IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,362

THE STATE OF FLORIDA,

Petitioner,

-vs-

CHRISTINE HOLLY BARNES,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3010

BETH C. WEITZNER
Assistant Public Defender
Florida Bar No. 203221

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,362

THE STATE OF FLORIDA,

Petitioner,

-vs-

CHRISTINE HOLLY BARNES,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

INTRODUCTION

This cause is before this Court on the state's application for discretionary review of a decision of the District Court of Appeal of Florida, Third District, pursuant to a certification by that court of a question of great public interest. The parties will be referred to as they stand before this Court. The symbol "R." will be used to designate the record on appeal, and the symbol "T." the transcript of trial proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts set forth by petitioner.

QUESTION PRESENTED

Respondent restates the question presented as follows:

> WHETHER THE TRIAL COURT ERRED IN DISALLOWING TWO DEFENSE PEREMPTORY CHALLENGES OF *WHITE* JURORS WHO WERE CRIME VICTIMS WHERE (A) THE STATE FAILED TO OVERCOME THE PRESUMPTION OF NONDISCRIMINATORY INTENT IN THE DEFENSE'S PEREMPTORY CHALLENGES OF RACIAL *MAJORITY* MEMBERS; THE STATE'S OBJECTION ITSELF WAS PRIMA FACIE EVIDENCE OF THE STATE'S RACIAL DISCRIMINATORY INTENT TO RESTRICT THE NUMBER OF *BLACKS*; (B) THE REASONS PROFFERED BY THE DEFENSE WERE RECORD-SUPPORTED AND RACE-NEUTRAL; AND (C) THE COURT EMPLOYED AN ERRONEOUS LEGAL STANDARD IN EVALUATING THE REASONS.

SUMMARY OF ARGUMENT

Under the guise of *State v. Neil*, 457 So.2d 481 (Fla. 1984), the trial judge unlawfully impaired the respondent's right to challenge peremptorily two *white* jurors.

First, the state failed to dispel the heightened presumption of nondiscriminatory racial intent which legally attends a peremptory challenge exercised against a member of a racial *majority* group. To the contrary, the record establishes that the prosecutor's very objection to the defense peremptory challenges was itself racially motivated and designed to exclude a fourth black from serving on the jury.

Second, the reason proffered by defense counsel that both white jurors had been crime victims was racially neutral, record supported, and consistent with the defense's treatment of all other prospective jurors.

Third, the trial judge failed to recognize the validity of this reason because he evaluated the peremptory challenges under patently erroneous legal standards. The judge articulated that the proffered reason for the peremptory challenges required "good cause", and that the petit jury needed to mirror "a cross-section of the community."

The unfair abridgement of respondent's peremptory challenge rights warrants reversal for a new trial.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DISALLOWING TWO DEFENSE PEREMPTORY CHALLENGES OF *WHITE* JURORS WHO WERE CRIME VICTIMS WHERE (A) THE STATE FAILED TO OVERCOME THE PRESUMPTION OF NONDISCRIMINATORY INTENT IN THE DEFENSE'S PEREMPTORY CHALLENGES OF RACIAL *MAJORITY* MEMBERS; THE STATE'S OBJECTION ITSELF WAS PRIMA FACIE EVIDENCE OF THE STATE'S RACIAL DISCRIMINATORY INTENT TO RESTRICT THE NUMBER OF *BLACKS*; (B) THE REASONS PROFFERED BY THE DEFENSE WERE RECORD-SUPPORTED AND RACE-NEUTRAL; AND (C) THE COURT EMPLOYED AN ERRONEOUS LEGAL STANDARD IN EVALUATING THE REASONS.

In this case, the Third District Court of Appeal certified the question whether the "sole remedy" for a violation of *State v. Neil*, 457 So.2d 481 (Fla. 1984) is "to dismiss the jury pool and start voir dire over with a new jury pool" upon a finding that a party has exercised a racially-based peremptory challenge. *Barnes v. State*, 592 So.2d 1127, 1128 (Fla. 3d DCA 1992). The district court, adhering to *Neil*, 457 So.2d at 487, reversed respondent's convictions solely upon a holding that the trial court had erred in seating jurors, rather than dismissing the panel and beginning jury selection anew. The district court expressly refrained from ruling upon the remaining issues raised by respondent, which included whether the trial judge correctly found that the defense had exercised racially-based strikes. *Barnes v. State*, 592 So.2d at 1128.

In its brief, the state has defended the trial court's rulings that: (1) the seating of the challenged jurors was an appropriate remedy; and (2) the peremptory challenges were racially motivated. Brief of Petitioner at 14-32. This Court recently resolved the first issue in *Jefferson v. State*, 17 FLW S139 (Fla. Feb. 27, 1992), by holding that a trial court has discretion to seat an improperly challenged juror. The second ruling which the state attempts to defend is addressed below.

The trial court, over defense objection, ordered the seating of two *white* jurors whom defense counsel challenged peremptorily because they were crime victims. The record establishes that (a) the state never established a likelihood of racial discrimination in the exercise of peremptory challenges so as to shift the burden to respondent to establish an absence of racially discriminatory motive; to the contrary, it was the state that was attempting to restrict the number of blacks on the jury; (b) the reasons given by respondent for the challenges were racially neutral and record-supported; and (c) the trial judge employed an erroneous legal standard in ruling upon defense counsel's peremptory challenges.

a. No prima facie showing that defense peremptory challenges of two white jurors were racially motivated.

Respondent does not dispute that the holding of *State v. Neil*, 457 So.2d 481 (Fla. 1984) applies to *whites*. However, whites constitute a racial *majority*. Therefore, where peremptory challenges are directed at white jurors, the party opposing the challenges bears a greater burden of establishing racial discrimination than is the case where racial minority members are challenged. This was recently recognized by the First District in *Elliott v. State*, 591 So.2d 981, 986 (Fla. 1st DCA 1991):

> [W]here the peremptory challenges are being used to strike members of the *majority* race, the state, as the objecting or complaining party, carries an enormous burden to establish invidious racial motivation." (emphasis added).

This view was re-emphasized in *McClain v. State*, 17 FLW D946 (Fla. 1st DCA April 8, 1992). The trial judge in *McClain* had required the defense to provide reasons for its six peremptory challenges against white jurors, and ultimately disallowed four of the defense peremptory strikes on the ground they were not race neutral. The First District reversed McClain's convictions, holding that the mere exercise of six peremptory challenges against racial majority members failed to rebut the presumption that the challenges were nondiscriminatory:

> . . . the "initial presumption is that peremptories will be exercised in a nondiscriminatory manner." *Neil* at 486. A *Neil* inquiry shall be instituted *only* upon a demonstration on the record that the challenged jurors are members of a distinct racial group *and* that a strong likelihood exists that they have been challenged solely because of their race. In the absence of that demonstration and a corresponding finding by the trial judge of a substantial likelihood of racial discrimination, "no inquiry may be made of the person exercising the questioned peremptories." *Id.* Further, as recognized in *Elliott*, when peremptory challenges are being used to strike members of *the majority race*, a *heavy burden* to establish invidious racial motivation accompanies any attempt to deny, pursuant to *Neil*, the striking party's right to exercise its peremptory challenges.
>
> . . . our scrutiny of the record reveals no apparent basis for the trial judge's sua sponte institution of the initial *Neil* inquiry into the defense's exercise of the *six* peremptory challenges. Therefore, we must conclude that the defense was improperly denied, under the guise of *Neil*, its right to exercise peremptory challenges in a presumptively nondiscriminatory manner.

McClain v. State, 17 FLW at D947. (emphasis added).

In this case, the state failed to satisfy its heavy burden of overcoming the heightened presumption of nondiscriminatory intent which attends a party's use of peremptory challenges against members of a racial *majority*. Ironically, the record strongly supports the conclusion that the prosecutor's objection to defense counsel's peremptory challenges was itself racially motivated: it was designed to prevent a fourth black from serving on the jury.

The record in this case indicates that of the 19 persons in the venire, four were black. (R. 5; T. 77). The trial itself had no racial overtones; the race of the witnesses was not an issue, nor was it alleged that the crimes charged were committed through racial animus. The state's allegation that defense counsel was challenging white prospective jurors with racially discriminatory intent rested solely upon the fact that defense counsel exercised peremptory challenges against several white jurors.

Defense counsel's first peremptory challenge was exercised against a white juror who was closely related to crime victims - both his parents were murdered. (T. 25-26, 74-75).

Upon defense counsel's second peremptory challenge of a white juror, the prosecutor immediately objected, stating only: "I ask for grounds. That's the second white juror he's struck and the defendant is black." (T. 75). That objection was irrational: no one would reasonably consider a second peremptory challenge of a white prospective juror as racially motivated.[1] Although the judge did not ask for reasons, defense counsel explained that the juror's husband worked for the federal government at Homestead Air Force Base, and that he did not want a government employee because the prosecution was an arm of the government. (T. 22, 75). The judge, finding no pattern, allowed this peremptory challenge. (T. 76).

Upon defense counsel's third peremptory challenge to a white juror, the prosecutor objected, stating only that this was the defense's third peremptory challenge, and baldly ascribed thereto a discriminatory motive: "I now ask for a Neal [sic] challenge. This is the third. *** Third white juror. Obviously you're striking for racial reasons." (T. 76). Defense counsel explained that he was striking this juror because her family had been a victim of crime, and that the instant case involved drugs, a major cause of crime. (T. 76). The prosecutor avoided a response to this reason. Instead, she made a statement which revealed the real basis for her objections to defense counsel's peremptory challenges: if the third peremptory challenge were allowed, there would be four black jurors on the petit jury:

> MS. CAMPBELL [prosecutor]: For the record, I want to say Juror No. 7, Ms. Haynes is black, Ms. Brown is black, Ms. Hollifield is a black woman and when he strikes Ms. Weber--next person up is Ms. Weber--and that's four out of the six, he has struck three white jurors.[2]

(T. 77).

---

[1]Indeed, the state's objection was inconsistent with the demographics of Dade County where 20% of the population is black and 70% is white. Metropolitan Dade County Planning Department, *Population by Race, City & Census Tract, Dade County, Florida,* (August 1991).

[2]Apparently, the next prospective juror after Weber was Ms. Murphy, a black juror. (R. 5).

The prosecutor was plainly determined to prevent any more than three blacks from being impanelled, and the basis for this objection was to keep the fourth black juror off. As set forth *infra*, at this point, the trial judge found a "pattern" and denied defense counsel's third, fourth[3] and fifth[4] peremptory challenges of white jurors. (T. 77, 78, 79).

It is well established that a party's assertion that several members of a racial *minority* group have been excluded by peremptory challenge is, by itself, insufficient to establish a prima facie case of discrimination.[5] Consequently, the bare fact in this case that several members of a racial *majority* group have been challenged peremptorily cannot possibly satisfy the "enormous" burden, *Elliott v. State*, 591 So.2d 981, 986 (Fla. 1st DCA 1991), required of the state to overcome the presumption of a lack of discrimination. [6] *McClain v. State*, 17 FLW

---

[3]On defense counsel's fourth peremptory challenge of a white juror, the prosecutor repeated the same shallow objection: "He is white and what else?" (T. 77). Defense counsel explained that this juror had been a victim of a mugging. (T. 78).

[4]Defense counsel's reason for his fifth peremptory challenge of a white juror was that the juror was a letter carrier for the government. (T. 78).

[5]Thus, where peremptory challenges are aimed at members of a racial *minority*, "[u]nder the procedure prescribed by *Neil*, the objecting party must ordinarily do more than simply show that several members of a cognizable racial group have been challenged in order to meet his initial burden." *Kibler v. State*, 546 So.2d 710, 712 (Fla. 1989). To make out a prima facie case, a party objecting to the removal of racial minority members "'must point to more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal.'" *United States v. Allison*, 908 F.2d 1531, 1538 (11th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1681 (1991), quoting *United States v. Young-Bey*, 893 F.2d 178, 180 (8th Cir. 1990). The "presumption that peremptory challenges are being properly exercised is not overcome merely because a party 'has used a particular number of his peremptory challenges to exclude *black* potential jurors.'" *Koenig v. State*, 497 So.2d 875, 880 (Fla. 3d DCA 1986)(quoting from *State v. Neil*, 457 So.2d 481, 486 (Fla. 1984)). When "the defendant relies solely on the fact that the jurors excused were *black* and makes no contention that the jurors' answers on voir dire suggest no prima facie reason, other than their race, as to why the state would not want them to serve on the jury", such a "meager showing is insufficient to trigger a *Neil* inquiry." *Riggins v. State*, 557 So.2d 185 (Fla. 3d DCA 1990)(citing *State v. Slappy*, 522 So.2d 18, 21 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *Norwood v. State*, 559 So.2d 1255 (Fla. 3d DCA 1990); *Smith v. State*, 538 So.2d 926 (Fla. 1st DCA 1989).

[6]As noted *supra*, the record indicates that there were four blacks in the 19-member venire. There was no suggestion by the prosecutor or judge that whites comprised a disproportionately small number of the venire, and only the ordinary can be assumed: whites

D946 (Fla. 1st DCA April 8, 1992)(six peremptory challenges against white jurors insufficient). Indeed, the only evidence of racial discriminatory intent can be found in the prosecutor's unsupported objection to the defense's second challenge of a white juror. This objection was so fundamentally inconsistent with the county's racial demographics that the objection itself - coupled with the prosecutor's emphasis that, if overruled, a fourth black juror would be seated - was prima facie proof of the the state's racially discriminatory intent. Thus, the prosecution converted the protective shield of *Neil* into a sword to avert a fourth black from serving on the jury.

b. The grounds for peremptorily challenging jurors Lawman and Weber were race-neutral, reasonable and record supported.

The trial judge denied respondent the right to challenge peremptorily two prospective jurors. One juror, Mr. Lawman, had been the victim of a mugging (T. 24); and, as to the second juror, Ms. Weber, her family's home was burglarized and her mother had also been the victim of a purse snatching. (T. 29). Yet, the judge forced both jurors to be seated on the petit jury; Mr. Lawman became the jury's foreperson. (T. 310; R. 5).

The record unmistakably establishes that defense counsel's reason for challenging jurors Lawman and Weber was because they were victims or were closely related to victims. (T. 76, 77-78). The fact that a juror or his close family member has been the victim of a crime constitutes a reasonable, race-neutral basis for a defendant's use of a peremptory challenge, since a juror who has been victimized might be far more sympathetic to the state than to a criminal defendant. *Adams v. State*, 559 So.2d 1293, 1296 (Fla. 3d DCA), *dismissed*, 564 So.2d 488 (Fla. 1990)(prospective juror "had her house broken into a few years before"; this

---

comprised the majority. Thus, decisions finding prima facie cases based upon peremptory challenges which effect a substantial elimination of racial-*minority* representation in the venire are inapposite. *See, e.g., Reynolds v. State*, 576 So.2d 1300 (Fla. 1991); *Parrish v. State*, 540 So.2d 870 (Fla. 3d DCA), *review denied*, 549 So.2d 1014 (Fla. 1989); *Foster v. State*, 557 So.2d 634 (Fla. 3d DCA 1990)(state challenged three of five prospective black jurors); *Sampson v. State*, 542 So.2d 434, 435 (Fla. 4th DCA 1989)(state used its first two peremptory challenges against two of the "very few minorities on the panel").

event "could affect a prospective juror's ability to make an impartial decision."); *Pickett v. State*, 537 So.2d 115, 116 n.2 (Fla. 1st DCA 1988)(that one of stricken jurors had been a crime victim was attribute "which ordinarily would seem *favorable* to the state.") (emphasis by court).[7]

In its brief, the state attempts to obscure the basis for defense counsel's peremptory challenges to jurors Lawman and Weber.[8]

---

[7] *Cf. Stephens v. State*, 559 So.2d 687 (Fla. 1st DCA 1990), *approved*, 572 So.2d 1387 (Fla. 1991)(black juror's 1973 robbery arrest valid ground for state's peremptory challenge, and another black juror's "undetermined" criminal record also valid ground for a state peremptory challenge); *Knight v. State*, 559 So.2d 327 (Fla. 1st DCA), *review denied*, 574 So.2d 141 (Fla. 1990)(black juror's felony conviction record valid ground for state's peremptory challenge); *Gonzalez v. State*, 569 So.2d 782 (Fla. 4th DCA 1990), *vacated in part*, 585 So.2d 932 (Fla. 1991)(involvement of a juror's close family member with the law is a valid reason for state's peremptory challenge).

[8]The state also attacks the reason given for the defense's fifth peremptory challenge of juror Valatti. However, it overlooks that because the state never met its burden of overcoming the presumption of nondiscriminatory intent, the defense was not required to tender a reason. As the Second District observed in *Green v. State*, 572 So.2d 543, 548 (Fla. 2d DCA 1990), *review denied*, 581 So.2d 164 (Fla. 1991):

> When one side does not carry its initial burden in support of its objection to a challenge . . . it is irrelevant whether or not the other side is shown to have had racially neutral motivations for its challenge, just as a showing of the challenging party's motivations are irrelevant to other peremptory challenges. If the motivations of a party exercising any peremptory challenge were determinative of the validity of the challenge, such challenges would of course not be peremptory.

Additionally, since the proffered reason - Valatti's governmental employee status as a letter carrier (T. 25, 28) - was racially neutral, the state's failure to meet its initial burden pretermits evaluation of the reason. *See Green, supra* (where proffered reason, although insufficient under *Slappy*, does not affirmatively show racial motivation, it cannot be relied upon to compensate for failure to satisfy initial burden.)

Likewise, the state's attack upon the defense's reason for its second peremptory challenge of juror Becker is immaterial. First, the judge granted this defense challenge, making no finding of discriminatory intent. Second, the state's argument that the same reason for challenging Becker applied to a black juror, Ms. Brown, is ill-founded. The defense reason for challenging Becker was that her husband worked for the federal government at Homestead Air Force Base, and defense counsel did not want persons employed with the government since the prosecution was an arm of the government. The occupation of black juror Brown's husband - a driver of a municipal truck - is hardly equivalent to a federal air force governmental employee. (T. 28). Additionally, the state neglects that Ms. Brown expressed a

Regarding Mr. Lawman, the state goes off on a tangent by exclusively discussing defense counsel's statement that this juror felt that not enough had been done in the war against drugs. Brief of Petitioner, at 29-30. Avoided by the state was defense counsel's first and central reason for peremptorily challenging Mr. Lawman:

> Mr. DeLeon (defense counsel): He has been the victim of a mugging in a different country.[9] I didn't want a victim of a crime, someone that's been personally victimized, either here or somewhere else. The fact that I believe he is one of those folks who it's on the record, I don't know if I mentioned it, he thinks not enough has been done in the drug war.

(T. 77-78).

Regarding Ms. Weber, defense counsel related that Ms. Weber's family had been the victim of crime, that respondent was being prosecuted in this case for a drug offense, and that drugs were a major cause of crime in the community. (T. 76). This juror had testified on voir dire: "My family has been broken into before and my mom has had her purse snatched." (T. 29).

As to Ms. Weber, the state, in its brief, splices the record as if a film editor and creates the illusion that defense counsel gave three entirely discrete reasons for this juror's challenge where in fact he gave but one (Brief of Petitioner at 28-29):

> MR. DeLEON (defense counsel): This woman works for a bank at Chase Federal. She has been the victim of a crime.
>
> MS. CAMPBELL (prosecutor): She hasn't been the victim. It was her mother's house.[10]

---

general sympathetic disposition stemming from her employment at Miami Children's Hospital, a factor alone sufficient to distinguish the two jurors.(T. 27-28, 42).

[9]Mr. Lawman testified on voir dire that he had been the victim of a mugging in Spain. (T. 24-25).

[10]The correctness of the prosecutor's assertion that this juror "hasn't been the victim. It was her mother's house", is not borne out by the record. The juror specifically testified: "My family has been broken into before and my mom has had her purse snatched." (S.R. 29).

> MR. DeLEON: Somebody in her family has been the victim of a crime. Thinking on this case which involves drugs. Drugs happen to be a major cause of crime in the community.

(T. 76).

The state then attempts to discredit defense counsel's reason for challenging peremptorily Ms. Weber by referring to the fact that defense counsel did not strike a black juror, Ms. Hollifield. Brief of Petitioner at 29. The state's attempted impeachment is groundless. Ms. Weber had testified that her closest relatives were crime victims. (T. 29). Ms. Hollifield never testified that either she or any of her family members had been crime victims. For its "disparate treatment" argument, the state cites only to the following testimony of Ms. Hollifield:

> MS. CAMPBELL (prosecutor): Over here in this row; anybody here know a friend, family member or close associate who has been accused of a crime or actually convicted of a crime?
>
> Anybody in the back row, Ms. Hollifield?
>
> MS. HOLLIFIELD: Well, a friend of mine's sister was murdered by her brother. They recently called him a couple of days ago.

(T. 52). The state's reliance upon this testimony is inexplicable. Unlike Ms. Weber whose family was victimized, there is not the slightest indication that Ms. Hollifield was personally acquainted with her friend's sister. Indeed, the question posed was whether she knew someone who was *accused or convicted of a crime*, not the victim of one; Hollifield's answer, at best, indicates an awareness that her friend's brother was culpable of the homicide of his sibling.

In short, none of the black prospective jurors was either a victim or closely related to a victim. Defense counsel's peremptory challenges to juror Lawman and Weber were not only race neutral, record supported, and unimpeached, but were fully corroborated by the fact that defense counsel had initially requested to challenge for cause another juror, Mr. Breslin, whose parents had been murdered, and when that challenge was denied, he then peremptorily challenged him. (T. 25-6, 72-3, 74). Finally, perhaps the best evidence of the defense's lack

of discriminatory intent is the fact that defense counsel repeatedly implored the trial judge to strike the petit jury rather than to allow the two jurors, Weber and Lawman, who were past crime victims to remain seated on it. (T. 124-25, 162, 255). Thus, the defense was willing to forego having three blacks on the petit jury, in order to eliminate those two jurors whom he had unsuccessfully sought to peremptorily challenge.

> c. Trial judge employed an erroneous legal standard in ruling upon respondent's peremptory challenges.

The trial judge's failure to recognize the validity of defense counsel's reason for challenging peremptorily Weber and Lawman is perhaps explained by the fact that he employed erroneous legal standards in evaluating the challenges.

First, when defense counsel explained that his third peremptory challenge was due to the fact that the juror's family had been crime victims, the trial judge responded: "That's not a *neutral* reason to me." (T. 76-77). This ruling was erroneous; as noted *supra*, a prospective juror's status as a crime victim unquestionably constitutes a neutral ground. What may explain the judge's erroneous conclusion is the statement he made immediately after the prosecutor's announcement that four blacks would be on the jury if defense counsel's third peremptory challenge were allowed:

> [Judge:] The jury is supposed to be a cross-section of the community. I believe what you're trying to do is -- *I don't see any good cause.* I am seeing a pattern.

(T.77). The judge's statement, "*I don't see any good cause*", indicates that the judge was erroneously evaluating the crime-victim explanation under the inapplicable, challenge-for-cause standard. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

Most notably, right after the prosecutor pointed out that there would be four blacks on the jury if defense counsel's third peremptory challenge were allowed, the judge denied the challenge and ordered the white juror seated, stating: "*The jury is supposed to be a cross-section of the community.*" (T. 77).

This statement reveals the judge's misunderstanding that the petit jury itself had to mirror the community's racial composition; of course, only the source - the pool from which the petit jury is randomly selected - is required to reflect a fair cross section. In *Koenig v. State*, 497 So.2d 875, 880 (Fla. 3d DCA 1986), the judge, "out of no-doubt worthy motives", struck the chosen but unsworn jury because no blacks were on the panel. The Third District Court of Appeal found a serious encroachment upon Koenig's peremptory-challenge rights, emphasizing that a trial judge is not allowed to interfere with the exercise of peremptory challenges simply because he believes that a jury lacks "a good cross section." *Koenig*, 497 So.2d at 880. Here, the trial judge likewise impaired respondent's peremptory-challenge rights - not because whites were being improperly excluded from the jury - but because, without his interference, the jury would have been predominantly black (four blacks/two whites), and, thus, in the judge's view, racially imbalanced.

In sum, the trial judge disallowed respondent from exercising two peremptory challenges which were irrefutably valid. As a result, over respondent's objections, the judge forced two prospective jurors who had been crime victims to sit on her jury. The seating of these two jurors compels reversal for a new trial since the encroachment upon an accused's right to peremptorily challenge a single juror is *per se* reversible error. *Gilliam v. State*, 514 So.2d 1098, 1099 (Fla. 1987).

CONCLUSION

Based upon the foregoing, respondent requests this Court to approve the decision of the court below to the extent that it orders a new trial in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3010

BY: Beth C. Weitzner
BETH C. WEITZNER
Assistant Public Defender
Florida Bar No. 203221

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Charles M. Fahlbusch, Assistant Attorney General, Department of Legal Affairs, 4000 Hollywood Boulevard, Suite #505-S, Hollywood, Florida 33021 this 4th day of May, 1992.

Beth C. Weitzner
BETH C. WEITZNER
Assistant Public Defender