IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

vs. Case No. 79,149

JOSEPH ALDRET,

Respondent/
Cross-Petitioner.

PETITIONER'S REPLY BRIEF AND CROSS-RESPONDENT'S ANSWER BRIEF, BOTH ON THE MERITS

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PRELIMINARY STATEMENT

Aldret has reversed the order of the issues presented. The State will retain the First District's sequence of certified questions: Issue I (remedy) corresponds to the first certified question; Issue II (State standing), to the second. Aldret v. State, 16 F.L.W. D3018 (Fla. 1st DCA Dec. 3, 1991), *certifying additional question*, 17 F.L.W. D128 (Fla. 1st DCA Dec. 26, 1991). For convenience, Aldret's answer/cross-initial brief will be cited as his "answer" brief.

STATEMENT OF THE CASE AND FACTS

The State objects to one of Aldret's additions to the State's original statement of the case and facts. He claims that 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." (answer brief, p. 2). While the prosecutor did compel a Neil inquiry, he did not expressly mention that case. Aldret's statement is, in effect, improper argument. At no time did the prosecutor expressly limit the legal grounds for his objection to the grounds announced in Neil.

SUMMARY OF THE ARGUMENT

ISSUE I: Remedy

Disallowance of a racist peremptory challenge by defense counsel does not deprive a defendant of an impartial jury. When a defendant's only reason for striking a prospective juror is race, there is no legally recognized allegation of bias or partiality by that juror. Therefore, retaining the juror does not force the defendant to be tried by a juror that is not impartial.

ISSUE II: State Standing

The State has an independent standing under Art. I, §16(a) and §22 of the Florida Constitution to object to defense exercise of peremptory challenges, based on the constitutional requirement that trials be "public;" that the right to a jury trial be secure to all and remain inviolate; and that the qualifications of jurors be fixed by law. The State also has representational standing to enforce a prospective juror's equal protection rights under the Fourteenth Amendment, and under Art. I, §2 of the Florida Constitution.

ARGUMENT

[Reply Brief]

ISSUE I

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

This Court has very recently and squarely held that a trial court has discretion to fashion the "appropriate" remedy to racist use of peremptory challenges, including the remedy of disallowance of a challenge and retention of the prospective juror. Jefferson v. State, 17 F.L.W. S139 (Fla. Feb. 27, 1992). The only factual difference between Jefferson and this case is that Jefferson involved one peremptory challenge exercised by the prosecution. This case involves one peremptory challenge exercised by the defendant. There is no legal distinction between the two.

Very significantly, the Jefferson opinion's most prominent statement does not limit itself to peremptories exercised by the State. As it frequently did in Neil, *supra*, this Court deliberately used the word "party" rather than "defendant" or "accused":

> 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. *Id.*, slip op. at p. 5 (footnote and citations omitted)[e.s.].

Thus, Aldret's only point meriting response[1] -- that disallowance of a racist peremptory, rather than discharging the jury pool, deprives a defendant of a fair trial -- has been decided against him.

Aldret then reverts (answer brief, p. 16-17) to his argument against the State's standing to object to defense exercise of peremptory challenges. The State will answer that point in Issue II. Furthermore, the State declines to answer Aldret's poppycock about "cross-race antipathy." (answer brief, p. 19). A prosecutor's motives for objecting to a defense peremptory are irrelevant where the defense peremptory is unconstitutionally based solely on race.

The First District must be reversed on this point, and the trial court affirmed. Judges must be allowed to refuse individual peremptory challenges rather than dismiss the entire jury pool.

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[1] Aldret also relies upon a technical reading of Fla.R.Crim.P. 3.340. (answer brief, p. 16). The rule, obviously a procedural matter only, cannot be applied to thwart the state and federal constitutional rights of prospective jurors. *See* Benyard v. Wainwright, 322 So.2d 473, 476 (Fla. 1975)(the Florida Supreme Court's rulemaking authority is limited to matters of procedure, and a substantive rule has no validity).

ISSUE II

[Answer to Issue on Cross-Appeal]

WHETHER THE STATE HAS STANDING TO CONTEST DEFENSE USE OF PEREMPTORY CHALLENGES

A. Introduction

This Court must see Aldret's position for what it is. His claim that the State lacks standing[2] to contest his use of peremptories is actually an argument that a defendant has unbridled discretion to exercise peremptory challenges in a racist manner. The irony looms large. This Court's decisions to require racially neutral use of peremptories have largely been engendered by defense objections to prosecution strikes of black prospective jurors. Now, Aldret claims that defendants are above the law.

Notably, Aldret implicitly concedes that defense counsel's reasons for the strike were not proper under Neil. The First District so found. (*See* slip op. at p. 7-8). Aldret does not even attempt review of that finding. Having conceded his reasons for attempting to strike a black juror were racist, he now claims

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[2] The State reminds the Court that the identical issue is before the U.S. Supreme Court, in Georgia v. McCollum. *See* 116 L.Ed.2d no. 2 (Dec. 18, 1991) at page C-8. The Georgia Supreme Court's decision in McCollum is reported in State v. McCollum, 405 S.E.2d 688 (Ga. 1991).

the State cannot call him to task -- presumably leaving only the wrongly excluded juror with the legal ability to do so.

Responding to Aldret's introductory observations (answer brief, p. 6), the State adds that its standing derives, variously, from Art. I,§2, §16(a), and §22 of the Florida Constitution; and from the Fourteenth Amendment to the U.S. Constitution. The State adds, however, that its standing under the provisions of Art. I is not merely representational on behalf of the wrongly excluded juror; but direct, based on the State's right to an impartial jury, and the compelling interest of maintaining public confidence and respect for the court system.

B. Response on the Merits

1. Independent State Standing under Art. I, § 16(a) of the Florida Constitution

The State has standing to contest defense peremptories independent of the equal protection right of a prospective juror. This standing arises by the "public" nature of a criminal trial, required by Art. I, §16(a):

> In all criminal prosecutions the accused shall, upon demand, . . . have the right to . . . a speedy and public trial by impartial jury where the crime was committed. [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.
>
> * * * *
>
> 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).

As will also be argued below on behalf of the State's representational standing, it is the State which compels attendance of prospective jurors and can sanction them for unexcused failure. It is the State which conducts individual trials. A prospective juror who suspects she or he has been excluded due to race will not care whether it was the prosecutor or defense counsel who exercised the strike. Resentment will be against the state court system as a whole.

In contrast, Aldret advances a very problematic reading of Art. I, §16(a), Fla. Const., which sets forth certain rights of the accused. Because this section does not expressly mention the State (or prosecution, or the people generally), Aldret contends one of its announced rights -- impartial jury -- does not extend to the State. Therefore, he would avoid the statement in Neil that "both the state and the defense may challenge the allegedly improper use of peremptories." *Id.* at 487. His absolute focus on the term "impartial jury" explains his misapprehension of the significance of requiring criminal trials to be "public."

Although not saying as much, Aldret employs a principle of statutory construction that express mention of one or more items

excludes all items not mentioned. P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). Single-minded reliance on this principle is misplaced, despite the fact that rules of statutory construction are generally applicable to constitutional provisions. State ex rel. McKay v. Teller, 191 So.2d 542, 140 Fla. 346 (1939). Refusing to allow the State to contest Aldret's use of peremptory challenges would tolerate discrimination on the basis of race. Such interpretation of Art. I, §16(a) would nullify the directive of Art. I, §2; that a person shall not be denied rights on the basis of race. One constitutional provision must not be interpreted to nullify another, unless expressly required. *Id.* at 545; Burnseed v. Seaboard Coastline R.R., 290 So.2d 12 (Fla. 1974)(construction giving effect to every clause and part of constitution favored).

The right conferred by Art. I, §16(a) is not a right to peremptory challenges, which is "not of constitutional dimension." Neil, *supra* at 486. Instead, the right to peremptory challenges is established by §913.08, Florida Statutes (1989). While exercise of that statutory right undoubtedly implicates Art. I, §16(a), there is nothing in that article or in §913.08 that precludes the prosecution from challenging a defendant's peremptory strike. To the contrary, §913.08 begins by declaring that "the state and the defendant shall each be allowed the following number of peremptory challenges."

To the extent an accused's right to an impartial jury depends on peremptory challenges, Art. I, §16(a), is not self-executing. The statute (§913.08) giving effect, in part, to that right does not distinguish between the State and a defendant. It follows that exercise and objection to peremptory challenges may be wielded equally by defendants and the State.

Through a tenuous reading of state constitutional rights, Aldret relies on this Court's recent decision in Traylor[3] to insulate a defendant's peremptories from a Neil inquiry. He misapplies Traylor, erroneously claiming it extends greater latitude to a defendant's exercise of a peremptory challenge than to the State's. Even if his absurd position were true, which it is not, Aldret forgets that Traylor -- interpreting the Florida Constitution -- still must yield to federal constitutional rights. Assuming the state constitutional right to an impartial jury somehow broadens a defendant's statutory right to peremptory challenges does not permit exercise of that right in violation of the Fourteenth Amendment. However, nothing in Traylor indicates its rationale applies to peremptory challenges, which are not of state or federal constitutional status.

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[3] Traylor v. State, 17 F.L.W. S42 (Fla. Jan. 16, 1992).

As noted by the First District (slip op., p. 3-5), Neil is persuasive authority that the State has standing. That decision speaks in terms of a "party" or the "other side's" use of peremptories (457 So.2d at 486-7) despite the fact that prosecution use of such challenges was at issue. Following decisions from California and Massachusetts, the Neil court expressly held 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. *Id.* at 487 [e.s.].

If the State is equally entitled to an impartial jury, then Aldret is rebuffed by his own logic. If a defendant's right to an impartial jury precludes a Neil inquiry, then the State's equal right does also. Actually, the opposite is true: neither side's right to an impartial jury precludes inquiry into alleged unconstitutional use of peremptory challenges.

Aldret advances no credible argument that his protected constitutional right to an impartial jury is abridged by requiring him to exercise his statutory right to peremptory challenges in a non-racist manner. He does not even address the fact that the State's compelling interest in a public trial confers independent standing on the prosecution to object to defense peremptories alleged to be racially motivated.

2. Independent State Standing under Art. I, §22 of the Florida Constitution

Another provision of Florida's constitution reinforces the State's independent standing under Art. I, §16(a). As this Court noted in Neil, *supra*, the State is entitled to an impartial jury. Article I, §22 declares that the "right of trial by jury shall be secure to all and remain inviolate." [e.s.] Notably, this provision is not limited to a "person" or a "defendant," or an "accused." By contesting defense use of peremptories, the State is asserting its due process right to an even-handed[4] jury selection process; and its responsibility to ensure that trials are conducted in accord with constitutional principles. The State is also exercising its duty to protect the equal protection rights of citizens (venire members) against improper jury selection tactics that would bring the process into disrepute. Only the prosecution is available to assert this compelling interest.

Article I, §22 also provides that the qualifications of jurors shall be fixed by law. Peremptory challenges are a creature of statute, §913.08. Because jury selection is conducted

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[4] *See* Batson v. Kentucky, 476 U.S. 79, 107-8, 106 S.Ct. 1712, 90 L.Ed.2d 69, 95 (1986)("Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'")(Marshall, J., concurring), *quoting* Hayes v. Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 30 L.Ed. 578 (1887).

under the auspices of the State, and even may cause mistrial or reversal, the prosecutor has a legal responsibility to see that jury selection is conducted pursuant to both statutory and constitutional law. To hold that the State has no standing to challenge the unconstitutional use of peremptory challenges would stultify this responsibility.

The proposition that all parties have standing to challenge the unconstitutional use of peremptory challenges under both §16(a) and §22 is supported by Florida Rule of Criminal Procedure 3.260: "A defendant may in writing waive a jury trial with the consent of the state." [e.s.] Patently, that rule is grounded on a right to jury trial by both the defendant and the state. Otherwise, either could waive jury trial and the opposing party could not object; that is, would have no standing. Because both sides have an equal right to a jury trial, the exercise of peremptory challenges by the defense is subject to the same constitutional restraints as exercise of peremptory challenges by the State.

The State's position on the meaning of §22 is also supported by this Court's decision in Brooks v. Mazaheritehrani, 17 F.L.W. S153 (Fla. Feb. 27, 1992), a civil case presenting the same issue as in Jefferson, *supra*. In Brooks, this Court held that disallowing an improper peremptory challenge was an appropriate

remedy in a civil case. The Court cryptically held there was no conflict with Neil, and relied on Jefferson. Obviously, in a civil trial there is no criminal accused. Brooks, then, cannot rest on Art. I, §16(a), which applies to criminal prosecutions. Although the Court does not say so, Brooks must rest only on Art. I, §22. Under Brooks, either party has standing to challenge the unconstitutional use of peremptory challenges.

If either party in a civil case has standing under Art. I, §22, to contest the other's use of peremptories, then both sides must have standing in a criminal prosecution. This is true because Art. I, §22 is not limited to civil cases, and because of Brooks' unexplained reliance on Jefferson. It should be noted that neither Brooks nor Mazaheritehrani were themselves state actors. State action arose simply because the trial was conducted under state constitutional auspices. Art. I, §22.

To claim that a defendant's right to an impartial jury defeats the State's standing is ludicrous. When a defense peremptory is held improper under Neil, the trial court expressly finds that race is the only ground for the strike; not any bias of the prospective juror. Therefore, State objection to an improper strike does not implicate a defendant's right to a jury that is impartial. It merely forces the defense to demonstrate the

reasonable possibility of juror bias on some ground other than vague, racially-based suspicion. Again, and as this Court said in Jefferson, *supra*: "It is the right to an impartial jury, not the right to peremptory challenges, that is constitutionally protected."

3. Representational State Standing Under The Fourteenth Amendment and Art. I, §2 of the Florida Constitution

The United States Supreme Court has recently announced that prospective jurors have an equal protection right not to be excluded from service on the basis of race only. Powers v. Ohio, 113 L.Ed.2d 411 (1991). Moreover, the Powers court also announced that a defendant has standing to raise the excluded juror's right to equal protection. *Id.* at 425-8.

Powers employed a three-prong test to find such third-party standing:

> [first,] 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; . . . [second], the litigant must have a close relation to the trial party; . . . and [third], there must exist some hinderance to the third party's ability to protect his or her own interests. (citations omitted). *Id.* at 425.

The State readily meets all three prongs of the test employed in Powers. The State is injured when racist use of peremptory

challenges fosters resentment of the court system generally. *See id.* at 426 ("The overt wrong [racist peremptory challenge], often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law."). By compelling a prospective juror's attendance and relying upon that juror, if selected, to follow the law, the State has a close relation to that juror. Finally, the obstacles faced by a prospective juror who would enforce his or her rights are "daunting." *Id.* at 427. This is true regardless of which side improperly exercises a strike. Aldret concedes this when he claims (answer brief, p. 11) the State has no standing only under parts one and two of the Powers test.

The State also has representational standing to enforce the prospective juror's right against race-based exclusion under Art. I, §2 of the Florida Constitution. That provision declares: "No person shall be deprived of any right because of race, religion or handicap." [e.s.] Employing a strained interpretation of this constitutional imperative, Aldret counters by noting the obvious, that the Florida Constitution does not confer the right to serve as a juror. (answer brief, p. 13). The State does not argue otherwise.

The right at issue, however, is the prospective juror's right not to be excluded solely on the basis of race. Jefferson,

supra (slip op., p. 4). Aldret's counsel attempted to strike a juror because of race, thereby abridging that right and violating Art. I, §2. *See* Tillman v. State, 522 So.2d 14, 17 (Fla. 1988)(by using a peremptory challenge procedure that fell short of the requisites of Neil and Slappy,[5] the trial court failed to ensure that the jury was composed of a fair cross-section, and 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.").

In Neil, this Court reviewed case law from other jurisdictions and expressly emulated the procedures announced in the New York case of People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 793 (1981). It follows that later New York decisions are also highly persuasive.

Such a case is People v. Kern, 75 NY.2d 638, 554 N.E.2d 1235 (N.Y. 1990), *cert. denied*, 111 S.Ct. 77 (1990). There, New York's highest court held that purposeful racial discrimination by the defense in exercise of peremptory challenges violated both the civil rights clause and the equal protection clause of Article I,

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[5] State v. Slappy, 522 So.2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

§11 of the New York State Constitution, a provision[6] substantively similar to Florida's Art. I, §2. As to the civil rights clause contained in the second sentence of the New York provision, the Kern court, noting accord with Soares,[7] and Wheeler,[8] and Neil, *supra*, stated:

> [J]ury service is a means of participation in government which can only be considered a privilege of citizenship. Racial discrimination in the selection of juries harms the excluded juror by denying this opportunity to participate in the administration of justice, and it harms society by impairing the integrity of the criminal trial process. (citations omitted).

Kerns, *supra* at 1242, n. 2. The court then held that "opportunity for service on a petit jury is a privilege of citizenship which may not be denied our citizens solely on the basis of their race." *Id.* at 1243.

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6 Article I, §11 of the New York State Constitution provides:

> No person shall be denied the equal protection of the laws of this State or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the State or any agency or subdivision of the State.

7 Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979).

8 People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748 (1978).

Finding that New York's equal protection clause prevented the defense from improperly challenging jurors, the Kern court stated:

> Our analysis begins with the Supreme Court's decision in *Batson v. Kentucky* (*supra*). In *Batson*, the court expressly declined to decide whether the Equal Protection Clause restricted the exercise of peremptory challenges by defense counsel as well as the prosecution . . . although in his dissent, Chief Justice Burger concluded that the same restrictions on defense peremptories would "inevitably" follow . . . and Justice Marshall concurring in the majority opinion, noted that the "potential for racial prejudice . . . inheres in the defendant's challenge as well" and recommended eliminating peremptories entirely . . . (citations omitted)[emphasis in original]. *Id.*

Rejecting defense argument that "Batson does not restrict defense exercise of peremptory challenges because such conduct is not state action and therefore is not subject to the mandates of the Equal Protection Clause," the Kern court stated:

> [T]here can be no question that the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges. A defendant's right to exercise the challenges is conferred by State statute . . . . The jurors are summoned for jury service by the State, sit in a public courtroom and are subject to voir dire at the direction of the State, and although defense counsel exercised the peremptory challenge and advised the Judge of the decision, it is the Judge, with the full coercive authority of the State, who enforces the discriminatory order . . . (citations omitted).

Construing New York's substantively similar constitutional provision, the Kern court had no difficulty in finding that defense peremptories must not be based solely on race. By analogy, Art, I, §2 of the Florida Constitution applies with equal force to the defense. By analogy to Powers, the State has standing to enforce the prospective juror's rights under Art. I, §2.

Art. I, §2 does not limit its stricture to state action, or to actions by the prosecutor. Therefore, defense exercise of a racially-based peremptory challenge violates the prospective juror's rights under that provision. Under the logic of Powers, *supra*, either side must be able to assert the prospective juror's rights through objection to the other's use of peremptory challenges.

4. Other Points

Three other points by Aldret must be addressed. First, he intimates a preservation argument when he declares that the "state's objections in jury selection contained no hint of invocation of a federal right,[9] either on its own behalf or that

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[9] Powers was decided in April, 1991 (113 L.Ed.2d at 411), or about 5½ months after Aldret's trial. (T 1). It would be unreasonable to expect the prosecutor to invoke this decision before it had been announced. Otherwise, this appeal is a "pipeline" case subject to controlling decisions by the U.S. Supreme Court. Also, this Court in Jefferson, *supra*, frequently relied on Powers,

of jurors." (answer brief, p. 10). Aldret should read the record. The prosecutor implicitly asserted standing by making the objections to Aldret's strikes. (T 44-8). At no time did defense counsel ever question the State's standing to object to the peremptory challenges. If any issue is not preserved, it is the issue of standing raised by Aldret for the first time before the First District. Since he has never claimed he was tried by a jury that was not impartial, he cannot allege fundamental error. Therefore, this Court could properly decline to reach this issue at all.

Next, Aldret maintains that his private defense counsel is not a "state actor," thereby converting his improper peremptory challenges to private action.[10] The forced attendance of prospective jurors and the trial itself are certainly state action. Peremptory challenges are a matter of statutory right; that is, conferred by the state through action by the Legislature. When a private defense counsel exercises a defendant's statutory right to peremptorily challenge a juror solely on the basis of

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despite the fact that the defendant in Jefferson was tried before Powers was decided. *See* Jefferson v. State, 584 So.2d 123 (Fla. 4th DCA 1 991)(appellate court decision issued Aug. 7, 1991, strongly implying that defendant's trial was before April of the same year).

[10] Again, Art. I, §22 of the Florida Constitution requires that the right to jury trial remain "inviolate," thereby necessitating state action. See Subsection 2 above.

race, then defense counsel has violated that juror's civil rights under the color of state law. The fact that Aldret's trial counsel was privately employed is immaterial. Also, if Aldret's position is correct, the criminal defendant represented by private counsel would have a greater right in the exercise of peremptory challenges than the defendant represented by a public defender. This difference certainly would not withstand the strict scrutiny required when classifications are made on the basis of race.

Aldret's final point relies upon attorney-client privilege, the evidence code, and the rules of professional conduct. For the first time before this Court, he claims that a defendant's desire to exclude a prospective juror on the basis of race is, in effect, a confidential communication that cannot be disclosed.

Preliminarily, Aldret never advanced this argument before the trial court or the First District. This does not daunt him, despite his complaint (answer brief, p. 10) that the prosecutor did not invoke any federal right before the trial court. Aldret's temerity is exceeded only by his inconsistency.

Aldret advances no authority that attorney-client privilege, a creature of statute (§90.502), can defeat state and federal constitutional rights. He never explains how defense counsel, deliberately seeking to exclude a juror on an illegal

(racial) basis, is complying with the rules of professional conduct.

Lastly, Aldret never demonstrates that reasons for peremptory strikes -- subject to a Neil inquiry since 1984 -- are "confidential" as defined by §90.502(1)(c). If such were true, how could the trial court compel defense counsel to disclose reasons for challenging prospective jurors for cause? This Court must disregard Aldret's belated reliance on attorney-client privilege.

CONCLUSION

The first certified question must be answered negatively as to its first part, and affirmatively as to its second part. In the absence of prejudice to either side, the trial court must have the option to allow the peremptory challenge held improper under Neil rather than dismiss the jury pool. By answering the first certified question in this manner, the Court must reverse the First District's disposition of the remedy issue, thereby affirming Appellant's conviction and sentence.

The State has independent standing by virtue of the "public" trial requirement in Art. I, §16(a), and by virtue of its right to a jury trial in Art. I, §22 of the Florida Constitution. The State has representational standing under the Fourteenth

Amendment of the U.S. Constitution and Art. I, §2 of the Florida Constitution. For these reasons, the answer to the second certified question is "YES."

Respectfully submitted,

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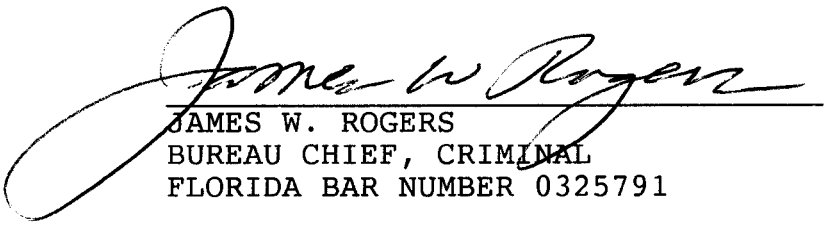

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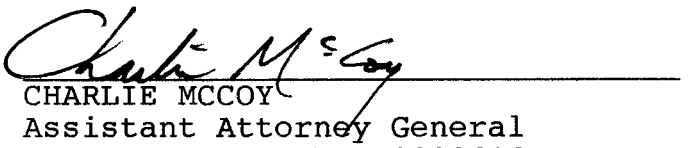

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief and Cross-Respondent's Answer Brief, Both 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 18th day of March, 1992.

Charlie McCoy

CHARLIE MCCOY