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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v.

JOSEPH ALDRET,

Respondent/Cross-Petitioner.

CASE NO. 79,149

REPLY BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Interspersed among the ad hominem attacks and distortions in the state's reply brief/cross-answer brief is argument on the merits. Apart from correction of misstatements by the state, this brief is limited to response to legal argument.

This brief contains argument only on the issue of the state's standing. Herein, the state's reply brief/cross-answer brief is referred to as an answer brief, and Aldret's answer brief/cross-initial brief as an initial brief. Citations to the briefs appear as (AB[page number]) and (IB[page number]).

In response to the state's objection to Aldret's statement in the initial brief that the prosecutor expressly invoked State v. Neil and its assertion that the prosecutor "did not expressly mention that case," (AB1), Aldret directs the Court to Appendix 1, which contains record page 44.

<u>ARGUMENT</u>

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

In reframing the issue, the state has substituted ends for means. This is not "actually an argument that a defendant has unbridled discretion to exercise peremptory challenges in a racist manner." (AB5) This is an argument that the state lacks standing to object to a defendant's use of peremptories. If accepted, a consequence of that argument is that a defendant may not be compelled to explain the reasons for a peremptory challenge at the state's behest.

Second, in declining to relitigate the trial court's findings, Aldret has not conceded his reasons for striking the juror were racist. Review of a trial judge's findings on a <u>Neil</u> objection is limited to determining whether the ruling was an abuse of discretion, a difficult standard for the challenging party. The district court found no abuse of discretion. Given the presumptions and burdens involved, a decision to forgo this issue at this point is itself an exercise in discretion and not tantamount to an acknowledgement that the challenge was, in the state's terms, "racist."

The state argues that state standing derives from the public trial guarantee of Article I, Section 16 of the Florida Constitution. (AB6) Later, the state observes that Aldret "does not even address" this issue. (AB11) After hearing nothing on this subject in the district court, Aldret had no idea the state would attempt to raise it here. No matter; the claim is

meritless. The right to a public trial derives from the same clause of the same constitutional provision as the right to trial by an impartial jury, and likewise is expressly conferred upon the accused. Additionally, the connection between public trials and exercise of peremptory challenges is too attenuated for the state's purposes here. If state standing does not derive from an accused's right to a public trial, it certainly does not flow from the accused's right to a public trial.

At page 7 of the answer brief, the state has marshalled portions of the dissenting opinion in State v. McCollum, 405 S.E.2d 688 (Ga. 1991), rev. pending, 116 L.Ed.2d No.2 at page C-8. The majority of the Georgia Supreme Court evidently disagreed with this analysis, perhaps because as in Florida, the Georgia constitutional rights to a public trial and an impartial jury are expressly defendants' rights. In a brief opinion, the majority pointed to historical and constitutional anomalies in the requested restriction of defense peremptories: "Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant." Id. at 688.

Contrary to the state's argument at page 9 of the answer brief, a construction of Article I, Section 16 according to its plain wording does not nullify Article I, Section 2. Means other than turning an accused's constitutional right against him exist to protect or vindicate a wrongfully excused juror's rights. The state equal protection clause is not rendered a nullity merely

because the impartial jury clause gives prosecutors no standing to serve as the champion of wronged jurors. Stretching one constitutional provision beyond recognition to coordinate with another falls outside accepted principles of statutory construction.

Next, the state attempts to co-opt Florida's constitutional right to trial in civil cases. (AB12) Article I, Section 22 is limited to civil trials, contrary to the state's claim. (AB14) The district court recognized this principle below. Aldret v. State, 592 So.2d 264, 266 (Fla. 1st DCA 1991), citing to City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985). No less or more than the Seventh Amendment right to jury trials, Article I, Section 22 applies solely to civil cases. The state has cited no authority holding otherwise.

The state correctly notes that it has a procedural right to nullify a defendant's waiver of trial by jury. (AB13) That right does not, however, confer on the state a right to avail itself of a constitutional provision expressly conferred on the accused, and use it against the accused.

On the question of third-party standing to assert jurors' equal protection rights, the state neither suffers a cognizable injury nor has a close relation to the juror within the parameters of the test set out in Powers v. Ohio, 113 L.Ed.2d 411 (1991). General resentment of the court system, invoked by the state (AB15), is not a concrete injury. In this context, the Powers court noted that the jury protects against the wrongful exercise of power by the state and its prosecutors. As stated in

the initial brief (AB11-12), the state cannot suffer a cognizable injury during a procedure that exists solely to prevent abuse by the state.

In response to the assertion that Aldret was wrong in stating the prosecutor did not invoke a federal right, (AB20) the undersigned has read the record and urges the Court to do the same. Aldret stands by his claim on this point. Additionally, in reply to the state's notion that the prosecutor was not on notice that he could invoke a federal right because Powers v. Ohio had not been decided at the time of trial, the 1986 opinion in Batson v. Kentucky 476 U.S. 79 (1986), placed him on notice.

Finally, on the issue of attorney-client confidentiality, (AB22) it is indeed a creature of statute -- as well as an ethical mandate -- but one with constitutional implications. An attorney who violates the command of confidentiality deprives an accused of his Sixth Amendment right to the effective assistance of counsel. The state may wish to consider the price in reversible error of requiring defense lawyers to violate the rule of confidentiality when forced to explain reasons for a peremptory challenge. The question posed by the state at page 23 of the answer brief -- how defense counsel may be ethically compelled to disclose a challenge for cause -- is easily answered. A cause challenge must meet objective statutory criteria and have record support. No confidential communication need be divulged in attempting to justify a cause challenge. In contrast, a peremptory challenge is subjective. When a defense lawyer exercises a peremptory challenge because of reasons

arising from confidential communications, Florida statutes and the Rules of Professional Conduct preclude him from explaining the reason for the strike.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Aldret requests that this Honorable Court answer the second certified question in the negative, and order that he receive a new trial.

Respectfully submitted,

NANCY A. DANIELS
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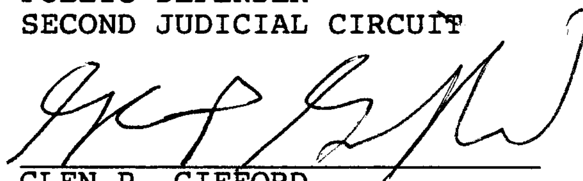
SECOND JUDICIAL CIRCUIT



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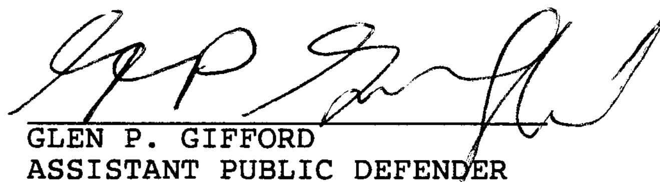
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon James Rogers and Charlie McCoy, Assistant Attorney Generals, The Capitol, Tallahassee, Florida, 32399, on this 13th day of April, 1992.



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