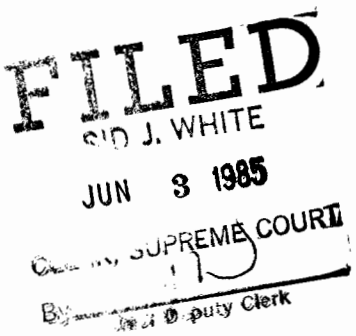
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,046



THE STATE OF FLORIDA, :

Petitioner, :

vs. :

JOSE CASTILLO, :

Respondent. :

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF OPPOSING JURISDICTION

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INTRODUCTION

As Petitioner, the State has attempted to contaminate the jurisdictional issue by exclusively arguing matters which are not expressed in the decision of the District Court of Appeal. To this end, the State has violated Rule 9.120, Fla.R.App.P., by cluttering its Appendix with arguments, motions and responses not addressed in the brief written decision of the district court of appeal. This impropriety has been addressed by Respondent in a Motion to Strike Improper Appendix and Substitute Corrected Appendix, which motion is currently pending before the Court.

To be sure, neither issue argued in the Petitioner's Brief on Jurisdiction is expressed in the decision of the district court of appeal and the decision is not in express or direct conflict with State v. Neil, 457 So.2d 481 (Fla. 1984).

ISSUES PRESENTED FOR REVIEW

I.

PETITIONER HAS FAILED TO DEMONSTRATE THIS COURT'S JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION IN CASTILLO v. STATE, 466 So.2d 7 (Fla. 3d DCA 1985).

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT EXPRESS A HOLDING THAT A TIMELY OBJECTION MAY BE MADE TO THE JURY PANEL PURSUANT TO STATE v. NEIL, 457 So.2d 481 (Fla. 1984), AFTER THE JURY IS SWORN, THUS IT DOES NOT CONFLICT WITH THE NEIL DECISION.

III.

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT EXPRESS A HOLDING THAT STATE v. NEIL, 457 So.2d 481 (Fla. 1984) SHOULD BE RETROACTIVELY APPLIED, THUS IT DOES NOT CONFLICT WITH THE NEIL DECISION.

STATEMENT OF THE CASE AND FACTS

The entire Statement of Case and Facts submitted by the Petitioner is in error. Most of it is unsupported by the decision of the district court of appeal (Corrected Appendix, Exhibit A) and part of it gives an incomplete recitation of the holding.

Specifically, the decision of the district court does not mention whether or not Mr. Castillo was tried before or after this Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984); it does not mention the crime or crimes of which he stood convicted or appealed; nor does it mention at what point in the proceedings Mr. Castillo objected to the systematic exclusion of blacks from his jury. None of these facts are set forth in the decision of the district court.

Not only did the district court reverse Mr. Castillo's conviction based on Andrews v. State, 459 So.2d 1018 (Fla. 1984) and State v. Neil, supra, but it also found prosecutorial misconduct during the cross-examination of a defense witness. This led to an additional basis for reversal under Harris v. State, 447 So.2d 1020 (Fla. 3d DCA 1984) and Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982). [Appendix, Exhibit A.]

ARGUMENT

I.
PETITIONER HAS FAILED TO DEMONSTRATE THIS COURT'S JURISDICTION TO REVIEW THE DISTRICT COURT'S DECISION IN CASTILLO v. STATE, 466 So.2d 7 (Fla. 3d DCA 1985).

Petitioner's brief on jurisdiction does not establish conflict jurisdiction under the 1980 Amendment to Article V, Section 3(b)(3) of the Florida Constitution. Ignoring the dramatic impact of the Amendment, Petitioner would have this Court return to the days before the Amendment to find conflict jurisdiction based solely on motions and responses filed by the litigants in the district court of appeal. However industrious this attempt might seem, it violates the terms of the Florida Constitution.

The addition of the term "expressly" to Article V, Section 3(b)(3) is a change of substance and not merely of form. As former Chief Justice England described it, the change has a "profound effect" in that the Supreme Court's "discretionary jurisdiction is now predicated on written opinions of the district courts on points of law brought for review . . ." England, Hunter Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U.Fla.L.Rev. 147 (1980) at 176-177. This Court, in Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), made a similar observation:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to."

Quoting from Justice Adkins, in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970), the Jenkins Court provided this succinct statement of the Constitutional standard of conflict jurisdiction:

> It is conflict of decisions, not conflict of opinions or reasons that supplies the jurisdiction for review by certiorari. At 1359.

The requirement of express and direct conflict of "decisions" has been ignored by the Petitioner. In its stated issues, the Petitioner merely argues a conflict between the "opinion" of the district court and other decisions. (See: Brief of Petitioner on Jurisdiction; "Issue Presented For Review", page 2; "Summary of Argument", page 4; "Argument", pp. 5-7). If judgment on the pleadings were possible in this Court, it would be appropriate on the face of Petitioner's Brief.

But even if the Petitioner's issues alleged a conflict in decisions, the allegation could not withstand scrutiny. In eight pages of brief, the Petitioner could not cite a single written word in the decision of the district court which conflicts, even

implicitly, with any other decision of any other case. Nor has the Petitioner demonstrated that the reasons set forth in the decision below conflict with any other decision. Instead, the Petitioner attempts to create a straw man by arguing matters not contained in the decision, in order to show that conflict should exist.

The decision of the district court of appeal states no facts concerning the jury issue. It does not analyze the law. It merely applies the law of this Court to an unknown fact pattern. The Per Curiam decision begins:

> On the authority of Andrews v. State, [citation omitted], State v. Neil, [citation omitted], and City of Miami v. Cornett, [citation omitted], we reverse the defendant's conviction and sentence.

The footnote and remainder of the decision concern matters unrelated to the conflict alleged by the Petitioner. Express and direct conflict of decisions can hardly arise from such limited language.

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT EXPRESS A HOLDING THAT A TIMELY OBJECTION MAY BE MADE TO THE JURY PANEL PURSUANT TO STATE v. NEIL, 457 So.2d 481 (Fla. 1984), AFTER THE JURY IS SWORN, THUS IT DOES NOT CONFLICT WITH THE NEIL DECISION.

The entirety of the district court's discussion of the facts and holding on the jury selection issue is found in the following quotation:

> On the authority of Andrews v. State, [citation omitted], State v. Neil, [citation omitted], and City of Miami v. Cornett, [citation omitted], we reverse the defendant's conviction and sentence.

A footnote observes:

> 1. A sub-issue under this point is whether a defendant may protest that an identifiable group other than his own is being systematically excluded. The question was answered affirmatively by the United States Supreme Court in Peters v. Kiff, [citations omitted], which held that a criminal defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race from service on a grand or petit jury.

The remainder of the brief decision discusses other grounds for reversal on which the Petitioner does not allege conflict jurisdiction.

Where is there expressed a single word about timeliness of objections pursuant to Neil. As the immortal Casey Stengel might have said, "Nowhere -- that's where."

The idea that the decision of the district court expressly and directly conflicts with Neil on the issue of timeliness of objections is fanciful at best and has

no support in the decision itself. Since this Court is obliged to find conflict, if any, based upon the words expressed in the decision, Jenkins v. State, supra, it must be concluded that express and direct conflict have not been demonstrated by Petitioner.

III.

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT EXPRESS A HOLDING THAT STATE v. NEIL, 457 So.2d 481 (Fla. 1984) SHOULD BE RETROACTIVELY APPLIED, THUS IT DOES NOT CONFLICT WITH THE NEIL DECISION.

Casey's proverbs apply with equal force to the allegation that the decision of the district court expresses a holding that Neil v. State, supra, should be applied retroactively. Certainly the decision does not say this. Nor does it detail facts which explain that Mr. Castillo was tried before the Neil decision. Historians, jurists and members of the Bar can read this decision forever and never be lead to the conclusion that the district court of appeal has applied Neil retroactively.

The decision merely says that, based on the authority of Andrews and Neil, Mr. Castillo's conviction and sentence must be reversed and remanded for a new trial. No express or direct conflict with Neil can be found in this language.

CONCLUSION

The Petitioner seeks to have this Court find jurisdictional conflict where none exists. Improperly filling the Appendix with motions of litigants in the district court does not change the Constitutional standard by which this Court must determine conflict jurisdiction. There is no reasonable basis for a determination that the simple 14-line decision of the district court of appeal conflicts in any way with the decision of Neil v. State, supra. The Court should, therefore, refuse to invoke its jurisdiction to review the decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF OPPOSING JURISDICTION was served by mail to CHARLES M. FAHLBUSCH, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 30th day of May, 1985.