IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,730

THE STATE OF FLORIDA,

Petitioner,

vs.

SANDY SAFFORD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE

Safford, 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. He was caught committing the acts; charged and confessed. After a jury trial in August, 1982, Safford was convicted as charged on four counts and convicted of a lesser offense as to a fifth count.

Safford filed his Notice of Appeal on or about October 8, 1982. On July 14, 1983, the Third District Court of Appeal dismissed Safford's appeal for failure to file a brief.

In August, 1984, his appeal was reinstated, Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969), and his brief filed. Safford claimed error in only one aspect of the trial below: that the prosecutor had improperly and systematically excluded all blacks and one person of Puerto Rican descent from the jury and the trial judge had refused to make any inquiry. The State argued that State v. Neil, 457 So.2d 481 (Fla. 1984) was not to be applied retroactively.

On January 22, 1985, the Third District Court reversed

for a new trial, applying the rule in Neil retroactively based upon this Court's application of Neil to 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.
>
> Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985).

The Third District reaffirmed its position in City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985) 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.)

463 So.2d at 400.

A Motion to Certify, Motion for Rehearing and Suggestion for Rehearing En Banc, was denied on February 26, 1985. On March 13, 1985, the notice of intent to seek the discretionary review of this court was filed. Conflict certiorari review was accepted August 23, 1985.

POINT ON APPEAL

WHETHER THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME SAID DECISION BECAME FINAL?

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984) should not be applied retroactively to cases pending appeal (within the pipeline) prior to Neil being final. This is especially true in light of the clear language in Neil stating said decision was not to be applied retroactively. The exceptions carved out in Andrews v. State, 459 So.2d 1018 (Fla. 1984)(a companion case) and Jones v. State, 464 So.2d 547 (Fla. 1985)(a death case) ratify this Court's intent to follow People v. Wheeler, 583 P.2d 748 (1978) and People v. Thompson, 79 A.D.2d 87, 435 N.Y.D.2d 739 (1981) where similar retroactive application of this issue germinated. The Third District's decision in Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985) must be reversed.

ARGUMENT

STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS NOT TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME SAID DECISION BECAME FINAL.

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 affirmatively held that the application of Neil was not retroactive. The Third District Court nevertheless has applied Neil retroactively based upon Andrews v. State, 459 So.2d 1018 (Fla. 1984). City of Miami v. Cornet, 463 So.2d 399 (Fla. 3d DCA 1985)(citing Safford v. State, holding the Neil rule to be retroactive); Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), cert. granted, Case No. 046, August 23, 1985; Hernandez v. State, ___So.2d___ (Fla. 3d DCA decided Aug. 6, 1985)[___F.L.W.___].

Presumably, the Third District Court and other district courts[1] have attempted to interpret this Court's reasoning of Neil's retroactive application based on two subsequent

[1]Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985); Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985) and Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985).

decisions, Andrews v. State, 459 So.2d 1018 (Fla. 1984) and Jones v. State, 464 So.2d 547 (Fla. 1985).

Without regard for the distinguishing features of Andrews v. State, supra (a companion case to Neil), or Jones v. State, 464 So.2d 547 (Fla. 1985)(a death case decided upon the authority of Neil),[2] the Third District in Safford and other cases has continued to apply Neil to pipeline cases in spite of the clear language in Neil of no retroactive application.

The only court to adhere to Neil's non-retroactive application has been the Fifth District Court speaking through Judge Upchurch in Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985). The Court correctly opined:

> The Third District, in Jones v. State, 10 F.L.W. 528 (Fla. 3d DCA February 26, 1985), and the Fourth District, in Franks v. State, 10 F.L.W. 798 (Fla. 4th DCA March 27, 1985), have applied Neil to "pipeline" cases. Because of specificity of the language of Neil set out above, we do not come to the same conclusion. The Court in Neil gave as its reason for not applying the decision retroactively, "the difficulty of trying to second-guess records that do not meet the

[2]See Parker v. State, 476 So.2d 134 (Fla. Case No. 63,1777, decided August 22, 1985)[F.L.W.](holding Neil applicable, but no violation since there was an insufficient showing that the challenges were used solely based on race).

> standards set out herein as well as the extensive reliance on the previous standards...." (Emphasis added). Since these reasons apply equally to "pipeline" cases as to cases tried and appeals completed before the decision in Neil was announced, it is our conclusion that the supreme court intended Neil to apply only to those cases going to trial subsequent to Neil.
>
> In the instant case, the trial court predated the decision in Neil and the test described there was not available to the trial court. (footnote omitted).
>
> 471 So.2d at 1295.

That decision not only strictly applies Neil's language, but follows sub silencio the reasoning in People v. Thompson, 79 A.D.2d 87, 435 N.Y.D.2d 739 (1981) and People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) relied upon by this Court in Neil.

In Neil, the Court adopted in material part, the procedures enunciated in People v. Thompson, supra. Specifically discussing retroactive application, the Court concluded:

> [13] 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, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).
>
> 457 So.2d at 488.

This Court in fashioning the Neil test relied heavily on People v. Thompson, supra, which looked to People v. Wheeler, supra, and Daniel v. Louisiana, 420 U.S. 31 (1975) for support and guidance regarding retroactive effect. In Thompson, supra, the court observed:

> We add that the difficulty of reconstruction jury selection procedures, particularly as they relate to the particular manner in which peremptory challenges were employed, and other factors, such as undoubted extensive reliance by prosecutors on the heretofore statutory inviolability of the peremptory challenge, militate against retroactive application of our decision in this case. (see People v. Wheeler, supra 148 Cal.Rptr.P. 908, 583 P.2d p. 766 N. 31; Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790).

In People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978), that court originally observed:

> 31. The rule we adopt herein applies to defendants in the case at bar and in the companion matter of People v. Johnson, post, page

> 915, of 148 Cal.Rptr., page 774, of 583 P.2d and to any defendant now or hereafter under sentence of death. (Cf. In re Jackson (1964) 61 Cal.2d 500, 39 Cal.Rptr. 220, 383 P.2d 420). In all other cases the rule will be limited to voir dire proceedings conducted after the present decision becomes final. (See People v. Cook, (1978) 22 Cal.3d 67, 99, fn. 18, 148 Cal. Rptr. 605, 624, 583 P.2d 130, 149, and cases cited.)
>
> 583 P.2d at 766 n. 31.

The Wheeler court approved the foregoing limited retroactivity of its decision since it was only by luck of the draw that the companion case to Wheeler was not the case that changed the law and therefore it would be unfair not to apply the decision to the companion case. See People v. Johnson, 583 P.2d 775, 148 Cal.Rptr. 915 (1978). The Wheeler court also included all death cases within its scope of retroactivity inasmuch as death is different and it would have limited application affecting only those defendants who, sentenced to death, suffered the same prejudicial error as the case that overruled the precedent. The Court found that since this category would contain a small finite group, and no further numbers to that group would be added, the decision could be retroactively applied because it would not overburden the admnistration of the criminal justice system. See, In re Jackson, 61 Cal.2d 500, 393 P.2d 420, 39 Cal.Rptr. 220 (1964). Moreover, the Wheeler court held

that its decision would not be retroactive to all other cases where voir dire proceedings were conducted prior to Wheeler becoming final. The Court reasoned that because official reliance had doubtless been placed on the prior unrestricted use of peremptory challenges, the rule now adopted would only be applicable to voir dire conducted after Wheeler became final. See, People v. Cook, 22 Cal.2d 67, 583 P.2d 130, 148 Cal.Rptr. 605 (1978).

This rationale is supported by the decision in Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975). In Daniel, the United States Supreme Court held that its decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970) which held the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury from a fair cross-section of the community, was not to be applied retroactively to convictions obtained by juries impaneled prior to the date of the Taylor decision. The Court reasoned:

> As we stated in Taylor v. Louisiana, supra, at 5350536, 95 S.Ct., at 700, "until today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." Given this statement, as well as the doctrinal underpinnings

of the decision in Taylor the question of the retroactive application of Taylor is clearly controlled by our decision in DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (168), where we held Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. L.ED.2d 491 (1968), to be applicable only prospectively. The three relevant factors, as identified in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed. 2d 1199 (1967), are

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

In Taylor, as in Duncan, we are concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In Taylor, as in Duncan, our decision did not rest on the premise at that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest

> at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.
>
> 95 S.Ct. at 705.

Albeit, this Court intended to further rather than impede Article I, Section 16 of the Florida Constitution by discarding the test set-out in Swain v. Alabama, 380 U.S. 202 (1965), the analysis by the United States Supreme Court in Taylor v. Louisiana, supra, is herein apropos. This is especially true when a similar analysis was employed in Thompson, supra, and Wheeler, supra, wherein the retroactive rule created in Neil germinated. See: State v. Neil, 457 So.2d at 487 n.12; See also Abrams v. McCray, Case No. 84-1426, 37 Cr.L. 4031.

Reversal was mandated in Andrews v. State, supra, since Andrews was a companion case to Neil. Although an argument was made Andrews represented a "pipeline" case, said argument was properly rejected because of Andrews' "companion case" status. Likewise, in Jones v. State, a death case, the "pipeline" theory was not applicable.[3] See Parker v. State, supra. (death case).

[3]In Jones v. State, supra, this Court found that Neil governs those cases where the issue was preserved below and pending when Neil was decided. In support thereof this

In Neil, much discussion centered on which alternative procedure to Swain should be adopted. Recognizing the tests derived from Wheeler v. State, supra, and Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), and People v. Thompson, supra, this Court stated:

> While quite similar to Wheeler and Soares, People v. Thompson, (cite omitted); charts a more even course in the exercise of peremptory challenges.[8]
>
> [8]One commentator considers Thompson more workable than either Wheeler or Soares, Comment, Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law, 44 U.Pitt.L.Rev. 673 (1983).

Certainly, the non-retroactive application to "pipeline" cases is the better view.[4]

Court cited Hoberman v. State, 400 So.2d 758 (Fla. 1981) which applied State v. Sarmiento, 397 So.2d 643 (Fla. 1981) to a pending appeal. However, a clear reading thereof, shows that Hoberman was a companion case to Sarmiento and therefore was an exception to the pipeline theory and therefore Sarmiento was applicable thereto.

[4]The State recognizes that the Court in 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 (1970) has held, at 387 N.E.2d 518, N. 38, that its rule was held to apply to the defendants in the present case and to the defendants in all cases now pending on direct appeal where the record is adequate to raise the issue. However, since the Florida Supreme Court did not adopt the Soares opinion, the Soares holding on retroactivity is not persuasive and should be rejected for a more workable rule.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS was furnished by mail to HENRY H. HARNAGE, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 12th day of September, 1985.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

/vbm