IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,720

THE STATE OF FLORIDA,

Petitioner,

vs.

SANDY SAFFORD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON JURISDICTION

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I

STATEMENT OF THE CASE

The Defendant, a black male, was charged by information with three counts of robbery and two counts of involuntary sexual battery based upon the sexual batteries and robberies of three young white girls on January 6, 1982[1]. See, R3a; R3d-R3g. The Defendant was caught during the acts charged and confessed. See, Id. After a jury trial in August of 1982, the Defendant was convicted as charged on four counts and was convicted of a lesser offense as to a fifth count. See, R3a.

The Defendant filed his Notice of Appeal on or about October 8, 1982. On July 14, 1983, after an order warning that dismissal would follow if a brief was not filed, the Third District Court of Appeal dismissed the Defendant's appeal for failure to file a brief. See, R2.

In August of 1984, the Defendant got his appeal reinstated under Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969) and submitted his brief. See, R3-R3g. In his brief the Defendant claimed error in only one aspect of the trial

[1]The reference "R" refers to the pagination in the Petitioner's appendix, consisting of pages R1-R15, which contains the portions of the proceedings below sufficient to demonstrate jurisdiction in this court.

below: that the prosecutor had improperly systematically excluded all blacks and one person of puerto rican descent from the jury and the trial judge had refused to make any inquiry. See, R3b-R3d. The State's answer brief was confined to arguing that. Neil v. State, 457 So.2d 481 (Fla. 1984) should not be applied retroactively. See, R3h-R3j.

On appeal to the Third District Court of Appeal, on January 22, 1985, the District Court reversed for a new trial, applying the rule in Neil retroactively to the present cause based upon this Court's application of Neil in Andrews v. State, 459 So.2d 1018 (Fla. 1984):

> "We reverse and remand for a new trial in accordance with the decision of the Florida Supreme Court in State v. Neil, 457 So.2d 481 (Fla. 1984) as applied by the court in Andrews v. State, No. 64,426 (Fla. Oct. 4, 1984)[9 FLW 432].
>
> Reversed and remanded for new trial."
>
> R4.

The State's analysis of the precise intent and meaning of the foregoing passage, was directly confirmed in City of Miami v. Cornett, Case No. 81-85 (Fla. 3d DCA January 29, 1983) wherein the court explained:

> "The question of Neil's applicability to trials which concluded before the decision in Neil was rendered has already been resolved. Despite the statement in Neil that "we do not hold that the instant decision is retroactive," 457 So.2d at 488, the Florida Supreme Court's later action in the substantially identical case of Andrews v. State, ___So.2d___(Fla. 1984)(Case No. 64,426, opinion filed October 4, 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, ___So.2d___(Fla. 3d DCA 1985)(Case No. 82-2194, opinion filed January 22, 1985). Cf. Hoberman v. State, 400 So.2d 758 (Fla. 1981)(applying holding in State v. Sarmiento, 397 So.2d 643 (Fla. 1981), to case pending on appeal)."
>
> Slip opinion, at p. 2, n 1.

The State filed a vigorous Motion to Certify, Motion for Rehearing and Suggestion for Rehearing En Banc, which was denied on February 26, 1985. See, R5-R14. On March 13, 1985 the State submitted its Notice of intent to seek the discretionary review of this court. See, R15.

II

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION AND SHOULD EXERCISE IT HEREIN?

III

ARGUMENT

THIS COURT HAS JURISDICTION AND SHOULD EXERCISE IT HEREIN.

Under Rule 9.030(a)(2)(A)(iv) Florida Rules of Appellate Procedure, this Court has jurisdiction, where an opinion of a district court directly conflicts with an opinion of this Court of of another district court. In the present cause, this reason is present to enable this Court to properly exercise jurisdiction.

In State v. Neil, 457 So.2d 481 (Fla. 1984) the court established a rule of law wherein any systematic exclusion of jurors based upon an allegation of racial grounds must be examined by the trial court. In Neil, the court however held that the application of Neil was not retroactive. The district court nevertheless applied Neil retroactively based upon Andrews v. State, 459 So.2d 1018 (Fla. 1984). See, also, City of Miami v. Cornet, Case No. 81-85 (Fla. 3d DCA, January 29, 1985) Slip opinion, at p. 2, n1 (citing Safford v. State, as holding the Neil rule to be retroactive). Whatever Andrews or any other opinion may have said or implied, Neil has not been expressly overruled in any opinion. The present opinion applying Neil retroactively therefore conflicts directly with Neil's no-retroactivity rule.

Even if the District Court believed Neil to be modified or overruled, it still had no authority to not follow Neil under this Court's rule in Hoffman v. Jones, 280 So.2d 431, at 440, 434 (Fla. 1973). If the District Court considered that the no retroactivity rule in Neil has been modified or overruled by Andrews, under Hoffman v. Jones, it must still follow Neil and should instead certify such a question to this court. The District Court's refusal to follow the binding precedent in Neil plainly creates jurisdiction in this Court under Hoffman v. Jones.

The present cause is also an important case worthy of this Court's review. First of all, as noted City of Miami v. Cornet, supra, specifically relies upon the present cause to apply Neil retroactively. See, also, Castillo v. State, Case No. 84-930 (Fla. 3d DCA March 12, 1985)(citing, Andrews and Cornet); Jones v. State, Case No. 82-2176 (Fla. 3d DCA February 26, 1985)(Citing Andrews and Cornet). The present misapplication of Neil is therefore a serious error involving substantial judicial time and effort and public funds required for retrial.

Secondly, the Defendant delayed presenting this matter for more than two years. The victims were transients. The prosecutors have indicated that retrial may be impossible. If retrial is not possible the Defendant will escape justice

based upon a judicial policy unrelated to the conclusive and overwhelming evidence against him in this cause.

Furthermore, even if there was some sort of "pipeline" here, the Defendant was excluded from it when this cause was dismissed on July 14, 1983. Any other interpretation in a criminal case under Baggett[2] renders this Court's Neil rule of no retroactivity useless and futile.

[2]Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969) permits the reinstatement of any direct criminal appeal.

IV

CONCLUSION

WHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order accepting jurisdiction herein and will reverse the ruling of the Third District Court of Appeal.

RESPECTFULLY SUBMITTED, on this 15th day of March, 1985, at Miami, Dade County, Florida.

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V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was served by mail upon HENRY B. HARNAGE, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 15th day of March, 1985.

CALVIN L. FOX, Esquire
Assistant Attorney General

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