IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,730

THE STATE OF FLORIDA,

Petitioner,

-vs-

SANDY SAFFORD,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The defendant accepts the Statement of the Case of the State.

STATEMENT OF THE FACTS

[The state has not filed a Statement of the Facts in its Brief on the Merits.]

The state charged the defendant, a nineteen year old black man, with the robbery of three teenage white girls and the involuntary sexual battery of two of the same three white girls. (R. 4).[1]

During the voir dire process the clerk called forth the prospective jurors of the venire in two groups: a first group of eighteen persons (T. 38, 39). After the preliminary questioning by the court and the attorney-conducted examination by both the state and the defense, the peremptory challege process began.[2]

After proceeding through the list of the first fourteen prospective jurors in the first group, the defense made a motion for mistrial. (T. 131). Of the first fourteen persons there were four black persons; the state struck each one of them.[3] (T. 128, 129, 130, 131). The basis of the motion for mistrial was the systematic exclusion of black persons from the panel when there was nothing in their responses to indicate an inability to be fair and impartial jurors. The court, without any inquiry,

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1 The defense to the state's charges was that the girls were looking to buy drugs and, en route, encountered the defendant and his companions and consented to having sex with them.

2 There were no challenges for cause suggested by either the state or the defense.

3 Juror numbers 209, 228, 242, and 247. (T. 131).

denied the motion. (T. 131).

The state struck the next black person [juror number 250]. (T. 132). The defense renewed its same motion which was again denied by the Court. (T. 132).[4]

After the second group of prospective jurros was called up and examined, the peremptory challenge process continued. (T. 213). The next black person of the venire [juror number 261] was stricken by the state. (T. 213). The defense then made the same motion, asked for an evidentiary hearing as to the systematic exclusion of black [and "colored"] prospective jurors by the state attorney's office, and, further, asked the court to strike the panel. (T. 214). The court denied the motions. (T. 215). Both sides accepted the next two prospective jurors and thereby six persons were selected and able to be impaneled. (T. 215).[5]

Of the six potential black jurors prior to the requisite number for the panel, the state struck <u>all</u> six black persons. The state utilized six of its seven peremptory challenges against black persons. The state did not exercise one of its peremptory challenges against a non-Latin white person. Therefore, in

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4 At the conclusion of the first group, the state struck juror number 257, a man of Puerto Rican extraction. (T. 133). The defense renewed its motion stating that the state was excluding jurors (of color) including all black jurors. The motion was denied. (T. 133).

5 The state did accept a black person as the alternate juror (T. 216) but that person was not needed for the deliberation process and was discharged by the court after the jurors retired to consider their verdict. (T. 804).

ridding the panel of 100% of the prospective black jurors, the state used 100% of its peremptory challenges against blacks and one person of Puerto Rican extraction.

No black person sat in deliberation on the guilt or innocence of the defendant and thereby none participated in the verdict of his guilt.

QUESTION PRESENTED

WHETHER THE DECISION IN NEIL V. STATE, 457 So.2d 481 (Fla. 1984), SHOULD BE APPLIED TO OTHER DECISIONS PENDING ON DIRECT APPEAL AT THE TIME NEIL WAS DECIDED, IN CONFORMITY WITH THIS COURT'S LONG-STANDING PRACTICE IN CRIMINAL AND CIVIL CASES THAT THE DECISIONAL LAW AND RULES IN EFFECT AT THE TIME OF APPEAL GOVERN?

SUMMARY OF ARGUMENT

In accordance with the common law in the United States, this Court traditionally has applied the decisional law in effect at the time of appeal as governing a case on direct appeal even if there has been a change in the law since the time of the trial.

The state seeks to contravene this long-standing principle for policy reasons arguably pertinent to post-conviction [collateral] appeals, as so expressed in Neil v. State, 457 So.2d 481 (Fla. 1984) by citation to Witt v. State, 381 So.2d 922 (Fla. 1980).

This Court has considered as informative the "retroactivity law" of the United States Supreme Court. Because that Court very recently reevaulated (in the decision of Shea v. Louisiana, ____ U.S.____, 105 S.Ct. 1065, _____ L.Ed.2d _____ (1985)) its pronouncements in the retroactivity area, that opinion -- totally omitted by the state -- is significant. Especially is this so because the state relies upon a prior decision [Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970)] now outmoded as to its retroactivity analysis.

After twenty years of an "ambulatory retroactivity doctrine" (as so termed by Mr. Justice Harlan), the United States Supreme Court has embraced the reasonings set forth in numerous dissents by Justice Harlan, at least as apply to matters on direct appeal as is the case at bar.

Those reasonings calling for application of a new rule of law (as announced in Neil) to cases pending on direct review are necessary for: (1) principled decision making; (2) the courts to

avoid being in the position of a super-legislature; and (3) the courts to avoid selecting one of several pending cases to use to announce a new rule and then allowing all others, similarly-situated, to be passed by unaffected and unprotected by the new rule.

The defendant below was denied the right to an impartial jury as constitutionally required. Despite timely objections throughout the voir dire process, motions for inquiry as to race being the sole basis for exclusion from the jury when there was nothing in their responses to indicate an inability to be fair and impartial jurors, and a motion to strike the panel, the trial judge refused even to make inquiries as to the substantial likelihood that peremptory challenges were being exercised solely on the basis of race. In ridding the panel of 100% of the prospective black jurors, the state struck all black men and women.

The Third District Court of Appeals was correct in applying Neil to the facts at bar. In so doing, the District Court followed common law tradition, this Court's decision in Andrews v. State, 459 So.2d 1018 (Fla. 1984), and the following persuasive reasoning of Mr. Justice Harlan -- now the cornerstone of federal application of new law in matters still on direct appeal:

> Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a steam of similar cases subsequently to flow by unaffected by the new rule constitutes an indefensible departure from th[e] model of judicial review.

ARGUMENT

THE DECISION IN NEIL V. STATE, 457 So.2d 481 (Fla. 1984), SHOULD BE APPLIED TO OTHER DECISIONS PENDING ON DIRECT APPEAL AT THE TIME NEIL WAS DECIDED, IN CONFORMITY WITH THIS COURT'S LONG-STANDING PRACTICE IN CRIMINAL AND CIVIL CASES THAT THE DECISIONAL LAW AND RULES IN EFFECT AT THE TIME OF APPEAL GOVERN.

This court held in Neil v. State, 457 So.2d 481 (Fla. 1984) that members of a distinct racial group may not be systematically excluded from a petit jury by the use of peremptory challenges solely on the basis of their race. As to cases which followed Neil, this Court stated:

> Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral proceedings as set out in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980).[6]

Three District Courts of Appeal have construed Neil to apply to subsequent cases on direct appeal. Safford v. State, 463 So.2d

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6 Witt v. State, supra, involved applications of law change to post-conviction challenges to proceedings already final, that is, not on direct appeal. See: Linkletter v. Walker, 381 U.S. 618, 622 n. 5, 85 S.Ct. 1731, 1734, __ L.Ed.2d __ (1965) ("By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision [in Mapp v. Ohio]."); Florida Patient's Compensation Fund v. Von Stetina, 10 F.L.W. 286, 288 (Fla. May 24, 1985) ("The judgment awarded . . . is not final until the case has been disposed of on appeal.").

378 (Fla. 3d DCA 1985); Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985); and Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985).[7]

This construction mirrors well-established law. The decisional law existent at the time of direct appeal governs "even if there has been a change since time of trial." Florida Patient's Compensation Fund v. Von Stetina, 10 F.L.W. 286, 288 (Fla. May 24, 1985), rehearing denied, 10 F.L.W. 480 (Fla. September 6, 1985); Dougan v. State, 470 So.2d 697, 701 n. 2 (Fla. 1985); Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983).

The principle is central to the common law.[8] Early on in this nation's legal history, Chief Justice Marshall pronounced in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 102 (1801):

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But, if subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation . . . In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

While "[T]he federal constitution has no voice upon the

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7 Contra, Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985).

8 Note, "Prospective Overruling and Retroactive Application in the Federal Courts", 71 Yale L. J. 907 (1962) [hereafter cited as Note, "Prospective Overruling"].

subject" of retroactivity, Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932), this Court has announced that it will look to the criteria established by the United States Supreme Court for guidance in determining when principles should be applied retroactively. Bundy v. State, 10 F.L.W. 269, 272 (Fla. May 17, 1985); Cf., Witt v. State, 387 So.2d 922, 925 (Fla. 1980).[9]

The state's contention that Neil not be applied retroactively completely ignores the most recent pronouncement of the United States Supreme Court: Shea v. Louisiana, ___ U.S. ___, 105 S.Ct. 1065, ___ L.Ed.2d ___ (1985) [hereafter Shea].

For twenty years, confusion was rampant following the 1965 decision of Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), [retroactivity of exclusionary rule of evidence] (which one former member of that Court characterized as "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim"[10]). However, the United States Supreme Court this term (after foreshadowing a change in its retroactivity doctrine in United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)) has finally resolved

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9 In Bundy, this Court applied the analysis in the Arizona Supreme Court in State ex rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982). That Arizona opinion was rendered prior to two United States Supreme Court opinions which have revisited and finally brought order into the chaos of twenty years of that Court's retroactivity law.

10 Mackey v. United States, 401 U.S. 675, 676, 91 S.Ct. 1171, 1172, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part).

the inconsistencies in its retroactivity law -- at least as applies to the issue in the case at bar.

In Shea, the United States Supreme Court held that on direct review it will give retroactive effect to new constitutional pronouncements, "subject, of course, to established principles of waiver, harmless error, and the like." Id. at 1070, 1074.[11] In so ruling, the Court applied the reasoning of Mr. Justice Harlan which had been set forth persuasively in two of his prior dissenting opinions concerning retroactivity. [12]

The thematic reasoning of Shea, supra at 1069, is as follows:

> . . . application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule.

In Andrews v. State, 459 So.2d 1018 (Fla. 1985), this Court already has applied the Shea reasoning to the application of

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11 It is noteworthy that while the decision is by a vote of five to four, one of the dissenting justices, Mr. Justice Rehnquist, approves of this part of the majority's ruling but dissents because of the illogic of not applying the approach so as to inequivocally exclude collateral attacks. Shea v. Louisiana, supra at 1074 (Rehnquist, J., dissenting). Hence, as pertaining to the issue presently before this Court, the decision in Shea is, essentially, by a vote of six to three.

12 Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1968); Mackey v. United States, 401 U.S. 675, 91 S.Ct. 1171, 28 L.Ed.2d 404 (1971).

Neil. Three District Courts have followed Andrews.[13]

In the case now before this Court, the defendant [as in Shea] is on direct appeal, seeking the application to him of the Neil decision to the facts as occurred at his voir dire below. The state suggests that non-retroactivity to those on direct appeal is "a more workable rule." (State's Brief, p. 14). Not only does the state offer nothing to substantiate this assertion, but also, even if it did, such a suggestion already has been rejected in Shea:

> Next, it is said that the application of Edwards to cases pending on direct review will result in the nullification of many convictions and will relegate prosecutors to the difficult position of having to retry cases concerning events that took place years ago. We think this concern is overstated. We are given no empirical evidence in its support. . . . We note, furthermore, that several courts have applied Edwards to cases pending on direct review without expressing concern about lapse of time or retroactivity and without creating any apparent administrative difficulty. [] And if a case is unduly slow in winding its way through a State's judicial system, that could be as much the State's fault as the defendant's, and should not serve to penalize the defendant.

Shea, supra, at 1070, 1071.

The additional (and, indeed, crucial) significance of Shea

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13 City of Miami v. Cornett, 463 So.2d 399, 400 n. 1 (Fla. 3d DCA L985) (applying Neil to a civil action) (". . . the Florida Supreme Court's later action in the substantially identical case of Andrews v. State, 459 So.2d 1018 (Fla. 1984), quashing 438 So.2d 480 (Fla. 3d DCA 1983), establishes that Neil applies to cases, as the present one, in which the issue was raised at trial and which were pending when Neil was decided. See Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985).").

is that after twenty years of chaotic, arbitrary line-drawing [from the Linkletter decision in 1965] it returns the federal courts to the common law of retroactivity; that is, the decisional law in effect at the time of appeal governs an issue raised on direct appeal when there has been a change of law since the time of trial. This pronouncement of Shea destroys any purported effectiveness of the linchpin of the state's suggested rationale to contravene the common law. (State's Brief, pp. 11-13).

The state relies upon Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975) (holding nonretroactive its prior pronouncement that excluding women from jury venires [not a petit jury] deprived a criminal defendant of his Sixth Amendment right to trial by an impartial jury). The case [relying on the factors identified in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967)] was discussed in United States v. Johnson, supra, 457 U.S. at 551, 102 S.Ct. at 2588. Johnson's "threshhold test" received numerous criticism.[14]

In Shea the Supreme Court has met, with minor exception, the scholarly criticisms and, unequivocally, has embraced Justice Harlan's reasoning -- "principled decision-making and fairness to similarly situated petitioners requires application of a new rule to all cases pending on direct review, including cases outside of

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14 Note, "United States v. Johnson: Reformulating Retroactivity Doctrine" 69 Cornell L. J. 166, 204 [hereafter cited as: Note,"Reformulating Retroactivity"; See also: Note, "Retroacitivity and the Exclusionary Rule: A Unifying Approach" 97 Harvard L. Rev. 961 (1984).

the Fourth Amendment area." Shea, supra at 105.

Justice Harlan viewed the failure to apply a newly declared constitutional rule, at least to cases pending on direct review at the time of the decision, as violative of three norms of constitutional adjudication.

First, the Court's "ambulatory retroactivity doctrine" conflicted with the norm of principled decision making. Mackey v. United States, 401 U.S. 675, 681, 91 S.Ct. 1171, 1174, 28 L.Ed.2d 404 (1971) (separate opinion of Harlan, J.). See also, Michigan v. Payne, 412 U.S. 47, 61, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (Marshall, J. dissenting) ("principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity").

Second, Justice Harlan found it difficult to accept the notion that the court, as a judicial body, could apply a "new" constitutional rule entirely, prospectively, while making an exception only for the particular litigatant whose case was chosen as the vehicle for establishing that rule." He stated the following in Mackey v. United States supra, 401 U.S. at 679, 91 S.Ct. at 1171:

> Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

Third, Justice Harlan declared that selective application of new constitutional rules departed from the principle of treating

similarly-situated defendants in a similar fashion:

> When another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law. Desist v. United States, 394 U.S. at 258-259, 89 S.Ct. at 1038-1039 (dissenting opinion).

These three views now are the cornerstone of the Shea opinion.

Justice Harlan's concerns, traditionally, have predominated in Florida on direct review matters. For example, this Court has acknowledged his second assertion as to doing justice to each litigant on the merits of his case in the so-called "pipeline" concept. Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973) (applying comparative negligence to cases on appeal in which the applicability of its rule was properly and appropriately made a question of appellate review); E.g., Bundy v. State, supra at 272 ("We further hold that any conviction presently in the appeals process in which there was hypnotically refreshed testimony will be examined on a case by case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction.").

Aside from post-conviction matters,[15] this Court has ruled likewise in criminal matters: Lowe v. Price, supra at 144 (Deciding the applicability of new speedy trial rule, "Decisional

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15 See, Witt v. State, supra; E.g., Williams v. State, 421 So.2d 512, 515 (Fla. 1982).

law and rules in effect at the time that an appeal is decided govern the case even if there has been a change since the time of trial."); Spurlock v. State, 420 So.2d 875, 877 (Fla. 1982) ("We stated in Tascano that parties like respondent that had preserved on appeal the [jury] penalty instruction issue are to have the benefit of our interpretation of Rule 3.390 (d)."); Hoberman v. State, 400 So.2d 758 (Fla. 1981) (Applying State v. Sarmiento, 397 So.2d 643 (Fla. 1981) to the application of warrantless electronic eavesdropping in the home, "In light of our recent decision [in Sarmineto], the tape recording of conversations held in the home should have been suppressed, and we therefore reverse.");[16] Tascano v. State, 393 So.2d 540, 541 (Fla. 1980) (Concerning the application of instructing the jury as to maximum and minimum penalties, "The defendant, as well as all others who have presented this point on appeal, received the benefit of this interpretation of the rules."); Gonzalez v. State, 367 So.2d 1008, 1011 (Fla. 1979) (As to the retroactivity of Dorfman v. State concerning the propriety of general sentences, decision to be applied ". . . only in cases not yet final on appeal at the time of the Dorfman decision and only where a challenge to the general sentence has been made and properly preserved as the question for appellate review.").

In a consistent manner, this state has applied to civil

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16 The state (State's Brief, p. 14) exhorts a "clear reading" of Hoberman shows it "was a companion case to Sarmiento"; a clear reading shows the contrary. See also, City of Miami v. Cornett, supra n. 1.

matters the principle of utilizing the law in effect at the time of direct appeal notwithstanding a change in the law since trial. Florida Patient's Compensation Fund v. Von Stetina, supra at 288 ("An appellate court is generally required to apply the law in effect at the time of its decision."); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467, 468 (Fla. 1978) ("Vining [causation of injury by leaving key in car ignition and intervening criminal act of driver stealing car] had not been decided when this case was before the trial court. But it controls now since disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment of appealed was rendered."); Linder v. Combustion Engineering, Inc., 342 So.2d 474, 476 (Fla. 1977) ("As to those cases on appeal in which the applicability of the strict liability rule has been properly and appropriately made a question of appellate review, the strict liability rule should be applicable."); Hoffman v. Jones, supra at 440 ("As to the cases on appeal in which the applicability of the comparative negligence rule has been proper and appropriately made a question of appellate review, this opinion shall be applicable."); Florida East Coast Railway Co. v. Rouse, 194 So.2d 260, 262 (Fla. 1967) (applying new law that comparative negligence statute unconstitutional: "We recognize the general and Florida rule to be that an appellate court, in reviewing a judgment of direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to

the law prevailing at the time of rendition of the judgment appealed."); Eastern Airlines, Inc. v. Gellert, 438 So.2d 923, 929 (Fla. 3d DCA 1983) (Applying this Court's decision of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981) as to the requirement that an employer must be shown by independent proof to have been at fault in order to award punitive damages against the employer for the employee's misconduct, ". . . but where a change in the state of the law occurs between trial and appeal, we are bound to apply the law as it exists at the time of appeal.").

The state suggests that, instead of applying the traditional rule, this Court should adopt the California prospectivity approach [which excepts death cases].[17] The arbitrariness of

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17 The state's suggestion that Andrews v. State, supra,[not a death case] is a "companion" case to Neil v. State, supra, as People v. Johnson, 583 P.2d 774 (Calif. 1978) was to People v. Wheeler, 583 P.2d 748 (Calif. 1978) can not be taken seriously. Aside from the fact that the California Supreme Court called them "companion" cases, each decision was issued on precisely the same date; that is, Spetember 25, 1978. See also: City of Miami V. Cornett, supra at 400 n. 1.

The state acknowledges [State's Brief, p. 10] that not applying Neil to a so-called companion case would be unfair; i.e., not equal. Putting aside the status of the case, the illogic of that propo-sition is recognized in Shea, supra at 1071:

> In addition, it is said that in every case, Edwards alone excepted, reliance on existing law justifies the nonapplication of Edwards. But, as we have pointed out, there is no difference between the petitioner in Edwards and the petitioner in the present case. If the Edwards principle is not to be applied retroactively, the only way to dispense equal justice to Edwards and to Shea would be a rule that confined the Edwards principle to prospective application unavailable even to Edwards himself.

such application, and then non-application to defendants whose initial appearance before trial and appellate courts is not yet final, quite simply, is innappropriate. As Mr. Justice Harlan stated in Mackey v. United States, supra, 401 U.S. at 679, 91 S.Ct. at 1173:

> In truth, the Court's assertion of power to disrgard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

Notwithstanding California's aberrant retroactivity statement, it is totally at odds with the sound and long-standing principle in Florida that the law in effect at the time of appeal governs.

The state makes passing reference to "extensive [official reliance" [State's Brief, pp. 8, 9, 11] and to non-retroactivity in direct appeal matters as "a more workable rule [State's Brief, p. 4], not overburden[ing] the administration of the criminal justice system." [State's Brief, p. 10]. These arguments may be relevant to a consideration of whether to apply Neil to collateral attacks in criminal matters already finalized. See: Witt v. State, supra at 926.

For that consideration, all of these policy concerns -- finality, judicial resources, workability, past reliance -- come into focus. See generally: Mackey v. United State, 401 U.S. at 689, 91 S.Ct. at 1178, 28 L.Ed.2d 404 (1971) (Harlan, J.

into focus. See generally: Mackey v. United State, 401 U.S. at 689, 91 S.Ct. at 1178, 28 L.Ed.2d 404 (1971) (Harlan, J. concurring) (". . . with few exceptions, the relevant competing policies properly balance out to the conclusion that, given the current broad scope of constitutional issues cognizable on habeas, it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation."). But these policy concerns have no place in the consistency and equal mindedness required for those appellate matters still not final and on direct appeal.

Furthermore, even applying, arguendo, these policy concerns to the matter at bar, retroactivity is required. This application would be mandated because the fairness of the trial itself [as compared with, for example, effective police deterrence] goes to "substantive due process" and the very bedrock of a trial; that is, an impartial jury. Mackey v. United States, id.; See also, Williams v. State, supra at 515 ("The rule [applying warrantless electronic surveillance interception to post-conviction matters] has no bearing on guilt and did not involve an attack on the fairness of the trial because the rule is based on the necessity for an effective deterrent to illegal police action."); City of Miami v. Cornett, supra at 402 ("anything less than an impartial jury is the functional equivalent of

no jury at all.").[18] Commonwealth v. Soares, supra, 387 N.E.2d at 518.

The matter at bar does not suffer from the infirmities as discussed by the First District in Finklea v. State, supra. In Finklea, upon motion, that trial judge, in accordance with Neil, had a bench conference and discussed the various challenges finding that there was not a substantial likelihood of racially based peremptory challenges. This Court's concern in Neil, supra, at 488 -- "trying to second-guess records" -- is of no concern here. Indubitably, excluding 100% of the perspective black veniremen and women over the constant objection that there was nothing in their responses to indicate inability to be impartial (T 131) should have caused the trial court to inquire as to the state's motives. The motion was made for such an inquiry and the judge denied the motion. (T. 131). In this case, the trial judge did not even consider [let alone, decide] the

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Nor can the state claim that Neil was totally radical and unforshadowed. While Neil overruled no Florida opinions [other than to quash the appeal from the Third District], several states had used their state constitutions (as this Court did in Neil) to declare that a person's race is not a valid reason to exclude prospective veniremen and women from service on petit juries.

Surely the area was uncertain at the time of the Neil decision as evidenced in the state's citation within its own brief to a 1983 law review article: "Comment, Survey of the Law of Peremptory Challanges: Uncertainty in the Criminal Law,' 44 U. Pitt. L. Rev. 673, 703 (1983) ("The result of these recent decisions and suggestions, however, has been to create uncertainty in this area of criminal procedure. . . . Until such action [judicial or legislative] is taken, the uncertainty is likely to continue for a long time to come."); See also: Andrews v. State, 438 So.2d 480, 482 (Fla. 3d DCA 1983) (Ferguson, J., specially concurring).

substantial likelihood that peremptory challenges were being exercised by the state solely on the basis of race.

Article I, Section 16 of the Florida Constitution always has required an accused in a criminal case the right to a trial by an impartial jury. Neil gives power to this fundamental right. As Judge Daniel S. Pearson stated for the Third District in applying the applicable Constitutional civil analogue in City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCA 1985):

> . . . anything less than an impartial jury is the functional equivalent of no jury at all
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> * * *
>
> [T]he requirement of impartiality inheres in any provision granting a right to a jury trial.

The District Court opinion at bar should be affirmed. The record is unarguably sufficient to have caused the trial judge, at the least, to have made an inquiry as the Third District determined from the facts of this transcript.

Because the issue properly was preserved below, this Court should apply Neil to the case at bar pending on direct appeal. In so ruling, this Court will be consistent with prior Florida pronouncements and the most recent opinion of the United States Supreme Court. The Shea opinion concluded, after two decades of confusion in the Court's retroactivity law, that the decisional law in effect at the time of the appeal governs a matter on direct appeal.

CONCLUSION

Based on the cases and authorities cited herein, the respondent requests this honorable Court to affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was delivered by mail to the Office of the Attorney General, SUite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 7th day of October, 1985.

HENRY H. HARNAGE
Assistant Public Defender