IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

vs. Case No. 79,149

JOSEPH ALDRET,

Respondent/
Cross-Petitioner.

PETITIONER/CROSS-RESPONDENT'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State is petitioning this Court to announce the proper remedy when a trial court finds a prospective juror has been stricken for reasons that are not race-neutral. The same issue has been raised in the context of a civil trial, in Brooks v. Mazaheritehroni, case no 77,692 (argued December 4, 1991). The same certified question is before this Court in Jefferson v. State, case no. 78,507.

At the federal level, the U.S. Supreme Court has recently granted review in a case that will affect disposition of this appeal. In Georgia v. McCollum, USSC case no. 91-372, the issue is whether the trial court erred in refusing to prohibit the defendants from exercising peremptory challenges in a racist manner. *See* 116 L.Ed.2d no. 2 (Dec. 18, 1991) at p. C-8. While McCollum[1] will not address the nature of the remedy upon improper striking of a prospective juror, it will squarely address -- as a matter of federal law -- the prosecution's standing to object to defense use of a peremptory challenge.

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[1] McCollum involves appeal of a pretrial motion. There, the state moved to prohibit the defendants from "using peremptory strikes in a racially discriminatory manner." 405 S.E.2d 688, 689 (Ga. 1991). The court expressly declined to "diminish the free exercise of peremptory strikes by a criminal defendant." *Id.* Merely by granting certiorari, the U.S. Supreme Court has cast grave doubt on the Georgia court's conclusion.

STATEMENT OF THE CASE

Aldret was convicted for aggravated assault with a firearm, and assault. (R 307, 309). Before the First District, he challenged his conviction only upon grounds relating to jury selection.

The First District held that the State had standing to object to defense use of peremptory challenges, and that the reasons given for striking one black juror were not "sufficiently race neutral." Aldret v. State, 16 F.L.W. D3018, 3019-20 (Fla. 1st DCA Dec. 3, 1991). That court, however, found reversible error in the refusal to strike the entire jury pool[2] by the trial court, which simply allowed the juror at issue to remain. *Id.* at D3020.

Recognizing the importance of the remedy issue, the First District certified the same question as was certified in Jefferson v. State, 584 So.2d 123 (Fla. 4th DCA 1991), *rev. pending* (case no. 78,507):

> Where the trial court finds that a peremptory challenge is based upon racial bias, is the sole

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[2] By "pool," the State refers to all jurors sent to the courtroom for selection in a particular trial. The State is not referring to the larger number of jurors that may be summoned to the courthouse at the same time, for concurrent selection of juries for several trials.

> 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?

Aldret, *supra* at D3020, *quoting* Jefferson, *supra* at 125.

Upon Respondent's motion, the court certified a second question:

> May the State object to the defendant's use of peremptory challenges in an allegedly discriminatory manner, and if so, on what constitutional basis.

Id., certifying additional question, 17 F.L.W. D128 (Fla. 1st DCA Dec. 26, 1991).

The opinion below became final on December 26, 1991. The State filed its notice to invoke this court's jurisdiction on December 30, 1991.

While postponing a decision on jurisdiction, a schedule for briefing on the merits was established pursuant to this court's order of January 8, 1992. That order was amended to treat the State as Petitioner on the first certified question, and Aldret as Cross-Petitioner on the second. For convenience, the parties will be referred to as "State" and "Aldret."

STATEMENT OF THE FACTS

The State will confine its statement to those facts relied upon to argue the first certified question:

Aldret struck all three black prospective jurors that were reached in the selection process. (T 46-7). Although a fourth black person remained in the pool (T 47, lines 19-20), the jury was accepted before getting that far. (T 48). The black juror at issue ultimately served on the jury. (T 49). Striking of the first two black prospective jurors was upheld by the trial court (T 46-7), and not further challenged by the State.

SUMMARY OF THE ARGUMENT

Applying Neil[3] too stringently, several district courts have concluded -- sometimes reluctantly -- that the only remedy available to the trial court is to dismiss the entire pool of prospective jurors when a peremptory challenge is held to be racially based. This conclusion is wrong under a careful reading of Neil, and improper under the U.S. and Florida Constitutions.

Discharging the entire pool of prospective jurors violates the equal protection right of all those jurors. Absent specific prejudice to the defendant or the prosecution, the

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[3] State v. Neil, 457 So.2d 481 (Fla. 1984).

constitutional remedy is to disallow the peremptory strike, thereby retaining the challenged juror. In so doing, the challenged juror's rights to equal protection are preserved. Also, the same rights of any other prospective juror in the pool are preserved. It is the only remedy which does not reward the deliberate misuse of peremptory challenges.

Requiring dismissal of the entire pool lends itself to abuse. It causes unnecessary delay and expense in jury selection, without protecting the rights this Court first recognized in Neil. Indeed, if dismissing is the only remedy, the wrongdoer has the power to indefinitely prevent trial. Therefore, the trial court did not abuse its discretion by retaining the improperly challenged juror.

Respectfully but strongly, the State requests that this Court clarify Neil, and announce that dismissing the entire pool of jurors is the least desirable response to improper peremptory challenges. Further, the State requests the Court to announce that retaining the improperly challenged juror is the preferred action, absent reasonable likelihood of prejudice to the defendant or the prosecution.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO DISMISS THE ENTIRE JURY POOL, UPON AN IMPROPER PEREMPTORY CHALLENGE TO ONE JUROR

As a matter of law, the decision below holds that the only remedy under Neil -- when a prospective juror is found to be stricken improperly -- is to dismiss the entire pool and start over. (slip op., p. 8-10; Aldret, 16 F.L.W. at D3020). As a matter of fact, the trial court achieved the constitutionally required result, and certainly did not abuse its discretion.

The State will begin with the most narrow ground requiring reversal: the First District, and two other district courts,[4] have read Neil too narrowly; and announced an "automatic-dismissal" rule that is unreasonable and constitutionally infirm. Specifically, the opinion below declares:

> [I]f 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. [e.s.]

Slip op. p. 8, *quoting* Neil, 457 So.2d at 487.

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[4] *See*, for example, Wright v. State, 17 F.L.W. D16 (Fla. 3d DCA Dec. 17,1991)(certifying the same question as this case, but adding the caveat that the peremptory challenge was made outside the jury's presence [*id.* at D17]); and Jefferson, *supra*, at 125 (certifying the same question as this case).

Preliminarily, the Neil court used the directory, but not mandatory "should." It could have said "shall." This court did not indicate that dismissing the panel was the *only* proper remedy.

The First District's stringent application of the suggested remedy in Neil effectively announces a rule requiring automatic-discharge of the jury pool once a peremptory challenge is held improper. This rule is not required by Neil, or the Florida or U.S. Constitutions; is not followed by the federal courts and several state courts; and leads to denial of equal protection to all members of the jury pool. The First District's application of Neil renders Neil unconstitutional.

Nothing in the Florida Constitution requires dismissal of the entire pool. To the contrary, Art. I, §16 favors retention of the stricken juror, and those members of the pool not excused for other reasons. Section 16(a) provides, in pertinent part:

> [T]he accused shall . . . have [the right to] a speedy and public trial by impartial jury. . . . [e.s.]

Thus, even when addressing the rights of the accused, the Florida Constitution places the right to an impartial jury in the context of a trial that is "public." Construing identical language in the Georgia Constitution, one dissenter in McCollum, *supra*, said:

> The language of the constitutional provision [Art. I, §I, par. XI, Ga. Const.] does not lodge exclusively with the defendant to the right to trial by jury. Since the right to a jury trial includes the right to a jury drawn from a fair cross-section of the community (*Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)), then the right to a fair and impartial jury selection belongs to the community as well as the defendant.
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> * * * *
>
> Although we have in the past given criminal defendants great deference in their use of peremptory strikes, that deferential treatment must be abandoned when it begins to erode the public's confidence in the entire legal process. Racially motivated jury strikes are of such an egregious nature that the jury selection process will suffer irreparable damage if we fail to act.
>
> The public interests in need of protection in this case are the integrity of the jury selection process, the very foundation of the truth-finding process, and the compelling need to encourage citizens to fulfill their citizenship requirements by freely serving on juries without the fear of having racial prejudice visited upon them.

405 S.E.2d at 692 (Benham, J., dissenting). This Court has often expressed similar mandates to eliminate racism from the judiciary. *See, for example*, State v. Slappy, 522 So.2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219 (1988)(appearance of racial discrimination in the courtroom is reprehensible); and Reynolds v. State, 576 So.2d 1300, 1302 (Fla. 1991)(past abuses of peremptory challenges have created the appearance of impropriety that must be eliminated).

Dismissing the entire pool does equal damage to individual and public confidence in the legal process. The prospective juror is denied the opportunity to serve on the jury, as a "remedy" for attempted racial misuse of a peremptory challenge. The automatic-dismissal rule would also deny opportunity for jury service to any jurors not stricken, and to any jurors who may have been reached later in the selection process.

The U.S. Constitution does not require the jury pool to be discharged in all instances. To the contrary, in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) -- the analog to this court's decision in Neil -- the U.S. Supreme Court expressly declined "to formulate procedures to be followed upon a timely objection to a prosecutor's challenges." *Id.*, 476 U.S. at 99, 90 L.Ed.2d at 90. In a footnote to that sentence, the Court also declared that it expressed no view as to whether the trial court should discharge the venire, or disallow the discriminatory challenges and resume selection with the improperly stricken jurors reinstated. *Id.* at note 24. *See* State v. Walker, 453 N.W.2d 127, 135 at n. 12 (Wisc. 1990), *cert. denied*, 112 L.Ed.2d 406 (1990)(quoting Batson to observe that the remedies upon disallowance of a peremptory challenge are to discharge the venire or to reinstate the improperly stricken juror; and that the trial court, in selecting the appropriate

remedy, should consider whether the juror was aware of the challenge).

No federal decision since Batson has attempted to confine trial courts to discharging the entire jury pool upon disallowance of a racist peremptory challenge. To the contrary, retention of the improperly challenged juror is the preferred remedy unless doing so results in seating a biased juror. In Powers v. Ohio, 113 L.Ed.2d 411 (1991), the Court held that a prospective juror has an equal protection right not to be stricken solely on the basis of race, and that a defendant has standing to enforce that right. However, the Court also observed:

> It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice. [e.s.] *Id.* at 429.

The First District's automatic-dismissal rule, which operates even in the absence of prejudice, creates "unnecessary disruption" of the jury selection process, at the very least. It forces the court, perhaps late in the week or shortly before trial is to begin, to summon new jurors. It certainly would

engender resentment among members of the pool who are discharged along with the improperly stricken juror.[5]

The rule would operate the same in every instance, regardless of the facts. At what gain? None -- the juror at issue still does not serve. The party exercising its peremptory challenge in a racist manner effectively removes the juror; and improperly strikes and dismisses an otherwise acceptable jury pool. In contrast, retaining the improperly challenged juror does not force acceptance of a juror who is objectionable for any legally recognized reason, and does not strike the jury pool.[6]

Other federal courts have expressly upheld the retention of improperly stricken jurors. In DeGross, *supra* at note 4, reversal was required because of an improper strike by the prosecution. However, that court specifically upheld the trial

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[5] *See* United States v. DeGross, 913 F.2d 1417, 1423 at n. 9 (9th Cir. 1990)(noting that three "vivid examples" of how a community might respond to perceived racisim in the court system are discussed in Pizzi, Batson v. Kentucky: Curing the Disease But Killing the Patient, 104 S.Ct. Rev. 97, 153 (1987); and that the three examples were all Florida cases in which public outrage and race riots erupted after acquittals of white or Hispanic defendants by all-white juries). The juries were obtained by defense use of peremptory challenges to strike all black panel members.

[6] It is important to remember that there is no constitutional right to peremptorily strike jurors. *See* Batson, 476 U.S. at 98 ("the Constitution does not guarantee a right to peremptory challenges").

judge's disallowance of a defense peremptory strike based solely on gender. 913 F.2d at 1426.

United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987), discussed the need for timely objections to peremptory strikes by the prosecution. Two reasons for such objections were to prevent the defense from delaying until reasons for a strike could be forgotten, and because an improper challenge could be "easily remedied prior to commencement of trial simply by seating the wrongfully struck venireperson." *Id.* at 1011.

Return to this Court's decision in Neil, *supra* at 487. That decision does not establish a single remedy, but only recommends that trial courts dismiss the pool and start over. The Neil remedy, however, is incapable of protecting a juror's right not to be excused on account of race, as enunciated in Powers, *supra*,[7] and should not be read as excluding other remedies.

To be fair, the remedy of dismissing the entire pool must be evaluated in the context of the facts and posture of Neil. There, this Court remanded for a new trial because no inquiry into the basis of the state's peremptory challenges had been

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[7] A prospective juror has a comparable right, under the Florida Constitution, not to be stricken solely on the basis of race. *See* Art. I, §2 (no person shall be deprived of any right because of race).

made. This Court was not reviewing the procedure actually used by the trial court. It was, instead, simply holding that peremptories could not be exercised based solely on race.

Moreover, the Neil Court was only beginning to develop a body of law relating to peremptory challenges. At that time, it was unclear what the legal foundation for this process would be. Several were later suggested. In Tillman v. State, 522 So.2d 14 (Fla. 1988), for example, this Court held that by using a peremptory challenge procedure that fell short of that announced in Neil and Slappy, *supra,* the trial court failed to ensure the jury was comprised of a fair cross-section. Also, the trial court subjected the defendant to a:

> proceeding that was open to racial discrimination by the state, thus violating article I, section 2 of the Florida Constitution as well as the Equal Protection Clause of the Fourteenth amendment to the United States Constitution.

Id. at 17. However, since Neil's legal basis was inchoate, the scope of the remedies did not emerge until the United States Supreme Court decided Powers.

In contrast, the majority of state jurisdictions which have considered this issue have found that disallowing improper peremptory challenges and retaining the prospective jurors is the preferred remedy. *See,* for example, People v. Piermont, 542

NY.Supp.2d 115, 118 (Westchester County Court 1989); People v. Kern, 554 N.E.2d 1235 (N.Y. 1990); Commonwealth v. Reid, 424 N.E.2d 495, 500 (Mass. App. Ct. Middlesex, 1981); Commonwealth v. DiMatteo, 427 N.E.2d 754, 757 (Mass. App. Ct. Suffolk, 1983); and Sims v. State, 768 S.W.2d 863, 864 (Tex. Ct. App. Texarkana, 1989).

By retaining the improperly challenged juror, the trial court also conserves limited judicial resources. This is always important but particularly so in less populated jurisdictions, where the number of potential jurors may be limited. It is also important in larger jurisdictions, in which many persons may be called to provide juries for several trials. Requiring a new pool whenever a peremptory challenge is improperly used, however, raises the distinct possibility of "unnecessary disruption." Powers, *supra*, 113 L.Ed.2d at 429.

To require dismissal of a jury pool because of peremptory misuse unnecessarily burdens the judicial system without better protecting the prospective jurors' right to equal protection. Additionally, the time of many jury panel members, "two lawyers, one court reporter, several court officers, clerks, and the judge would have been wasted [Piermont, at 118]," regardless of whether the jurisdiction was rural or urban.

The trial court, by retaining the stricken juror, also prevents a party from benefitting from its misuse of a peremptory challenge. In so doing, the trial court deters manipulation of the jury selection process. When the trial court's only remedy is to strike the entire jury pool, neither the defense nor the prosecution is prevented from engaging in a strategy of striking successive pools until the desired composition of people is obtained. Counsel could strike the entire pool simply by stating a single, calculated discriminatory reason.

It cannot reasonably be maintained that the only remedy for a constitutional violation should reward the wrongdoer. Picture, for example, the prosecutor or defense counsel who looks over the jury pool and announces that the cross-section is unacceptable, as it includes too many blacks or whites. Counsel then exercises peremptories for racial reasons against blacks or whites, to reach what counsel considers to be a suitable "cross section." If the trial court's only remedy is to dismiss everybody; then, simultaneously, the baby is thrown out with the bathwater and the rabbit is thrown into the briar patch.

The trial court could hold counsel in contempt of court, but this is inadequate at best. When the jury panel is struck once or twice during the selection process, the trial court may or may not be aware that counsel is engaging in a calculated

strategy. Counsel who obtain a favorable panel on the second or third try escape censure, even though the jury selection process has been unconstitutionally manipulated. Thus, striking the pool is not a deterrent, as the wrongdoer gets exactly what was wanted in the first place -- the challenged juror stricken.

The potential for abuse is even greater in jurisdictions which pick all juries for the week on one day and instruct the jury to return on a date certain to begin the trial. A lawyer could employ a backstrike for a blatantly racial reason. If the court did not have another venire available, the entire trial might have to be rescheduled. Thus, limiting a judge to only the Neil remedy could foster the discrimination it was intended to prevent.

Moreover, having an alternative remedy enhances the effectiveness of Neil. When a court evaluates the challenger's reason within the particular factual context, the court is more likely to grant relief if provided an effective, yet practical remedy.

A good example is provided by the facts of Knight v. State, 559 So.2d 327 (Fla. 1st DCA 1990), *rev. denied*, 574 So.2d 141 (Fla. 1990). Although four of six jurors were black, Knight claimed the prosecutor improperly struck other blacks from the panel. The prosecutor voluntarily gave solid reasons for three

of four blacks stricken. *Id.* at 328. While the reasons for the fourth strike were deemed "extremely marginal, at best" (*id.* at 329), the First District ultimately concluded the trial court did not err under all the circumstances. *Id.* at 330.

Suppose, however, the "extremely marginal" reasons for striking the fourth juror were not attended by other facts, and the trial court had concluded that strike was improper. The court would then have no choice, under the rationale of the opinion below, but to strike the pool; thereby eliminating at least three other black prospective jurors. Surely this Court never intended the nascent jurisprudence of Neil to compel such a result.

Koenig v. State, 497 So.2d 875 (Fla. 3d DCA 1986), also erodes the First District's automatic-discharge rule. There, the defendant struck four black prospective jurors. While one black remained on the panel, that person was not reached. *Id.* at 877. The court then dismissed the panel, over defense objection, as not being a cross-section of the community. The next day, another jury was picked with no black members. *Id.* at 878. While ultimately concluding no reversible error occurred, the Third District held the trial court was without authority to discharge the initial venire. *Id.* at 878. It did so after a thorough consideration of Neil.

A footnote in Koenig is quite appropriate. Observing that Neil was issued after the trial in Koenig, the Third District declared that Neil's procedures were the only acceptable means for determining whether peremptory challenges were properly exercised. It also declared that "venire-shopping by the trial court is not an acceptable substitute." 497 So.2d at 879, note 6.

If venire-shopping by the trial court is not acceptable, venire-shopping by a defendant or the prosecution also is not acceptable. The First District's automatic-dismissal rule is a ready vehicle for such tactics.

Returning to this case specifically, Aldret did not, and cannot, show that the trial court abused its discretion in disallowing the peremptory challenge. Discretion is particularly manifest in jury selection. Harper v. State, 476 So.2d 1253 (Fla. 1985). By retaining the prospective juror, the trial court struck the necessary balance between the defendant's right to an impartial jury, including the exercise of peremptories within constitutional bounds, and the prospective juror's independent right not to be stricken on the basis of race. This Court must ratify that balance by reversing the First District on this issue.

To sum: Automatic dismissal of the entire jury pool is not required by Neil. As an absolute rule,[8] automatic dismissal of the pool lends itself to abuse and is almost certainly unconstitutional. In contrast, the trial court -- by retaining the improperly challenged juror -- achieved the constitutionally mandated result. It certainly did not abuse its discretion.

CONCLUSION

The opinion below must be reversed on this issue, with directions to affirm the trial court.

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[8] The State questions whether an absolute rule -- designed to prevent racial discrimination -- could survive strict scrutiny of its discriminatory impact when prospective jurors, already accepted, are also dismissed.

Respectfully submitted,

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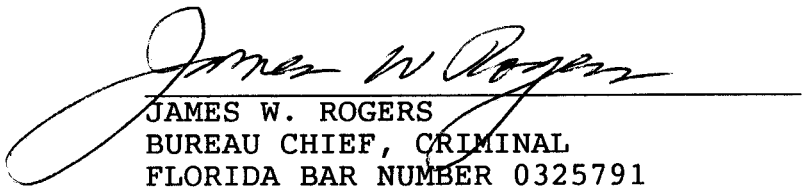

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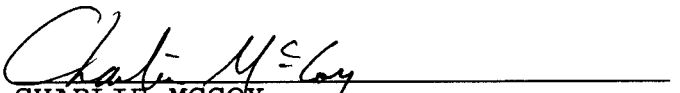

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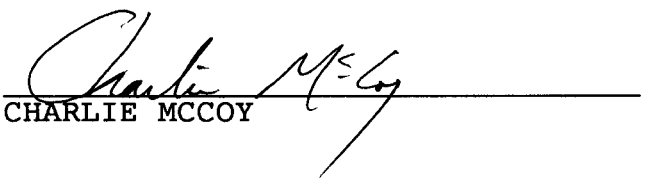
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner/Cross-Respondent's Initial Brief on the Merits has been furnished by U.S. Mail to **MR. GLEN P. GIFFORD**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of February, 1992.



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