. Fujino".

Ronald S. Fujino  
Attorney for Appellant Macial

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused an original and seven copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies to CHARLENE BARLOW of the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this ~~4<sup>th</sup>~~ <sup>5<sup>th</sup> - RSP</sup> day of February, 1993.

Ron S. Fujino  
RONALD S. FUJINO

DELIVERED by PAT ADAMSON  
this 5 day of February, 1993.

P Adamson

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February 18, 1993

  
Mary T. Noonan  
Clerk of the Court

Ms. Mary Noonan  
Utah Court of Appeals  
400 Midtown Plaza  
230 South 500 East  
Salt Lake City, Utah 84102

Dear Ms. Noonan:

Re: State v. Macial  
Case No. 920316-CA

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure and in response to the Court's comments made during oral argument, Defendant/Appellant Louis Lee Macial states:

1. "The burden of proof shift[s] to the prosecutor to provide race-neutral justifications for his actions." State v. Pharris, 204 Utah Adv. Rep. 39, 43 (Utah App. 1993); see also id. at 42 (citing Batson, 476 U.S. at 92) (emphasis added) ("the [United States Supreme] Court intended that its new analytical framework, should remove a crippling burden of proof from the defendant").

2. The Pharris opinion's list of criteria is controlling for the case at bar. Pharris, 204 Utah Adv. Rep. at 44 (citing Batson v. Kentucky, 476 U.S. 79 (1986), and State v. Cantu, 778 P.2d 517 (Utah 1989)).

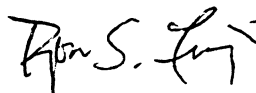
3. "Stare decisis has an equal application when one panel of a multi-panel appellate court is faced with a



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prior decision of a different panel [i.e. the Pharris  
panel]." State v. Thurman, 203 Utah Adv. Rep. 18, 25  
(Utah 1993) (panel conflicts should be avoided).

Respectfully,


A handwritten signature in dark ink, appearing to read "Ron S. Fujino". The signature is fluid and cursive, with the first name "Ron" and last name "Fujino" clearly distinguishable.

Ronald S. Fujino  
Attorney for Appellant Macial

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused an original and seven copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 18<sup>th</sup> day of February, 1993.

  
\_\_\_\_\_  
RONALD S. FUJINO

DELIVERED by  \_\_\_\_\_  
this 18 day of February, 1993.