IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,965

THE STATE OF FLORIDA,

Petitioner,

vs.

JOHNNY L. JONES,

Respondent.

* * * * * * * * * * * * * * * * *

ON DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON JURISDICTION

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
ISSUE PRESENTED	2
SUMMARY OF ARGUMENT	2-3
ARGUMENT	3-10
WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. NEIL, 457 So.2d 481 (FLA. 1984)?	
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF CONTENTS

CASES	PAGE
Andrews v. State, 459 So.2d 1018 (Fla. 1984)	2,3,5,6,7
Castillo v. State, ___ So.2d ___ (Fla. 3d DCA 1985), case no. 84-930, opinion filed March 12, 1985 [10 F.L.W. 687]	6
City of Miami v. Cornett, ___ So.2d ___ (Fla. 3d DCA 1985), case no. 81-85, opinion filed January 29, 1985 1985 [10 F.L.W. 283]	6
Franks v. State, ___ So.2d ___ (Fla. 4th DCA 1985), case no. 84-410, opinion filed March 27, 1985 [10 F.L.W. 798]	7
Jones v. State, ___ So.2d ___ (Fla. 1985), case no. 62,098, opinion filed February 21, 1985 [10 F.L.W. 136]	6
People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978)	5
People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982)	7
State v. Neil, 457 So.2d 481 (Fla. 1984)	1,2,3,4,5,6,7,8,9,10
People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981)	7
People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978)	3,5,6,7
Safford v. State, ___ So.2d ___ (Fla. 3d DCA 1985), case no. 82-2194, opinion filed January 22, 1985 [10 F.L.W. ____]	6

Shea v. Louisiana,
___ U.S. ___, ___ S.Ct. ___,
___ L.Ed.2d ___ (1985),
case no. 82-5950, opinion filed
February 20, 1985 [36 Cr.L. 3153] 8,9

Swain v. Alabama,
380 U.S. 202, 85 S.Ct. 284,
13 L.Ed.2d 759 (1965) 9

United States v. Johnson,
457 U.S. 537, 102 S.Ct. 2579,
73 L.Ed.2d 202 (1982), 8,9

INTRODUCTION

Petitioner, the State of Florida, was the prosecution at the trial level and the appellee on appeal. Respondent was the defendant at the trial level and the appellant on appeal. Parties will be referred to in this brief as "the State" and "Defendant." The symbol "A" will constitute a reference to the appendix being filed along with this brief.

STATEMENT OF THE CASE AND FACTS

Following a jury trial, Defendant was convicted of grand theft and he appealed (A 1). The case was heard en banc by the Third District Court of Appeal.[1]

The Court reversed Defendant's conviction, concluding that the trial court had erred in not making an inquiry into the basis of peremptory challenges exercised by the State to exclude black prospective jurors (A 2).

Despite recognizing the existence of language in this court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984) (A 17-25), to the effect that the case should not be applied retroactively (A 2), the court applied Neil retroactively and reversed on its authority (A 2).

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[1] The case was initially heard by a panel of judges. The proposed but unreleased panel opinion, which now constitutes the appendix to Judge Hubbart's dissenting opinion (A 3-16), had found the evidence insufficient to uphold Defendant's conviction, but was found to be in conflict with other Third District opinions (A 1). The en banc court disagreed and found the evidence sufficient (A 1-2). The portion of the en banc opinion dealing with that question is not at issue in the present proceeding.

ISSUE PRESENTED

WHETHER THE DECISION OF THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984)?

SUMMARY OF ARGUMENT

The Third District Court of Appeal reversed Defendant's conviction on the authority of State v. Neil, 457 So.2d 481 (Fla. 1984), despite the fact that the trial in the present case occurred prior to the decision in Neil. The decision here is in direct conflict with Neil because the opinion in Neil itself states that it is not to be applied retroactively. Moreover, since Neil specifically distinguishes retroactivity and application to cases on collateral attack as two different things, there can be no question that Neil holds that it should not apply to cases that were pending on direct appeal at the time Neil was decided. By applying Neil in just such a situation, the district court created conflict.

The fact that this court applied Neil to reverse the conviction in Andrews v. State, 459 So.2d 1018 (Fla. 1984), does not resolve this conflict. The district court concluded that this court, in Andrews, without discussing the question, implicitly receded from the clear language of Neil, even though Neil was decided only one week before Andrews. While that unlikely scenario is possible, the decision in Andrews is just as consistent with the much more likely possibility that this court acted in the same manner as did the California Supreme Court when it adopted in

People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the same rationale that this court adopted in Neil. The decision in Wheeler was applied to cases pending in the California Supreme Court at the time Wheeler was decidd, but not to cases pending in the California appellate courts. The fact that Andrews leaves open the question of which of these two approaches this court adopted demonstrates the continued existence of the conflict between the present case and Neil.

This court should resolve the conflict because of the large number of cases being decided on assumptions as to what this court meant in Andrews and because of the need to clarify the law regarding retroactivity, in light of the fact that applying Neil in the manner it was applied by the district court in the present case is clearly contrary to the conclusion that is mandated by analysis of the applicable standards regarding retroactivity.

ARGUMENT

THE DECISION OF THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984).

The decision of the Third District Court of Appeal in the present case reversed Defendant's conviction on the authority of this court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984).

Despite noting the contrary language in Neil itself, the court found that Neil should retroactively apply to the present case. As to this matter, the Third District's opinion reads as follows:

> And, notwithstanding the language in Neil concerning its general non-retroactivity, 457

> So.2d at 488, it is also clear from the Supreme Court's subsequent reversal for a new trial in the identical case of Andrews v. State, 459 So.2d 1018 (Fla. 1984), reversing 438 So.2d 480 (Fla. 3d DCA 1983), that Neil governs so-called "pipeline" cases such as this one, in which the issue was properly preserved below and which was pending when Neil was decided.
>
> (A 2)

Indeed, as the Third District's opinion specifically noted, this court's opinion in Neil does state that it should not be applied retroactively. This court said:

> Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive.
>
> 457 So.2d at 488.

This court went on to make it clear that in saying that Neil should not be retroactively applied, it was saying that Neil should not apply to cases on direct appeal, as well as that it should not apply to collateral attacks.

> 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).
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> 457 So.2d at 488 (emphasis added).

By using the word "or," this court plainly meant for the word "retroactivity" to apply to something other than collateral proceedings. That something can only be cases pending on direct appeal.

Thus, there can be no question that the opinion in the present case, applying Neil retroactively, expressly and directly conflicts with the Neil decision, which clearly indicates that it should not be so applied. Indeed, the Third District opinion even recognizes the contrary language of Neil.

The Third District attempted to justify its failure to follow Neil by pointing to the fact that this court applied Neil to reverse the conviction in Andrews v. State, 459 So.2d 1018 (Fla. 984).

This court's entire opinion in Andrews consists of the following:

> Quashed on authority of State v. Neil, 457 So.2d 481 (Fla. 1984), with directions to remand for a new trial.
>
> It is so ordered.
>
> 459 So.2d at 1018.

Certainly, Andrews did not expressly recede from the plain language of Neil. It is therefore unclear whether this court adopted the unlikely approach of receding by implication from a case that had been decided only one week earlier or whether this court adopted the approach taken by the California Supreme Court when it decided People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the case which first established the principle adopted in Neil. The California court found that the rule it adopted in Wheeler would apply in Wheeler itself and in the companion case of People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978), because Johnson was pending in the California Supreme Court at the time Wheeler was decided. The court found, however, that Wheeler would not apply generally to cases pending on appeal in the California appellate courts, and instead limited its applicability to cases

in which the voir dire proceeidngs were conducted after Wheeler became final and to death penalty cases. Wheeler, supra, 583 P.2d at 766, n. 31.

Given the fact that the nature of the court's opinion in Andrews leaves open the question of whether this court meant what it said in Neil or whether, as the Third District concluded, this court in Andrews implicitly receded from the dictates of the then week old Neil opinion, the conflict between the decision in the present case and that in Neil is real and needs to be addressed by this court.(2)

The State of course recognizes that even when, as here, conflict exists, this court's jurisdiction in nonetheless discretionary, but submits that two extremely strong reasons exist for accepting jurisdicton to resolve the conflict here.

The first reason is the large number of cases being reversed under circumstances similar to the present case. In the few months since Neil was decided, the Third District alone has already reversed on the authority of Neil not only the conviction in the present case, but also those in Castillo v. State, ___ So.2d ___ (Fla. 3d DCA 1985), case no. 84-930, opinion filed March 12, 1985 [10 F.L.W. 687] and Safford v. State, ___ So.2d ___ (Fla. 3d DCA 1985), case no. 82-2194, opinion filed January 22, 1985 [10 F.L.W. ___]. Moreover, the Third District has also upheld on the authority of Neil the granting of a new trial in the civil case of City of Miami v. Cornett, ___ So.2d ___(Fla. 3d DCA 1985),

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(2) The State is aware that this court also reversed the conviction in Jones v. State, ___ So.2d ___ (Fla. 1985), case no. 62,098, opinion filed February 21, 1985 [10 F.L.W. 136], on the authority of Neil. The Jones case, however, was pending in this court at the time Neil was decided. Moreover, the death penalty had been imposed in that case. Thus, the application of Neil there does not resolve the conflict between the present case and Neil any more than did the decision in Andrews. In each case, the application of Neil is equally consistent with this court receding by implication from the freshly minted dictates of Neil as it is with this court applying the California approach that is in total accord with the language used in Neil.

case no. 81-85, opinion filed January 29, 1985 [10 F.L.W. 283]. Additionally, the Fourth District reversed the conviction in Franks v. State, ___ So.2d ___ (Fla. 4th DCA 1985), case no. 84-410, opinion filed March 27, 1985 [10 F.L.W. 798] on the same basis. Surely, this number of cases should not be reversed on the mere assumption that this court chose to change its mind about what it said in Neil after only one week, and also chose not to articulate this fact, but to simply ignore the language of Neil. This is especially so when a plausible explanation for this court's approach in Andrews, the adoption of the California rationale, exists. Rather than simply allowing the district courts to engage in such speculation, this court shuld accept jurisdiction in this case to resolve the plain conflict and to make it clear whether it did indeed take the improbable approach assumed by the district courts or whether it acted in the same manner as the California Supreme Court.[3]

The second reason why the conflict here is of a nature that it should be resolved by this court is the fact that to assume, as did the district court, that this court intended for Neil to apply to cases pending

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[3] Of course, in Neil, the case primarily relied upon the court was People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). It appears that the New York appellate court that decided that case also concluded that its reasoning should not apply to cases pending on direct appeal, but only to cases in which the voir dire occurred subsequent to the decision. In the opinion, the court noted that various factors "militate against retroactive application of our decision in this case," 435 N.Y.S.2d at 756, n. 22, citing to Wheeler. The court had little chance to articulate in later cases exactly what it meant in using the above phrase, as the Court of Appeals of New York subsequently rejected the rationale of Wheeler, Thompson and Neil in People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982). In his dissenting opinion in McCray, however, Judge Meyer noted the apparent inconsistency in the appellate court's affirmance without opinion in McCray and its decision in Thompson and concluded that in light of the fact that the jury in McCray was selected over nine months before the Thompson decision, the apparent inconsistency could have resulted from the conclusion that Thompson should not be applied retroactively to the McCray case.

on direct appeal in the district courts, is to assume that this court disregarded the standards set by the United States Supreme Court to be employed in determining retroactivity, as those standards unmistakably point to the conclusion that Neil should not be applied in the manner that the district courts have applied it. Thus, the decision under review causes serious confusion as to the law regarding retroactivity.

In United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), the Court concluded that with certain exceptions, decisions of the Court construing the Fourth Amendment are to be applied retroactively to all convictions that are not yet final, including those pending on direct appeal, at the time the decision is rendered. This conclusion was recently extended to decisions construing the Fifth Amendment. Shea v. Louisiana, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1985), case number 82-5950, opinion filed February 20, 1985 [36 Cr.L. 3153].

Both United States v. Johnson and Shea recognize, however, that a different situation exists when a ruling constitutes "a clear break with the past." As noted in Johnson:

> Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," Desist v. United States, 394 U.S., at 248, 89 S.Ct., at 1033, it almost invariably has gone on to find such a newly-minted principle nonretroactive. See United States v. Peltier, 422 U.S. 531, 547, n. 5, 95 S.Ct. 2313, 2322, n. 5, 45 L.Ed.2d 374 (1975) (BRENNAN, J., dissenting) (collecting cases). In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course," Williams v.

> United States, 401 U.S., at 659, 91 S.Ct., at 1156 (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third Stovall factors--reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule--have virtually compelled a finding of nonretroactivity. See, e.g., Gosa v. Mayden, 413 U.S., at 672-673, 682-685, 93 S.Ct., at 2932-2933, 2937-2938 (plurality opinion); Michigan v. Payne, 412 U.S., at 55-57, 93 S.Ct., at 1970-1971.
>
> 457 U.S. at 549-550, 102 S.Ct. at 2587, 73 L.Ed.2d at 213-214 (footnote omitted).

See also Shea, supra, 36 Cr.L. at 3155.

There can be no question that Neil constitutes "a clear break with the past." The prior federal constitutional standard had been established in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 284, 13 L.Ed.2d 759 (1965) and certainly imposed no requirements similar to Neil. It is difficult to think of a more clear break with the past than Neil. Under such circumstances, as recognized repeatedly by the cases cited in United States v. Johnson, it is simply unfair to hold the government to a standard that it could not have known was to be adopted at some future date. Plainly, therefore, retroactivity analysis demonstrates that Neil should not be retroactively applied.

Thus, to allow the conflict here to remain unresolved is to totally confuse Florida law regarding retroactivity. The fact that the approach taken by the district courts in applying Neil simply cannot be reconciled with the accepted retroactivity standards will leave the courts of this state in a situation in which they will have no way of knowing how to determine whether any particular decision should be applied

retroactively. Only by resolving the conflict can this court avoid the obvious problems that will arise from this situation.

CONCLUSION

This court should grant jurisdiction to resolve the conflict between the decision in the present case and that in State v. Neil, 457 So.2d 481 (Fla. 1984).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded to Terry S. Bienstock, Frates, Bienstock and Sheehe, Suite 3699, One Biscayne Tower, Miami, Florida 33131, Fletcher Baldwin, University of Florida, Holland Law Center, Gainesville, Florida, and Bruce Rogow, 3100 Southwest 9th Avenue, Miami, Florida 33315, on this the 26th day of April, 1985.

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