IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v.

JOSEPH ALDRET,

Respondent/Cross-Petitioner.

CASE NO. 79,149

ANSWER BRIEF AND INITIAL BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this brief, Aldret addresses the certified question of the state's standing to object to his use of peremptory challenges in Point I, and the question of the proper remedy in Point II. Herein, Petitioner/Cross-Respondent is referred to as "the state" or "the prosecution," and Respondent/Cross-Petitioner as "Aldret" or "the defendant." References to the record on appeal appear as (R[page number]).

STATEMENT OF THE CASE AND FACTS

Aldret accepts the state's case and facts, with two additions.

James C. Banks, who represented Aldret at trial, is in private practice. (R1, R302-304)

The prosecutor expressly invoked State v. Neil, 457 So.2d 481 (Fla. 1984) when he objected to the first of defense counsel's three challenges to black jurors, and renewed the same objection to the two subsequent challenges. (R45-48) When the trial court disallowed the defense challenge of juror Zachery, defense counsel objected to the "remedy" of seating the challenged juror and moved for mistrial. (R48)

CERTIFIED QUESTIONS

I. MAY THE STATE OBJECT TO THE DEFENDANT'S USE OF PEREMPTORY CHALLENGES IN AN ALLEGEDLY DISCRIMINATORY MANNER, AND IF SO, ON WHAT CONSTITUTIONAL BASIS?

II. WHERE THE TRIAL COURT FINDS THAT A PEREMPTORY CHALLENGE IS BASED UPON A RACIAL BIAS, IS THE SOLE REMEDY TO DISMISS THE JURY POOL AND TO START VOIR DIRE OVER WITH A NEW JURY POOL, OR MAY THE TRIAL COURT EXERCISE ITS DISCRETION TO DENY THE PEREMPTORY CHALLENGE IF IT CURES THE DISCRIMINATORY TAINT?

SUMMARY OF THE ARGUMENT

I. The state lacks standing to object to the exercise of a peremptory challenge by a defendant in a criminal case. Article I, Section 16 of the Florida Constitution guarantees trial by an impartial jury to the accused. The right of an individual criminal defendant to an impartial jury should not be transformed into a weapon wielded against the individual by the state, the very entity against whom the right protects. Reliance on venire members' federal equal protection right for state standing founders on two points: state action and third-party standing. A private criminal defense lawyer is not a state actor. On third-party standing, the prosecution suffers no cognizable injury in juror exclusion, and lacks the congruence of interests with jurors that would make it an effective advocate for jurors' rights. Reliance on the equal protection clause of the state constitution suffers the same flaws. Also, state involvement in the judicial process does not constitute state action under Article I, Section 2, the state equal protection clause. State action sufficient for a claim under that provision occurs only when the challenge is denied and the juror seated, at which point a violation of a juror's right not to be excluded on the basis of race evaporates. Finally, state access to the Neil objection procedure compels defense counsel to explain reasons for a challenge, which often will result in a violation of the attorney-client privilege.

II. The Court's recent holding in Jefferson v. State should be limited to its facts. First, the state lacks the attributes

necessary to assert a venire member's right not to be excluded from a jury. Second, a trial court denies a defendant his or her right to trial by an impartial jury when it impanels a juror whom the defendant has attempted to strike peremptorily. The peremptory challenge is a tool by which a defendant realizes the constitutional right of an accused to an impartial jury. When the challenge is disallowed, the right is denied.

ARGUMENT

I. THE STATE LACKS STANDING TO OBJECT TO A CRIMINAL DEFENDANT'S EXERCISE OF A PEREMPTORY CHALLENGE.

When this Court first authorized inquiries into exercise peremptory challenges for a racial motivation, it invoked the state constitutional right to trial by an impartial jury as the basis for its decision. State v. Neil, 457 So.2d 481 (Fla. 1984). The United States Supreme Court, in erecting a similar procedure, grounded its decision in the federal constitutional right to equal protection. Batson v. Kentucky, 476 U.S. 79 (1986). The same court rejected the federal constitutional right to trial by an impartial jury as a source of the right to question a party's motivation for exercising a challenge. Holland v. Illinois, 493 U.S. 474 (1990). This Court recently approved a remedy of seating an improperly struck juror in an opinion relying at least partly on jurors' federal equal protection rights. Jefferson v. State, No. 78,507 (Slip op. Feb. 27, 1992). In its answer brief below, the state argued that the state constitutional right to equal protection authorized an objection by the state on an excluded jurors' behalf. If, then, the state has a constitutional right to object, it must derive from the right to trial by an impartial jury under the state constitution, or the right to equal protection in either the state or federal constitution.

The next three sections demonstrate why none of these constitutional provisions offers a sound basis for state access to the Neil objection procedure. Following the constitutional

analysis is a section exploring the conflict between attorney-client privilege and inquiry into a defense lawyer's reasons for excluding jurors.

A. IMPARTIAL JURY

In Neil, this Court set out the procedure for determining when a state uses peremptory challenges on the basis of race and thereby deprives a defendant an impartial jury. The Court wrote: "We agree with Wheeler and Soares (cites omitted) . . . and hold that both the state and the defense may challenge the allegedly improper use of peremptories.[1] The state, no less than a defendant, is entitled to an impartial jury." 457 So.2d at 487. Neil is grounded in Article I, Section 16 of the Florida Constitution. That section, headed "Rights of accused and of victims," reads, in pertinent part: "(a) In all criminal prosecutions the accused shall . . . have the right to . . . trial by impartial jury in the county where the crime was committed."

On its own terms, this is a defendant's right. It confers nothing on the prosecution. Words in a constitutional clause, like those in a statute, should be construed in their plain and ordinary sense. Cf. Citizens v. State Public Service Commission, 425 So.2d 534 (Fla. 1982). A threshold consideration is the plain meaning of the language used. St. Petersburg Bank & Trust

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[1]The Court pointed out in a footnote that at oral argument, Neil's counsel agreed that any new test should apply to both sides.

Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). The plain wording of Article I, Section 16 expressly confers the right to trial by an impartial jury on the accused and not on the state. It provides no authority for questioning a defendant's statutory right to exercise a peremptory challenge, which by nature is one for which no reason need be given. Section 913.08, Florida Statutes (1989). In its recent decision in Traylor v. State, 17 FLW S42 (Jan. 16, 1992), this Court reaffirmed its commitment to an interpretation of Florida's Declaration of Rights independent of corresponding rights in the federal constitution. As the Court repeatedly observed in Traylor, the Declaration protects individual rights. To wit:

> These rights embrace a broad spectrum of enumerated and implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority--from whatever official source--into his or her life. Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government.

Id. at S144. The right of an individual criminal defendant to trial by an impartial jury, guaranteed in the Declaration of Rights, cannot be transformed into a tool which the very entity against whom it is designed to protect may wield against an individual. A greater perversion of the intent behind of the Declaration of Rights, and a greater threat to its viability, are difficult to imagine.

The portion of Neil conferring access to the objection procedure upon the prosecution is dicta, as noted by the district

court of appeal in this case. 16 FLW at D3019. In deferring to the dicta but then certifying a question of the constitutional source of the prosecution's access to the Neil procedure, the district court has invited this Court to consider anew whether Article I, Section 16 extends to the state in a case in which the question is squarely presented. This, unlike Neil, is that case. If the state may object to exercise of peremptory challenges by the defense, per Neil, that power cannot derive from Article I, Section 16. This Court should so state.

B. EQUAL PROTECTION

1. Fourteenth Amendment

The state argued below that racial use of peremptory challenges abridges a prospective juror's federal right to equal protection, citing Powers v. Ohio, 113 L.Ed.2d 411 (1991). In its recent Jefferson decision, this Court also cited Powers for the proposition that an individual venireperson has the constitutional right not to be excluded from jury service on the basis of race. Slip op. at 4. Now pending before the United States Supreme Court is the question whether, under the federal Equal Protection Clause, the state may object to a defendant's alleged use of a peremptory challenge on racial grounds. Georgia v. McCollum, No. 91-372, 50 Cr.L. 3061 Nov. 6, 1991). Oral argument in McCollum was scheduled for February 26, 1992. 50 Cr.L. 3164 (Feb. 19, 1992).

As a preliminary observation, a decision in the state's favor in McCollum does not dictate the same result here. The federal analogue to Florida's procedure rests on equal

protection, not trial by impartial jury. As noted above, the United States Supreme Court has held that the constitutional right to trial by an impartial jury authorizes no inquiry into the exercise of peremptory challenges. So, unless this Court holds that federal equal protection underlies the Neil procedure -- with attendant difficulties explored below -- a decision in the state's favor in McCollum does not control here. Second, the state is barred from making an equal protection argument by its failure to raise the claim in the trial court. See generally, Williams v. State, 414 So.2d 509 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978). The state's objections in jury selection contained no hint of invocation of a federal right, either on its own behalf or that of jurors.

Reliance on potential jurors' federal constitutional right to equal protection founders on two points: state action and third-party standing. The U.S. Supreme Court has held that in the context of racially discriminatory use of peremptory challenges in a civil trial, state action occurs in the involvement of the state in the judicial process. Edmondson v. Leesville Concrete Co., 114 L.Ed.2d 660, 678 (1990). However, the Court noted its earlier holding that a public defender is not a state actor, because his or her relation to the government is adversarial in nature. Id. at 677, citing to Polk County v. Dodson, 454 U.S. 312 (1981). If so, a private defense lawyer, such as the one who represented Aldret at trial, is certainly not a state actor.

Assuming that venire members have a right to serve on juries and that the exercise of peremptory challenges by criminal defense lawyers implicates state action, appellee lacks standing to assert the third-party rights of jurors. In Powers v. Ohio, 113 L.Ed. 2d 411 (1991), the Court held that a defendant may assert the federal equal protection right of a juror not to be excluded from a jury solely on the basis of race. The Court recited and applied a three-part test to determine whether a litigant may bring an action on behalf of a third party: (1) the litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; (2) the litigant must have a close relation to the third party, and (3) there must exist some hindrance to the third party's ability to protect his or her own interests. Id. at 425. The Court held that criminal defendants satisfy the test and thus have third-party standing to assert the excluded juror's equal protections rights. Id. at 428. Here, the state's attempt to invoke third-party standing falls short on parts one and two of this test.

On the necessity of an injury-in-fact, the Powers Court spoke of a "cognizable injury," which occurs when racial discrimination in the selection of jurors places the fairness of a criminal proceeding in doubt. The Court observed that the jury "acts as a vital check against wrongful exercise of power by the State and its prosecutors," and that the "intrusion of racial discrimination into the jury selection process damages both the fact and and the perception of this guarantee." Id. at 425-426.

As the jury exists in large part to protect defendants from the power imbalance favoring prosecutors, any irregularity in the constitution of a jury can cause no cognizable injury to the entity against whom the jury system protects.

Neither does the state (acting through its prosecutorial arm) have a close relationship with jurors who may be subject to a discriminatory strike, as required under Powers. A criminal defendant and a juror are both individuals subject to the machinations of a large system, of which the prosecution is always an integral part. A loss of confidence in the system flowing from the results of a single proceeding is not a trenchant concern for the prosecution, which participates in all criminal cases. As their exposure to the court system is more limited, jurors and defendants are more likely to suffer great personal and psychological consequences from events in a single proceeding. Neither is likely to set in motion the arduous process needed to vindicate his or her own rights. As noted by Justice Kennedy, this is an important bond that links the accused and an excluded juror. Holland v. Illinois, 493 U.S. at 489 (Kennedy, J., concurring). Unlike jurors and defendants, jurors and prosecutors have no "congruence of interests" which would make the latter a natural and effective advocate for the equal protection rights of the former. See Powers, 113 L.Ed.2d at 427.

For these reasons, the state lacks standing to object to the exercise of peremptory challenges by the defense. No state action occurs in the conduct of a private criminal defense lawyer. Even if state action occurs, the prosecution suffers no

cognizable injury and has no close relation to the excluded party, foreclosing it from asserting the third-party equal protection rights of the individual juror.

2. Article I, Section 2

In the district court, the state asserted that the Equal Protection Clause of Article I, Section 2 of the Florida Constitution empowers it to assert the rights of the excluded juror. This assertion fails for the same reasons explained above, with one variation.

While the Fourteenth Amendment prohibits states from depriving persons "the equal protection of the laws," Article I, Section 2 of the Florida Constitution contains significantly different wording: "No person shall be deprived of any right because of race, religion or physical handicap." The federal provision requires equal application of laws, while the state clause prohibits denial of rights based on race. Neither the state constitution nor its statutes confer on individuals a right to serve as jurors. This Court held in Jefferson that "an individual venireperson has the constitutional right not to be excluded from jury service on the basis of race." Slip op. at 4. The state's role in the alleged denial of that narrowly defined right is minimal. The state does nothing more than provide the forum -- in which the defendant's participation is coerced -- and grant to each side a number of peremptory challenges, to be exercised at the parties' discretion. How those challenges are used by the defense is private action. In the context of a Neil claim, the state becomes directly involved in the defense

exercise of peremptories only when it denies the challenge and seats the challenged juror. However, upon impanelment of the juror, the deprivation of his or her right evaporates. No state action sufficient for an Article I, Section 2 violation occurs until the state denies a challenge, at which point there is no deprivation of a juror's Article I, Section 2 right -- Catch-22.

Here, a privately retained attorney, no state actor, actually caused any preceived denial of a juror's right. No violation of the state Equal Protection Clause occurred.

C. ATTORNEY-CLIENT PRIVILEGE

Jury selection is a critical stage of trial at which a defendant has a right to participate, including consultation on the exercise of peremptory challenges. See Smith v. State, 476 So.2d 748 (Fla. 3d DCA 1978) (excluding defendant from bench conferences during which peremptory challenges were exercised not error after counsel and defendant had opportunity to confer on exercise of each challenge); Francis v. State, 413 So.2d 1175, 1179 (Fla. 1982) (error to conduct challenges outside defendant's presence, thereby preventing defendant from consulting with attorney on challenges). Under Neil, when one party has made a prima facie showing that a challenge has been exercised solely on the basis of race, the burden shifts to the party exercising the challenge to explain the reasons for the strike. 457 So.2d at 486-487. A defense counsel who exercises a challenge on instructions or information from the client is foreclosed by Florida Statutes and the Rules of Professional Conduct from divulging the reasons. Section 90.502, Florida Statutes (1989),

Florida Rule of Professional Conduct 4-1.6. Thus, granting the state a right to object to defense use of peremptory challenges will in many instances force the defendant to forfeit either the challenge -- a means of securing an impartial jury -- or the confidentiality of communications with counsel. Additionally, if counsel divulges the confidence without the client's consent, even inadvertently, the trial judge who has compelled an explanation for the challenge has in effect become a party to an ethical violation. See Brassell v. Brethauer, 305 So.2d 217, 220 (Fla. 4th DCA 1977) (courts have duty to see to it that Canons of Professional Responsibility are complied with).

For the reasons provided above, this Court should answer the first part of the certified question, "May the state object to the defendant's use of peremptory challenges in an allegedly discriminatory manner," in the negative. No valid constitutional basis exists for infringement of a defendant's right to exercise peremptory challenges. Moreover, if this Court finds a constitutional basis, placing access to the Neil objection procedure in the state's hands puts the procedure on a collision course with the Florida Evidence Code and the Rules of Professional Conduct. Therefore, this Court should limit Neil to its original purpose -- enabling criminal defendants to protect their constitutional right to trial by impartial jury by denying the state a benefit from its exclusion of jurors solely on the basis of their race.

II. THE TRIAL COURT ERRED IN DISALLOWING A DEFENSE EXERCISE OF A PEREMPTORY CHALLENGE AND IN SEATING THE CHALLENGED JUROR.

After the state filed its initial brief in this cause, this Court issued the opinion in Jefferson v. State, No. 78,507 (Slip op. February 27, 1992). The second certified question here is the same as in Jefferson. The Court answered the question by holding that "it is within the trial judge's discretion to fashion the appropriate remedy under the particular facts of each case and, as long as neither party's constitutional rights are infringed, that remedy may include the seating of an improperly challenged juror." Slip op. at 7. Jefferson involved a defense objection to the state's exercise of peremptory challenges. Under the different facts of this case, in which the state objected to the defendant's exercise of a challenge, seating the juror denied Aldret his constitutional right to trial by an impartial jury.

Initially, this Court in Jefferson in effect held Florida Rule of Criminal Procedure 3.340 unconstitutional as applied. That provision reads:

> If a challenge for cause of an individual juror be sustained, such juror shall be discharged from the trial of the cause. If a peremptory challenge to an individual juror be made, such juror shall be discharged likewise from the trial of the cause.

Now, when a Neil objection is made, a court may refuse to "sustain" a peremptory challenge, a power not granted under the

rule.[2] Jefferson pitted the excluded juror's equal protection rights against the previously inviolate right to exercise a peremptory challenge, and concluded:

> While we recognize the importance of peremptory challenges to the guarantee of an impartial jury, the seating of an improperly challenged juror does not violate the constitutional rights of the party who attempted to exercise the challenge. It is the right to an impartial jury, not the right to peremptory challenges, that is constitutionally protected. Peremptory challenges merely are a "means of assuring the selection of a qualified and unbiased jury."
>
> The elimination of potential jurors by discriminatory criteria is an invalid exercise of peremptories and does not assist in the creation of an impartial jury. Such discrimination in the "selection of jurors offends the dignity of persons and the integrity of the courts." The discriminatory exclusion of potential jurors causes harm to the "excluded jurors and the community at large." Therefore, a party's right to use peremptory challenges can be subordinated to a venireperson's constitutional right not to be improperly removed from jury service.

Slip op. at 5-6 (citations omitted). The Court's analysis leaves open the question how and by whom the venireperson's right is to be asserted. For reasons explored in Part B1 of Point I, infra, the state lacks third-party standing to assert the rights of the excluded venire member.

Should this Court find state standing to object somewhere other than in an equal protection clause, the fact remains that

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[2]An observation which may cause this Court to wish to take steps to codify Neil, as subsequently modified, in the Rules of Criminal and Civil Procedure.

in cases such as this, the state has started the process by which the juror is seated. The sticking point of third-party standing thus reappears in the remedy. Any analysis which attributes only the objection to the prosecution and any remedy to another entity is mere sophistry, intellectual sleight-of-hand. A limitation of the remedy to dismissal of the entire jury panel, as originally provided in Neil, eliminates this problem.

More fundamentally, denying a defendant a peremptory challenge deprives him of the very constitutional right ostensibly protected by Neil, trial by an impartial jury. In Holland v. Illinois, the Court acknowledged that the constitutional phrase "impartial jury" in the Sixth Amendment takes its content from the common law right to peremptory challenges. 493 U.S. at 474. The Court also wrote that one may plausibly argue that the requirement of an "impartial jury" impliedly compels peremptory challenges, though it had held to the contrary. Id. at 481-482. In Florida, this Court has held that the purpose of peremptory challenges is to "effectuate the constitutional guaranty of trial by an impartial jury by the exercise of the right to reject a certain number of jurors whom the defendant for reasons best know to himself does not wish to pass upon his guilt or innocence." Meade v. State, 35 So.2d 613, 615 (1956), citing to Carroll v. State, 190 So. 437, 234-235 (1939).

When, as occurred below, the defendant is denied a peremptory challenge because his explanation fails to satisfy judicially established criteria, he has been denied his right to

trial by an impartial jury under Article I, Section 16 of the Florida Constitution. The very provision which expressly protects the defendant's right has been turned on the defendant to deny that right. The prosecutor has succeeded in seating a juror the defendant wished to strike. The prosecutor's motives for the objection may be no less racially biased than those of the defendant who exercised the challenge, yet there is no inquiry into those motives. In combatting a challenge based on cross-race antipathy, the state may bring own-race bias into the jury, via identification with the prosecutor or victim. Here, for instance, the state objected to three challenges of black jurors in a case in which the victim was black and the defendant white, although only one objection was upheld. Thus, in many instances, Jefferson actually fosters impaneling a partial juror, in violation of the explicit command of Article I, Section 16.

For these reasons, this Court should hold that when the trial court sustains a state objection to the exercise of a peremptory challenge by the defense, the sole remedy is to dismiss the jury pool, unless the defendant acquiesces in seating the challenged juror. No legal impediment precludes seating the juror if the defendant does not oppose that remedy.[3] The Fourth

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[3]As a practical consideration, retrial may be required if an appellate court rules that the challenge should have been allowed. Prejudice flows from a forced election between starting jury selection anew or proceeding with a juror that should have been excused. When the pool is dismissed, however, and an appellate court thereafter rules the challenge should have been allowed, a defendant may be unable to demonstrate prejudice in starting jury selection anew.

District Court of Appeal has held that a court may seat the challenged juror, unless the party who challenged the juror opposes the remedy. Jefferson v. State, 584 So.2d 123 (Fla. 4th DCA 1991); Palmer v. State, 572 So.2d 1012 (Fla. 4th DCA 1991). A rule of waiver by acquiescing in or failing to object to a remedy should apply to peremptory challenges exercised by either party. Here, however, defense counsel objected and moved for mistrial when the trial judge denied the strike and seated the challenged juror. Consequently, Aldret's conviction cannot stand.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Aldret requests that this Honorable Court approve the order of the First District Court of Appeal reversing his conviction and remanding for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon James W. Rogers and Charlie McCoy, Assistant Attorneys General, The Capitol, Tallahassee, Florida, 32399, on this 3rd day of March, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOSEPH ALDRET,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 90-3675

Opinion filed December 3, 1991.

An Appeal from the Circuit Court for Leon County.
Charles McClure, Judge.

Nancy A. Daniels, Public Defender; Phil Patterson, Assistant Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

SHIVERS, Judge.

Appellant, Joseph Aldret, appeals his convictions for aggravated assault and simple assault, arguing that the trial

court erred in sustaining the State's objection to his attorney's challenge of a prospective juror. He also appeals the trial court's imposition of costs without providing prior notice. We affirm in part, reverse, and remand.

The record on appeal indicates that the appellant in the instant case is a white male, and that the alleged victim of both charged assaults is a black male. During the jury selection process, defense counsel (Banks) used peremptory challenges to strike one black male and one black female from the jury pool. The State objected on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984), and the objection was eventually overruled after Banks stated his reasons for excluding the two jurors. Several minutes later, Banks used a third peremptory challenge to strike another black female, and the State again objected on the basis of Neil. The following exchange then occurred:

> MR. BANKS: Judge, in Ms. Zachery's case, she has a brother who has apparently a "crack" problem. I think it was a brother. He burglarized her mother's house. I'm not sure what kind of feelings she has about the system or anything else.
>
> * * *
>
> COURT: Well, I'm going to deny the peremptory challenge. So Ms. Zachery stays on.
>
> MR. BANKS: Note my objection for the record and I move for a mistrial.
>
> COURT: Motion denied.

Zachery was seated on the jury panel, and the appellant was eventually found guilty of both counts as charged. At

sentencing, the trial court imposed $200 in court costs and sentenced appellant to concurrent terms of 3 years and 60 days.

In his first point on appeal, appellant challenges the court's denial of his use of a peremptory challenge to strike Zachery from the jury pool, raising three separate arguments: (1) that the State had no standing to challenge a criminal defendant's use of peremptory challenges under Neil; (2) assuming the State had standing, that the trial court erred in not allowing appellant to exclude Zachery since the reasons given by defense counsel were sufficiently race neutral; and (3) assuming the challenge was properly denied, that the trial court erred in seating Zachery on the jury instead of dismissing the entire pool and beginning voir dire again with a new pool.

We find the first argument to be without merit. In State v. Neil, the supreme court set out the following test to be used when confronted with an allegedly discriminatory use of peremptory challenges:

> [T]rial courts should apply the following test. 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.

457 So.2d at 486-87 (emphasis supplied).

The court then specifically addressed the issue of standing raised in the instant case, by stating:

> [People v.] Thompson, [435 N.Y.S. 2d 739 (1981)] speaks only of challenges exercised by the prosecution. [People v.] Wheeler, [583 P.2d 748 (Cal. 1978)] and [Commonwealth v.] Soares, [387 N.E.2d 499 (Mass. 1979)], on the other hand, recognize that the ability to challenge the use of peremptories should be given to the prosecution as well as to the defense. We agree with Wheeler and Soares on this point and hold that both the state and the defense may challenge the allegedly improper use of peremptories. The state, no less than a defendant, is entitled to an impartial jury.

457 So.2d at 487 (emphasis supplied).

Appellant argues on appeal that the above language from Neil constitutes dicta and, therefore, is not controlling on the issue of the State's standing to object to the defense's exercise of peremptory challenges. We agree that the language constitutes

dicta; however, it is well established that dicta of the Florida Supreme Court, in the absence of a contrary decision by that court, should be accorded persuasive weight. O'Sullivan v. City of Deerfield Beach, 232 So.2d 33 (Fla. 4th DCA 1970); Weber v. Zoning Board of Appeals of the City of West Palm Beach, 206 So.2d 258 (Fla. 4th DCA 1968); Milligan v. State, 177 So.2d 75 (Fla. 2d DCA 1965). Because the supreme court repeatedly used the term "party" rather than "State" or "defendant," and worded its test to state that either side could object to the other's use of peremptory challenges, the Neil opinion strongly indicates that the court intended for both defendant and prosecution to be allowed to object to allegedly racially motivated peremptory challenges. Further, since there are no contrary decisions from either the Florida Supreme Court or the district courts on this issue, we find Neil to be persuasive authority for finding that the State has standing to object to a defendant's use of peremptory challenges in an allegedly discriminatory manner.

We note that there are several reported criminal cases which involve a prosecutor's objection to a defendant's use of peremptory challenges which, while not specifically addressing the issue raised in the instant case, apparently presume that the State did have such standing. See Perez v. State, 16 F.L.W. 2211 (Fla. 3d DCA August 20, 1991); Koenig v. State, 497 So.2d 875 (Fla. 3d DCA 1986). We also note that Neil has been applied by the courts in several civil cases as well. See, e.g., Smellie v. Torres, 570 So.2d 314 (Fla. 3d DCA 1990); Smith v. Coastal

Emergency Services, 538 So.2d 946 (Fla. 4th DCA 1989); Ensenat v. Abcug, 515 So.2d 1027 (Fla. 3d DCA 1987); City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985).

In the Cornett case, defense counsel used each of its peremptory challenges to exclude black jurors in a black plaintiff's suit against the City. The all-white jury returned a verdict in favor of the defendant, and a new trial was granted. The appellate court affirmed, holding:

> Neil focused on Article I, Section 16 of the Florida Constitution, which guarantees to an accused in a criminal case the right to a trial by an impartial jury. The civil analogue applicable to this case is Article I, Section 22 of the Florida Constitution, which provides that "[t]he right of trial by jury shall be secure to all and remain inviolate." While Section 22 does not expressly grant civil litigants the right of trial by an impartial jury,* we believe that anything less than an impartial jury is the functional equivalent of no jury at all.
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> * In Neil, the court, holding that both the state and the defense may challenge the allegedly improper use of peremptories, flatly declared that "[t]he state, no less than a defendant, is entitled to an impartial jury." 457 So.2d at 487. Since the Florida Constitution does not expressly provide that the state is entitled to an impartial jury, Neil itself is authority for the proposition that the basic right to a jury trial for any litigant includes the right that the jury be impartial.

463 So.2d at 402 (emphasis supplied). We agree with the Third District's conclusion in Cornett, and find that the guaranties set out in Article I, Section 16 of the Florida Constitution,

that an accused in a criminal case receive a trial by impartial jury, should act not only to insure that a defendant receive a jury which is not partial to the State, but also one which is not prejudiced in favor of the defendant.

We also disagree with appellant's contention that defense counsel presented sufficiently race neutral reasons for striking Zachery from the jury panel. In State v. Slappy, 522 So.2d 18 (Fla. 1988), the court held that a party's explanation for exercising a peremptory challenge must be weighed "in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record." Id. at 22. The court held that, in order to permit the questioned challenge, the trial court must conclude that the proffered reasons were first, race neutral, and second, not a pretext, and held:

> We agreed that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror who were not challenged.

Id. at 22.

We find that the record in the instant case contains the presence of factors 1, 4, and 5, above. First, although defense counsel stated at trial that he was "not sure" what kind of

feeling Zachery's experience had left her regarding the "system," the record indicates that Zachery did not respond when specifically asked during voir dire whether her experience would affect her ability to sit as a juror, or whether it would "turn her off" on the system, and gave no indication whatsoever that she would be affected. Second, since the defendant in the instant case was being tried on two counts of assault, Zachery's brother's use of cocaine and his burglary of her mother's house are not relevant, especially in light of the fact that Zachery gave no indication that the incident would affect her ability to sit as a juror. Third, although one other prospective juror indicated she had a son with a crack cocaine problem, and two other prospective jurors had directly been victims of burglaries or theft, two of these three jurors were not stricken by defense counsel. Therefore, the bias alleged by defense counsel was not shown to be shared by Zachery, and the record does not establish that the trial court abused its discretion in finding that defense counsel's reasons for excluding Zachery were racially motivated. Reed v. State, 560 So.2d 203 (Fla. 1990).

Appellant's third argument, regarding the remedy used by the trial court after denying the peremptory challenge of Zachery, requires reversal. The supreme court in Neil held that "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." 457 So.2d at 487. In Carter v. State, 550 So.2d 1130 (Fla. 3d DCA 1989), the trial

court found that the State had wrongfully excused two jurors on the basis of race, sustained the defendant's objections to their dismissal, and dismissed the entire pool according to Neil. The defendant argued on appeal that the court should not have dismissed the pool, but should have allowed the jurors already selected, plus the wrongfully challenged jurors, to hear the case. The appellate court disagreed, holding "We believe that a trial court should have the discretion to cure a discriminatory challenge by means other than dismissal of the entire panel. However, this court and the trial courts are bound by the clear language of Neil, absent directions otherwise from the Florida supreme court." 550 So.2d at 1131. The Fourth District reached the same conclusion in Mazaheritehrani v. Brooks, 573 So.2d 925 (Fla. 4th DCA 1990), a civil case, but held in Palmer v. State, 572 So.2d 1012 (Fla. 4th DCA 1991) that the defendant had waived the right to complain on appeal, where the court determined the State had improperly used peremptory challenges, offered defendant the remedy of dismissing the panel and starting over, and defendant declined.

Most recently, in Jefferson v. State, 16 F.L.W. 2070 (Fla. 4th DCA August 7, 1991), the Fourth District examined a case in which the State challenged jurors for racial reasons, the court seated the jurors instead of applying the Neil remedy, and the State "did not question the trial court's remedy." Id. at 2070. Defendant, however, raised the issue on appeal, claiming that it was reversible error not to use the Neil remedy, despite the fact that he (defendant) had not been prejudiced. The court held:

> The trial court's remedy in this case was not opposed by the state, and did not cause prejudice to the defendant. Therefore, the remedy does not conflict with Neil, Palmer, Carter, or Mazaheritehrani. These opinions, taken together, establish that the party alleging the biased motive has a right to object to the challenge (Neil), that it is reversible error to force the party exercising the challenge to accept the jurors in lieu of striking the panel and beginning voir dire again (Mazaheritehrani), and that these rights may be waived (Palmer). Even if the trial court lacks the discretion to seat the unlawfully challenged jurors, such error is harmless absent a showing of prejudice.

Id. at 2070.

Although defense counsel in the instant case did not specifically address the court's decision to seat Zachery instead of striking the entire pool, it appears that his objection and motion for mistrial went to that issue, preventing the court from finding a waiver of the remedy employed in this case. Further, the State has not shown beyond a reasonable doubt that the seating of Zachery did not contribute to the verdict of guilt and, therefore, it has not been established that the error was harmless. We therefore reverse and remand for a new trial, adopting the Fourth District's holding in Jefferson, and certifying the same question certified in that case:

> WHERE THE TRIAL COURT FINDS THAT A PEREMPTORY CHALLENGE IS BASED UPON RACIAL BIAS, IS THE SOLE REMEDY TO DISMISS THE JURY POOL AND TO START VOIR DIRE OVER WITH A NEW JURY POOL, OR MAY THE TRIAL COURT EXERCISE ITS DISCRETION TO DENY THE PEREMPTORY CHALLENGE IF IT CURES THE DISCRIMINATORY TAINT?

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOSEPH ALDRET,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 90-3675

Opinion filed December 26, 1991.

An Appeal from the Circuit Court for Leon County.
Charles McClure, Judge.

Nancy A. Daniels, Public Defender; Phil Patterson, Assistant Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

We certify the following additional question to the supreme court as one of great public importance:

> MAY THE STATE OBJECT TO THE DEFENDANT'S USE OF PEREMPTORY CHALLENGES IN AN ALLEGEDLY DISCRIMINATORY MANNER, AND IF SO, ON WHAT CONSTITUTIONAL BASIS?

ERVIN, SHIVERS, and WIGGINTON, JJ., CONCUR.