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FILED
SID J. WHITE
SEP 20 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,965

THE STATE OF FLORIDA,

Petitioner,

vs.

JOHNNY L. JONES

Respondent.

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

ON DISCRETIONARY REVIEW

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

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE PRESENTED	5
WHETHER THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY REVERSED DEFENDANT'S CONVICTION IN LIGHT OF (1) THE FACT THAT STATE v. NEIL, 457 SO.2D 481 (Fla. 1984) SHOULD NOT BE RETROACTIVELY APPLIED; (2) THE FACT THAT THE HARMLESS ERROR RULE SHOULD APPLY WHEN JURY SELECTION OCCURRED BEFORE THE DECISION IN NEIL AND NO CLAIM IS MADE THAT ANY JUROR THAT ACTUALLY TRIED THE CASE WAS IN ANY WAY PREJUDICED OR BIASED; (3) THE FACT THAT DEFENDANT DID NOT SEEK THE REMEDY CONTEMPLATED BY NEIL, BUT ONLY OTHER, MORE DRASTIC REMEDIES; (4) THE FACT THAT DEFENDANT FAILED TO OBJECT WITH SUFFICIENT SPECIFICITY TO PRESERVE THE NEIL ISSUE FOR REVIEW; (5) THE FACT THAT THE RECORD DEMONSTRATES THAT THE SHOWING REQUIRED BY NEIL BEFORE ANY RELIEF IS APPROPRIATE WAS NOT MADE HERE; AND (6) THE FACT THAT THE REMEDY, IF ANY, UNDER THE FACTS OF THIS CASE, SHOULD HAVE BEEN REMAND FOR A HEARING, NOT REVERSAL FOR A NEW TRIAL?	
SUMMARY OF ARGUMENT	10
ARGUMENT	15
CONCLUSION	37
CERTIFICATE OF SERVICE	37

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TABLE OF AUTHORITIES

CASES	PAGE
Andrews v. State, 459 So.2d 1018 (Fla. 1984)	11, 12, 17, 18, 19
Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920)	25
Castor v. State, 365 So.2d 701 (Fla. 1978)	28, 30
Clark v. State, 363 So.2d 331 (Fla. 1978)	28
Daniel v. Louisiana, 419 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975)	22
Darrigo v. State, 243 So.2d 171 (Fla. 2d DCA 1971)	30
Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985)	35
Ferguson v. State, 417 So.2d 639 (Fla. 1982)	30
Hernandez v. State, ___So.2d___ (Fla. 3d DCA 1985, case no. 84-685, opinion filed August 6, 1985 [10 F.L.W. 1876]	36
Hufman v. State, 400 So.2d 133 (Fla. 5th DCA 1981)	29
Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985) (en banc)	2, 17
Jones v. State 464 So.2d 547 (Fla. 1985)	18
Justus v. State, 438 So.2d 358 (Fla. 1983)	28, 29
Kujawa v. State, 405 So.2d 251 (Fla. 3d DCA 1981)	31
Oliva v. State, 354 So.2d 1264 (Fla. 3d DCA 1978)	30

People v. Johnson,
22 Cal.3d 296, 583 P.2d 774, 148 Cal.Rptr. 915 (1978) 10, 17, 18

People v. McCray,
57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982) 18

People v. Rousseau,
179 Cal. Rptr. 892, 129 Cal.App.3d 526 (1982) 34

People v. Thompson,
79 A.D.2d 87, 435 N.Y.S.2d 739 (1981) 18

People v. Wheeler,
22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) 4, 10, 11, 17, 18, 27, 28, 30, 31

Richardson v. State,
437 So.2d 1091 (Fla. 1983) 30

Shea v. Louisiana,
___ U.S. ___, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). 21, 22

State v. Barber,
301 So.2d 7 (Fla. 1974) 28

State v. Neil,
457 So.2d 481 (Fla. 1984) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 31, 32, 34, 35,

State v. Wilson,
276 So.2d 45, 47 (Fla. 1973) 24

Swain v. Alabama,
380 U.S. 202, 85 S.Ct. 284, 13 L.Ed.2d 759 (1965) 6, 22

Taylor v. Louisiana,
419 U.S. 532, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970) 12, 22, 23

Thomas v. State,
424 So.2d 193 (Fla. 5th DCA 1983) 29

United States v. Johnson,
457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) — 20, 21, 22, 26

United States v. Peltier,
422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975) — 25

Wright v. State,
471 So.2d 1295 (Fla. 5th DCA 1985) — 12, 19

OTHER AUTHORITIES

Florida Constitution, Art. I, Sec. 16 — 24

Florida Constitution (1885), Art. 11, Declaration of Rights — 25

Florida Statutes §924.33 — 24, 25

United States Constitution, Fourth Amendment — 20, 26

United States Constitution, Fifth Amendment — 21

INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee on appeal. Respondent was the defendant in the trial court and the appellant on appeal. The parties will be referred to in this brief as "the State" and "Defendant." The symbol "R" will constitute a reference to the record on appeal. The symbol "T" will constitute a reference to the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

Defendant was the superintendent of the Dade County public school system. He was charged by indictment with second degree grand theft and, after a jury trial, was convicted. The case received massive publicity in the Dade County area and was the focus of extensive community attention.

An appeal was taken and the case was argued before a three judge panel of the Third District Court of Appeal. The proposed panel opinion, in the view of a majority of the judges of the court, "demonstrated a misapplication and departure from" rules of law established by prior Third District decisions and, accordingly, the case was heard en banc.(1)

The en banc decision reversed Defendant's conviction on the authority of this court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984), which held that when a showing is made of a likelihood that peremptory challenges are being exercised solely on the basis of race, a complaining party is entitled to request and receive an inquiry by the trial court as to the basis for the challenges. The district court concluded that Neil should be retroactively applied and that under the facts of this case, the trial court should have conducted the inquiry required by Neil. The district court's opinion is reported as Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985) (en banc).

During jury selection, which occurred in April, 1980, the State used five peremptory challenges to excuse the only five

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(1)The case was heard by eight of the nine judges on the court. Judge Jorgenson did not participate.

black prospective jurors that were tentatively seated on the jury. Despite complaining about the manner in which the State was utilizing its challenges, Defendant did not ever request that an inquiry be conducted by the trial court, but only requested that other, more drastic remedies, be employed.

Defendant's counsel initially indicated his concern that some blacks be seated on the jury during a discussion of the procedures that would be followed during voir dire (T 218), but made no motion of the court with regard to the question. Indeed, he could not have done so at that time, as the State had not yet exercised any peremptory challenges.

The next two times Defendant's counsel addressed this matter were occasions on which he expressed his belief that unsuccessful challenges for cause by the State were efforts to systematically exclude blacks (T 336, 350). Again, no motions were made, as the State had still not exercised any peremptory challenges.

After the State exercised its second peremptory challenge, Defendant's counsel stated, "Your Honor, again I object to the systematic exclusion of blacks on this Jury (T 410)." No request was made for an inquiry and the trial court made no ruling on the objection.

The State exercised a third challenge (T 410). Defendant's attorney then moved the court to empanel additional black prospective jurors based on the fact that the State's three strikes had been exercised on the three blacks that had at that

point been tentatively placed on the jury (T 410-411). No request was made for an inquiry. The court did not rule on Defendant's motion to empanel additional blacks.

Other prospective jurors were then examined. Prior to any additional challenges being exercised by the State, Defendant's attorney indicated that he wished to make some factual statements for the record (T 501). He stated that three of the first 24 prospective jurors were black, that each survived a challenge for cause and that they were the only prospective jurors stricken by the State up until that point (T 501). Counsel then called the court's attention to the fact that only one of the 35 prospective jurors questioned to that point had indicated no prior knowledge of the case and referred to the opinions of the prospective jurors (T 502). Counsel then moved the court to strike the panel if it would not grant a continuance, renewed Defendant's motion for a change of venue as an alternative and, as a third choice, requested additional peremptory challenges (T 502). After making these motions, counsel stated that there existed case law for the proposition that the State should not be allowed to use its peremptory challenges in such a way as to select a racially biased jury, citing the court to People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) (T 503).[2] Counsel did not request that an inquiry be conducted, even though Wheeler, which was obviously known to the defense, contemplates such a

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[2] The transcript reflects a reference to People v. Weller. That this is a mistake by the court reporter is apparent from the fact that the citation given to the court is the correct citation for People v. Wheeler.

procedure. A second defense attorney then addressed the court. He argued that Defendant was entitled to a representative number of blacks on the jury (T 504-505) and asked the court to empanel additional black prospective jurors (T 505). He did not request that an inquiry be conducted. The trial court denied the various motions (T 505-507).

The process of selecting the jury then continued. After each of the next two State challenges, Defendant's attorney noted that the challenged juror was black and that each of the State's challenges had been directed to blacks (T 508, 509). On neither occasion was any objection or motion made. Although the trial court stated after the State exercised its fourth challenge that it did not wish to hear further argument, it did not preclude further objections or motions (T 508).

After the exercise of all challenges, Defendant's attorney renewed all of the previous motions (T 510) and stated that the defense did not accept the jury (T 512). Again, no request was made for an inquiry. The court expressed no ruling as to the renewed motions. As to the refusal of the defense to accept the jury, the court inquired as to whether that action was based on the previous defense arguments (T 512). Upon receiving an affirmative answer (T 513), the court made no further statement regarding the matter.

The next time this issue arose was when Defendant filed his motion for a new trial. Since Defendant had never requested an inquiry during the voir dire proceedings, he certainly could not have, and did not, allege that the denial of an inquiry

warranted a new trial. Rather, the only remedies referred to in Defendant's motion (R 299-309) were those that had been previously requested. The entire argument as to this matter contained in the motion was as follows:

> The court erred in permitting the State, over defense objections, to systematically exclude blacks from the jury, and in further failing to grant other relief to the Defendant in view of the State's misconduct, including such relief as granting more peremptory challenges to the defense, or dismissing the cause or granting a mistrial.
>
> (R 306)

Defendant also filed a supplement and amendment to his motion for new trial. In this pleading (R 349-352), Defendant once again made no claim that an inquiry should have been conducted. Instead, he asserted that the record demonstrated that the State's use of its peremptory challenges required the granting of a new trial (R 349), requested a hearing for the purpose of establishing a prima facie showing of discrimination under the federal constitutional standard of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 284, 13 L.Ed.2d 759 (1965) (R 349) and proffered evidence to be presented at such a hearing (R 350-351).

Although the State was not required to state the reasons for the exercise of its peremptory challenges, several such reasons are apparent from the record.

The State sought unsuccessfully to challenge two of the five prospective black jurors for cause and in doing so set forth the reasons why the State wanted those jurors excused.

Juror Kevyn Thomas Pope had stated that he felt that Defendant was "a black man trying to do, you know--you know, trying to do the best he can (T 329)." He also indicated that he heard his parents discuss the case and indicate the possibility that the charges in the case were based on Defendant's race (T 331-332). These factors were the basis of the State's challenge for cause (T 334-336).

The State also asked the court to excuse juror Eugene Walker for cause (T 349-351). The basis for this challenge was the fact that Mr. Walker was a teacher in the Dade County school system (T 340), the very system that Defendant headed. Additionally, Mr. Walker's wife was a teacher (T 341) and although he stated that he could render a verdict on the evidence, he stated that he had already formed an opinion as to guilt or innocence (T 338-339).

Although the other prospective black jurors were not challenged for cause, certain factors can be noted from the voir dire proceedings.

When initially questioned by the trial court, juror George Mathis stated that he had not read, seen or observed anything about the case (T 369). When questioned by the prosecutor, however, he stated that a long time ago, he had heard about the case on the television news, but that that was the only time he heard anything about it (T 371-372).

Juror Bessie Mae Forest stated that her boss was Henry K. Stanford (T 441), an individual who was listed as a witness for the defense (R 132-135) and who later testified for Defendant as a character witness (T 1934-1937).

Juror Cleveland Mills stated that he was aware that suggestions had been made in the news media that the accusations in this case "were blown up on a racial scale (T 469)." He stated that he had no opinion as to such allegations (T 469).

The State also relies upon such additional facts as are set forth in the argument portion of this brief.

ISSUE PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY REVERSED DEFENDANT'S CONVICTION IN LIGHT OF (1) THE FACT THAT STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) SHOULD NOT BE RETROACTIVELY APPLIED; (2) THE FACT THAT THE HARMLESS ERROR RULE SHOULD APPLY WHEN JURY SELECTION OCCURRED BEFORE THE DECISION IN NEIL AND NO CLAIM IS MADE THAT ANY JUROR THAT ACTUALLY TRIED THE CASE WAS IN ANY WAY PREJUDICED OR BIASED; (3) THE FACT THAT DEFENDANT DID NOT SEEK THE REMEDY CONTEMPLATED BY NEIL, BUT ONLY OTHER, MORE DRASTIC REMEDIES; (4) THE FACT THAT DEFENDANT FAILED TO OBJECT WITH SUFFICIENT SPECIFICITY TO PRESERVE THE NEIL ISSUE FOR REVIEW; (5) THE FACT THAT THE RECORD DEMONSTRATES THAT THE SHOWING REQUIRED BY NEIL BEFORE ANY RELIEF IS APPROPRIATE WAS NOT MADE HERE; AND (6) THE FACT THAT THE REMEDY, IF ANY, UNDER THE FACTS OF THIS CASE, SHOULD HAVE BEEN REMAND FOR A HEARING, NOT REVERSAL FOR A NEW TRIAL?

SUMMARY OF ARGUMENT

The State submits that the district court incorrectly reversed Defendant's conviction. This position is based upon several arguments.

In the first place, the State submits that the decision in State v. Neil, 457 So.2d 481 (Fla. 1984), the case relied upon by the district court to reverse Defendant's conviction, should not be applied retroactively to cases such as the present case, in which the jury was selected prior to the decision in Neil.

In Neil, this court specifically stated that "we do not hold that the instant decision is retroactive." 457 So.2d at 488. This court went on to note that that Neil was not such a decision as "to warrant retroactively or to warrant relief in collateral proceedings." 457 So.2d at 488 (emphasis added). By the use of the word "or" it is clear that this court meant for the word "retroactivity" to apply to something other than collateral proceedings and that something can only be cases pending on direct appeal.

This approach is wholly consistent with the approach taken by the Supreme Court of California in its application of 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.

In Wheeler, the court found that the rule it adopted would apply in Wheeler and in the companion case of People v.

Johnson, 22 Cal.3d 296, 583 P.2d 774, 148 Cal.Rptr. 915 (1978), which was pending in the Supreme Court of California while Wheeler was pending, but that the rule would not apply generally to cases pending on appeal. It was limited instead to cases in which the death penalty was imposed and to voir dire proceedings conducted after Wheeler became final. Wheeler, supra, 583 P.2d at 766, n. 31.

The fact that, subsequent to Neil, this court applied Neil in Andrews v. State, 459 So.2d 1018 (Fla. 1984), does not demonstrate, as the district court believed, that this court receded from its pronouncements in Neil. Rather, since Andrews was pending in this court at the time Neil was decided, just as Johnson was pending in the Supreme Court of California at the time Wheeler was decided, this court's reversal in Andrews is entirely consistent with the language of Neil. It is apparent that this court is following the approach taken in California, finding Neil applicable to cases pending in this court at the time Neil was decided, but not to other cases in which the jury was selected before that date.

To reach the conclusion adopted by the district court, it would have to be assumed that this court in Andrews decided to recede from what it said one week earlier in Neil and that, given the fact that Andrews is a two sentence opinion containing no analysis whatsoever, this court decided to do so by implication, without any discussion at all. Such assumptions seem so plainly unreasonable, particularly in light of the fact that the decision

in Andrews is easily and logically explained when it is realized that it is fully consistent with the approach taken in California, that the conclusion reached by the district court must be an incorrect one.

The conclusion that Neil should not be applied retroactively is also compelled by logic and traditional retroactivity analysis. As noted by the Fifth District Court of Appeal, in specifically rejecting the rationale of the Third District in the present case, the difficulty of trying to second guess records and the extensive reliance on the previous standards militate against the retroactive application of Neil. Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985). Applying similar reasoning, the United States Supreme Court has found that the decision in a case strongly relied upon by this court in Neil, Taylor v. Louisiana, 419 U.S. 532, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970), would not be retroactively applied. Clearly, it would be unfair to hold a party accountable for a change in the law that requires the giving of reasons for the exercise of peremptory challenges when the previous law imposed no such requirement. This is particularly true under the facts of the present case, since some four and a half years elapsed after the jury was selected in this case until Neil was decided.

The State's final contention with regard to retroactivity is that when, as here, no claim is made that any juror was actually prejudiced or biased, the harmless error rule should apply to cases in which the jury was selected before Neil was decided. Since a fair jury is chosen in such a situation, a

defendant is not harmed by any error under Neil and since the jury was selected before Neil was decided, no prophylactic effect would be achieved by not applying the harmless error rule.

The State also maintains that even if Neil is held to apply retroactively, no basis exists for the reversal of Defendant's conviction.

Defendant never requested that an inquiry of the sort contemplated by Neil be conducted. Rather, he sought only other, more drastic remedies that were inappropriate. Moreover, Defendant never objected with specificity as to the basis for his objection. Each of these factors precludes review of his claim for relief under Neil.

In addition, it is clear that the record in this case does not reflect a showing of a likelihood that the State's peremptory challenges were exercised solely on the basis of race. One of the jurors was a teacher in the school system that Defendant had headed. His wife was also a teacher in that school system. This juror had already formed an opinion as to guilt or innocence. The boss of another juror was listed as a witness for Defendant. A third juror had been exposed to a conversation between his parents in which they indicated the possibility that the charges in the case were based on Defendant's race. This juror also stated his belief that Defendant was "a black man ... trying to do the best he can." Another juror had been exposed to suggestions that the accusations in this case "were blown up on a racial scale." The only other black juror contradicted himself

as to whether he had heard anything about the case and ultimately would only admit to having heard of the case one time, an incredible statement in light of massive media coverage and extensive community interest. Given these facts, the State submits that even though the State was not required to put into the records the reasons for its peremptory challenges, the record reflects that reasons exist and that the showing required by Neil has not been made.

The State's last contention is that if any remedy is appropriate, it is remand for a hearing as to the basis for the State's challenges, not reversal for a new trial, as ordered by the district court. This is because at the time the jury was selected, the State had no reason to put the reasons for its peremptory challenges into the record and because under the facts of this case, these reasons can be easily and accurately ascertained.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY REVERSED DEFENDANT'S CONVICTION IN LIGHT OF (1) THE FACT THAT STATE v. NEIL, 457 SO.2D 481 (Fla. 1984) SHOULD NOT BE RETROACTIVELY APPLIED; (2) THE FACT THAT THE HARMLESS ERROR RULE SHOULD APPLY WHEN JURY SELECTION OCCURRED BEFORE THE DECISION IN NEIL AND NO CLAIM IS MADE THAT ANY JUROR THAT ACTUALLY TRIED THE CASE WAS IN ANY WAY PREJUDICED OR BIASED; (3) THE FACT THAT DEFENDANT DID NOT SEEK THE REMEDY CONTEMPLATED BY NEIL, BUT ONLY OTHER, MORE DRASTIC REMEDIES; (4) THE FACT THAT DEFENDANT FAILED TO OBJECT WITH SUFFICIENT SPECIFICITY TO PRESERVE THE NEIL ISSUE FOR REVIEW; (5) THE FACT THAT THE RECORD DEMONSTRATES THAT THE SHOWING REQUIRED BY NEIL BEFORE ANY RELIEF IS APPROPRIATE WAS NOT MADE HERE; AND (6) THE FACT THAT THE REMEDY, IF ANY, UNDER THE FACTS OF THIS CASE, SHOULD HAVE BEEN REMAND FOR A HEARING, NOT REVERSAL FOR A NEW TRIAL.

I

THIS COURT'S DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) SHOULD NOT BE RETROACTIVELY APPLIED.

A

THIS COURT'S DECISIONS DEMONSTRATE THAT STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) SHOULD NOT BE RETROACTIVELY APPLIED.

The decision under review in the present case is an en banc decision of the Third District Court of Appeal, reversing Defendant's conviction and remanding the cause for a new trial, on the authority of this court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984). The State submits that the decision in Neil should not be applied retroactively to cases, such as the present case, in which the jury selection occurred before Neil was decided and that, for this reason, the district court improperly applied Neil here.

In Neil, this court specifically stated:

> 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.

Had that been all this court said on the subject, this court's pronouncement could be interpreted to mean only that Neil would not apply to collateral attacks on convictions, but that it would apply to direct appeals pending when Neil was decided, the so-called "pipeline" cases. But that was not all this court said. The opinion in Neil goes on to say:

> 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).
>
> 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.

It may therefore be said that the very face of the Neil opinion makes it apparent that this court did not intend for the dictates of Neil to be applied to cases in which the voir dire proceedings occurred before the Neil decision.

The district court recognized the clear language of Neil, but concluded that because this court had applied Neil in Andrews v. State, 459 So.2d 1018 (Fla. 1984), Neil should also apply to the present case. Jones v. State, 466 So.2d 301, 302-303 (Fla. 3d DCA 1985) (en banc). It is the State's position that this conclusion is plainly incorrect.

It is apparent that this court's reversal in Andrews merely demonstrates that this court is applying Neil in precisely the same manner as the Supreme Court of California applied its decision in 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.

In Wheeler, the court found that the rule it adopted would apply in Wheeler and in the companion case of People v. Johnson, 22 Cal.3d 296, 583 P.2d 774, 148 Cal.Rptr. 915 (1978), which was pending in the Supreme Court of California while Wheeler was pending, but that the rule would not apply generally to cases pending on appeal. It was limited instead to cases in which the death penalty was imposed and to voir dire proceedings conducted after Wheeler became final. Wheeler, supra, 583 P.2d at 766, n. 31.

By applying the Neil rationale to Andrews, which was pending in this court at the time Neil was decided, this court is doing exactly what the Supreme Court of California did in applying Wheeler to Johnson,[3] and is not adopting an approach different than that indicated by the language of Neil.[4]

To reach the conclusion adopted by the district court, it would have to be assumed that this court in Andrews decided to recede from what it said one week earlier in Neil and that it decided to do so by implication, without any discussion whatsoever of the matter, inasmuch as the 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.

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[3] The State notes that this court has also applied Neil to reverse the conviction in Jones v. State, 464 So.2d 547 (Fla. 1985). This reversal is in total accord with the approach taken in Wheeler, as Jones, like Andrews, was pending before this court at the time Neil was decided. Moreover, the death penalty had been imposed in Jones.

[4] 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.

It is hard to imagine that this court would have changed its mind on the question of retroactivity over the course of a week and just as hard to imagine that if such a rapid reversal of position had occurred, this court would have simply ignored the language of Neil and receded from it by implication. It is certainly much more reasonable to assume that this court reversed Andrews by applying the same approach to retroactivity that was employed by the Supreme Court of California.

B

LOGIC AND RETROACTIVITY ANALYSIS DEMONSTRATE THAT STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) SHOULD NOT BE RETROACTIVELY APPLIED.

The conclusion that the reversal in Andrews was not meant as a rejection of the week old Neil decision is supported not just by the fact that it is entirely unlikely that this court would have accomplished such a rejection by such an unlikely procedure, but also by the fact that both logic and a traditional retroactivity analysis call for the conclusion that Neil should not apply generally to cases in which jury selection occurred before Neil was decided.

As pointed out by the Fifth District Court of Appeal in Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985), in specifically rejecting the rationale of the Third District in the present case:

> 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 standards set out herein as well as the extensive reliance on the previous standards ..." .... 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.
>
> 471 So.2d at 1296.

Indeed, the present case is a perfect example of the inappropriateness of attempting to second-guess the record. At the time this case was tried, Neil did not exist and there was no reason for the prosecutors to put into the record their reasons for exercising peremptory challenges. Thus, even if it is concluded that the record as it exists in the present case demonstrates an apparent violation of the dictates of Neil,[5] reversal on such a record would deprive the State of its right, guaranteed by Neil, to justify its peremptory challenges.

The impracticality of reviewing Neil issues on records that were made before it was known that the Neil requirements would be adopted is a primary factor in analyzing this question in terms of the legal standards regarding retroactivity of decisions.

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

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[5] The State of course submits that this conclusion should not be reached. See Section II (C) of this argument, infra.

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. ___, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985).

Both 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, ___ U.S. at ___, 105 S.Ct. at 1069, 84 L.Ed.2d at 45.

There can be no question that Neil constitutes "a clear break with the past." There was no reason at the time of Defendant's trial for the State to believe that there was any need to meet the requirements of Neil. The federal constitutional standards 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 thus difficult to think of a more clear break with the past than Neil. Under such circumstances, as recognized repeatedly by the cases cited in 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. This is particularly true in the present case since the change in the law did not occur until some four and a half years after the trial.

In Daniel v. Louisiana, 419 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975), the Court was faced with a retroactivity question very similar to that presented here, the question of whether to apply its decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970), a case strongly relied

upon by this court in Neil, to cases in which the jury was selected prior to the decision in Taylor. In Taylor, the Court had concluded that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. Primarily in light of the reliance by government officials on the prior standard and the fact that a conviction by a jury selected in violation of Taylor was not necessarily unfair, the Court found that Taylor should apply prospectively only. This reasoning is directly applicable here. Not only was the State justified in relying on the prior standard, but there is not even a suggestion in the record that Defendant did not receive a fair trial or that any of the jurors were in any way prejudiced or biased against him. Indeed, Defendant has never even asserted otherwise and his trial counsel flatly disavowed any such claim.

> And I don't say that these people and this jury are racially prejudiced. I am not saying that, because they have said they are not, and I have no way to indicate that they are.
>
> (T 504)

It should therefore be concluded that consideration of the relevant legal standards regarding retroactivity compel the conclusion that Neil should not be retroactively applied.

C

THE HARMLESS ERROR DOCTRINE SHOULD APPLY WHEN THE JURY WAS SELECTED PRIOR TO THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) AND NO CLAIM IS MADE THAT ANY JUROR WAS IN ANY WAY BIASED OR PREJUDICED.

An additional consideration also exists with regard to the question of retroactivity and that is the applicability of the harmless error doctrine to cases in which the jury selection process occurred prior to the Neil decision.

Florida Statutes §924.33 provides that no judgment shall be reversed unless the appellate court is of the opinion that error was committed that injuriously affected the substantial rights of the appellant and that it shall not be presumed that error affected those rights in such a manner. "While it may be difficult to determine if an error is injurious in a given case, that is what is required by §924.33." State v. Wilson, 276 So.2d 45, 47 (Fla. 1973).

In the present case, it cannot be said that any error under Neil injuriously affected Defendant's substantial rights. As noted previously, Defendant has never claimed that any of the jurors that were actually seated were in any way prejudiced or biased and there is no reason to believe that the jury in this case was anything other than completely fair and impartial. Since the opinion in Neil is based on the guarantee of Article I,

Section 16, of the Florida Constitution, to an impartial jury,[6] and since Defendant had an impartial jury, his substantial rights were not injuriously affected. Under these circumstances, the dictates of Florida Statutes §924.33 preclude reversal of the judgment.

It is of course true that the opinion in Neil is concerned with society's interest in not having racial groups systematically excluded from juries. Given this interest, it can be said that there exists a prophylactic value in reversing convictions when the dictates of Neil have been violated, even if there is no showing that any of the actual jurors were biased. Regardless of whether this is said to be the case generally, there can be no question that no prophylactic effect could be achieved by not applying the harmless error concept to the present case, inasmuch as the jury selection here occurred well before the Neil decision. Certainly, reversal of the present conviction will have no greater deterrent effect than did the opinion in Neil itself. Cf. United States v. Peltier, 422 U.S. 531, 540-541, 95 S.Ct. 2313, 2319-2320, 45 L.Ed.2d 374, 383-384 (1975), finding that the deterrent purpose of the exclusionary

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(6) Although not specifically stated by this court in Neil, it is likely that this court's holding in that case encompasses both the federal and Florida constitutional right to an impartial jury, as the two rights appear to be identical in scope. In interpreting Article 11 of the Declaration of Rights of the 1885 Florida Constitution, a provision that is, as regards the impartial jury provision, identical to the present Article I, Section 16, the provision upon which Neil was based, this court stated that the Florida constitutional guarantee "was not intended by the framers of the Constitution either to enlarge or abridge the rights of persons accused of crime." Blackwell v. State, 79 Fla. 709, 86 So. 224, 231 (1920).

rule is not served by applying retroactively a Fourth Amendment ruling that worked a "sharp break" in the law, since the law enforcement officer who conducted the search may not properly be charged with the knowledge that it was unconstitutional. See also United States v. Johnson, 457 U.S. 537, 560, 102 S.Ct. 2579, 2593, 73 L.Ed.2d 202, 220-221 (1982). Thus, when no claim is made of actual prejudice, the harmless error rule should preclude reversal in cases in which the jury selection occurred prior to the decision in Neil, without regard to the obviously more difficult question of whether such an analysis should also apply to cases in which the jury was selected after Neil was decided.

II

EVEN IF STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS DEEMED TO APPLY RETROACTIVELY, DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN REVERSED.

If this court decides that its decision in State v. Neil, 457 So.2d 481 (Fla. 1984) should apply retroactively, it should nonetheless conclude that no basis exists for the reversal of Defendant's conviction and that the district court's decision should therefore be reversed. This is true for each of several reasons.

A

DEFENDANT FAILED TO REQUEST AN INQUIRY AS CONTEMPLATED BY STATE V. NEIL, 457 SO.2D 481 (FLA. 1984), BUT ONLY OTHER, MORE DRASTIC REMEDIES.

In Neil, this court held that when a showing is made of a likelihood that peremptory challenges are being exercised solely on the basis of race, a party is entitled to request and receive an inquiry by the trial court as to the basis for the challenges.

As detailed in the Statement of the Case and Facts, Defendant, despite complaining repeatedly about the State's exercise of its peremptory challenges, did not ever request that an inquiry be conducted by the trial court. Each time that any mention was made of the alleged systematic exclusion of blacks by the State, Defendant either asked for no remedy at all, or he sought a more drastic remedy than that contemplated by Neil, such as the empanelment of additional blacks, the striking of the jury panel, a change of venue or the granting of additional peremptory challenges. Moreover, this is true despite the fact that Defendant's attorneys were obviously aware that an inquiry was the procedure contemplated by People v. Wheeler, 22 Cal.2d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the case cited to the court by the defense. Despite their knowledge in this regard, Defendant's attorneys asked only for other, more drastic, remedies not called for by Neil or Wheeler until after an inquiry is conducted and it is found that the questioned challenges cannot be justified.

There can be only one logical explanation for the approach taken by the defense in this respect, recognition of the fact that if the State had been called upon to justify its

challenges, it would have been able to do so satisfactorily. By proceeding in this manner, the defense was able to have a record on appeal which in the view of the district court demonstrated a prima facie case of discrimination, but which did not reflect the State's reasons, whether sufficient as a matter of law or not, for excluding the prospective black jurors.

It is therefore apparent that the trial court here did not err. Regardless of whether it is said that a basis did exist for an inquiry of the nature required by Neil or Wheeler, the fact remains that the only rulings the trial court made were the denials of Defendant's motions for more drastic sanctions than those mandated by Neil or Wheeler . It was not error to deny those motions, as relief of nature sought by Defendant would have been inappropriate without an inquiry that resulted in the satisfaction of the requirements set by those cases.

Since Defendant made no request for an inquiry, he has not preserved for review the question of whether an inquiry should have been conducted. It is well settled in Florida that in order for an issue to be considered on appeal, it must have been presented to the trial court. See Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Barber, 301 So.2d 7 (Fla. 1974).(7)

This requirement cannot be satisfied by making a motion for a more severe sanction than is appropriate. In Justus v.

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(7) Of course, when error is fundamental in nature, an objection is not required to preserve an issue for appeal. There can be no question that the error here is not fundamental. See Neil, supra, 457 So.2d at 486, "A party concerned about the other side's use of peremptory challenges must make a timely objection," citing Castor v. State, 365 So.2d 701 (Fla. 1978). Neil, supra, 457 So.2d at 486, n. 9.

State, 438 So.2d 358 (Fla. 1983), a challenge was made to the propriety of a statement made by and the conduct of a baliff at the time the court ordered a recess. The defense moved for a mistrial. On review, this court found no reversible error in the denial of the mistrial and concluded that by not asking that the court query the prospective jurors about the effect of the remark and conduct or that the court give a curative instruction, defense counsel waived any impropriety in not taking some curative measure.

The reasoning of Justus is applicable here. In each case, the defense made no request for the appropriate remedy and asked only for a more severe sanction than was appropriate. Thus, just as in Justus, it should be concluded that Defendant has waived the right to have considered the question of whether the appropriate remedy should have been utilized.

B

DEFENDANT FAILED TO OBJECT WITH SUFFICIENT SPECIFICITY.

In the Statement of the Case and Facts, the State has detailed the occasions upon which the defense complained about the manner in which the State exercised its peremptory challenges. It is clear that most of the complaints were either merely statements as to the factual circumstances or general objections to the alleged systematic exclusion of blacks, without any legal ground or basis for the objection being stated at all. Plainly, objections of this nature are insufficient to preserve the issue for review. See Thomas v. State, 424 So.2d 193 (Fla. 5th DCA 1983); Hufman v. State, 400 So.2d 133 (Fla. 5th DCA

1981); Darrigo v. State, 243 So.2d 171 (Fla. 2d DCA 1971). In addition, no ruling was made by the trial court on these objections and statements and they therefore cannot form a basis for reversal. See Richardson v. State, 437 So.2d 1091 (Fla. 1983); Oliva v. State, 354 So.2d 1264 (Fla. 3d DCA 1978).

On one occasion, Defendant's attorneys cited the court to People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (T 503),[8] and made the following statements.

> But it seems to me that we talk about Constitutional Rights of every people. We do have ethnic divisions historically, and all we are asking is a representative group of blacks on this jury.
>
> * * *
>
> ... I do think that we are kidding ourselves when we say that Dr. Jones can get a fair trial as we all look at it in the Constitutional concept with an all white jury.
>
> (R 504-505)

It is well settled in Florida that objections must be made with sufficient specificity to apprise the court of the potential error and preserve the point for appellate review. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978). The grounds set forth by Defendant are insufficient to meet this requirement. At no time did the defense ever assert that any specific provision of the Florida or

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(8) See n. 2, supra.

United States Constitution was being violated. The references to Wheeler and to constitutional rights and concepts did not apprise the court of the grounds in support of Defendant's position. The opinion in Wheeler is based on the California Constitution, which of course has no effect in Florida. The broad references to constitutional rights and concepts is not sufficiently specific to preserve an issue for review. As noted in Kujawa v. State, 405 So.2d 251, 252, n. 3 (Fla. 3d DCA 1981):

> Kujawa points to the fact that his counsel remarked with respect to the instruction: "... we feel it violates our client's constitutional rights." It is time to point out that such an objection is not, in our view, a distinct statement of grounds. A trial court should not be required to guess which phrase, clause, or amendment of the Constitution is offended.

Thus, it is apparent that Defendant's objections were not sufficiently specific to advise the trial court of the grounds asserted in support of them. Moreover, to the extent that Neil might be read to interpret the Florida Constitution more broadly than the United States Constitution, [9] the application of this doctrine is particularly appropriate here. The defense's manner of proceeding leaves open the question of whether the broad constitutional references were intended to

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[9] The State does not believe that Neil makes this distinction. See n. 6, supra.

encompass the Florida Constitution or not.[10] Accordingly, it should be concluded that the objections made in the trial court were not sufficiently specific to preserve the present issue for review.

C

THE PRELIMINARY SHOWING REQUIRED BY STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) BEFORE ANY RELIEF IS APPROPRIATE WAS NOT MADE HERE.

The State submits that the record in this case does not reflect a showing of likelihood that the State's peremptory challenges were exercised solely on the basis of race and that therefore Defendant was not entitled to any relief, without regard to the retroactivity or preservation questions previously discussed in this argument.

Although the State was not called upon to explain its use of peremptory challenges, certain assumptions can be made from the record.

As discussed in greater detail in the Statement of the Case of Facts, the reasons for the striking of the majority of the prospective black jurors are easily apparent from the record. Juror Eugene Walker was a teacher in the very school system headed by Defendant. Moreover, his wife was also a teacher in

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[10] It is quite likely that they were not so intended. As pointed out in n. 6, supra, the Florida constitutional right and the federal constitutional rights have been considered coextensive. Obviously, if Neil is deemed a break from that principle, a specific objection under the Florida Constitution would be necessary to preserve a claim under Neil.

that school system and he came into the case with an opinion already formed as to guilt or innocence. One of the defense witnesses was the boss of juror Bessie Mae Forest. Juror Kevyn Thomas Pope, a young man, had been exposed to speculation by his parents that the charges in this case were racially based and he expressed the opinion that Defendant was "a black man ... trying to do the best he can." There can really be little dispute that legitimate reasons exist for the use of peremptory challenges on these three individuals.

The record is less clear with regard to the reasons for excluding Jurors George Mathis and Cleveland Mills, but the record does indicate possible reasons why those individuals were excused.

Mr. Mathis contradicted himself as to whether he had heard anything about the case and then admitted to only hearing about the case on one occasion. This statement was inherently incredible in light of the massive publicity and the widespread interest in the case. It raised the possibility, particularly in light of the contradictory statements, that Mr. Mathis was lying, possibly in an effort to get on the jury. At the very least, it reflected that Mr. Mathis was an individual entirely out of touch with what was occurring in the community, thus raising a question as to whether Mr. Mathis was sufficiently aware or intelligent to sit on an extraordinarily complex case such as this one.

Mr. Mills was aware that suggestions had been made that the accusations in this case "were blown up on a racial scale." While he stated that he had not formed an opinion in that regard, his awareness of the existence of these accusations could very

well have put him in a position in which he would have been considering the State's motives and viewing the evidence with considerations other than just guilt or innocence in mind.

The State therefore maintains that the record reflects legitimate reasons to support the exercise of each of the peremptory challenges. Moreover, the State contends that even if this court should conclude that the record does not reflect a sufficient reason for one or more of the challenges, the showing required by Neil cannot be said to have been met. As noted in Neil, "the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories." 457 So.2d at 487. Since the reasons apparent from the record alone are sufficient to support most, if not all, of the peremptory challenges, the most that could be said is that the record does not reflect reasons to support the use of perhaps one or two challenges. Under the above quoted language of Neil, this cannot be said to be a sufficient showing to require an inquiry. Cf. People v. Rousseau, 179 Cal. Rptr. 892, 129 Cal.App.3d 526 (1982), holding that the unexplained striking by the prosecution of the only two black jurors did not establish a prima facie showing of systematic exclusion.

D

IF ANY REMEDY IS APPROPRIATE, THE REMEDY SHOULD BE REMAND FOR A HEARING AS TO THE BASIS FOR THE PROSECUTION'S EXERCISE OF ITS PEREMPTORY CHALLENGES, NOT REVERSAL FOR A NEW TRIAL.

Should this court conclude that the district court correctly found that Defendant is entitled to relief on his

claim, it should nonetheless conclude that the appropriate relief is remand for a hearing as to the basis for the prosecution's exercise of its peremptory challenges, not reversal for a new trial, as ordered by the district court. This is so because in light of the lack of an request for an inquiry into this subject, the State was never put on notice during the trial that the failure to conduct an inquiry into the State's rationale would be a subject for review and thus the State was never aware of a need to put its reasons into the record. The only issues that the State could know were subject to review were the issues actually raised by Defendant, issues regarding claims that certain relief was compelled based on the striking of black jurors alone. Given the factual circumstances of this case, the State should be given the opportunity to state its reasons in a hearing conducted at this time. As pointed out in the State's Notice of Supplemental Authority filed in the district court on or about October 30, 1984, the Fourth District Court of Appeal employed such a procedure in Franks v. State, case number 84-410, order filed October 15, 1984.[11] In light of the unusual circumstance of Defendant never requesting an inquiry in the present case, it would seem that the approach utilized in Franks would be particularly appropriate here.

Another factor also shows the particular applicability of this approach to the present case. Because of the great community interest in the case, it is likely that the memories of the participants will still be accurate, and that little

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[11] After the hearing on remand, the Fourth District found that Neil did compel reversal under the facts of the case. Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985).

difficulty would be encountered in reconstructing the reasons for the peremptory challenges.[12]

Accordingly, the State submits that if any remedy is deemed appropriate, that remedy should be remand for a hearing, not, as ordered by the district court, reversal for a new trial.

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[12] In Hernandez v. State, ___ So.2d ___ (Fla. 3d DCA 1985), case no. 84-685, opinion filed August 6, 1985 [10 F.L.W. 1876], the court rejected the State's argument that the case should be remanded for a hearing. Judge Pearson's concurring opinion makes it clear that the reason for this rejection was the fact that in light of the passage of time, a hearing would not likely accurately reconstruct the jury selection procedure. Given the nature of the present case, this is not true here. Moreover, there is nothing to lose by having a hearing. If the reasons for the challenges can be accurately ascertained, the case can be properly reviewed and the interests of justice will have been served. If they cannot be ascertained, the case can then be reversed for a new trial.

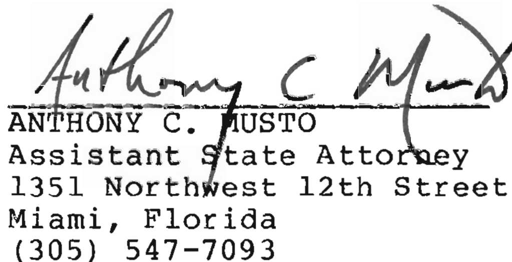
CONCLUSION

Based upon the foregoing argument and authorities, the State respectfully submits that the district court erroneously reversed Defendant's conviction and that this court should therefore reverse the district court's decision and remand this cause with directions to reinstate Defendant's conviction.

Respectfully submitted,

JIM SMITH
Attorney General

JANET RENO
State Attorney



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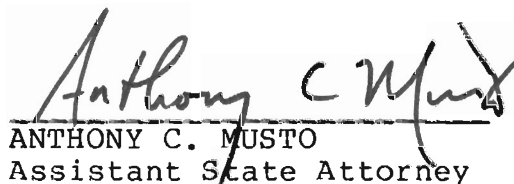
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded to Law Offices of A. John Goshgarian, 35 Northeast 17th Street, Suite 114, Miami, Florida 33132, on this the 17th day of September, 1985.



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