No Request Case

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,046

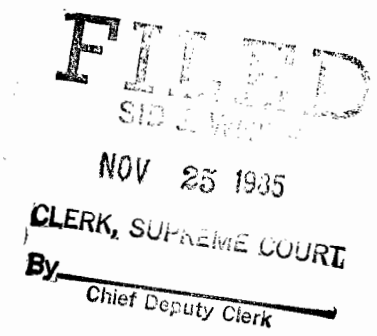
THE STATE OF FLORIDA,

Petitioner,

vs.

JOSE CASTILLO,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, Jose Castillo, was the Defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County Florida and was the Appellant in the District Court of Appeal of Florida, Third District. The petitioner, the State of Florida, was the prosecution in the Circuit Court of the Eleventh Circuit and the appellee in the District Court of Appeal. In this brief the Respondent will be referred to by name or as he appears before this Court. The petitioner, the State of Florida, will be referred to as the State or as it appears before this Court.

References to the Record on Appeal will be designated by the symbol (R.). References to the Transcript of Court Proceedings will be designated by the symbol (T.).

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Jose Castillo was charged by Information with the attempted second degree murder of Jose Morales and the second degree murder of his wife, Idolida Morales, during an altercation after a traffic accident on August 8, 1980. Castillo was arrested on November 11, 1983, [R.7] and the Information was filed on November 29, 1983 [R.1-2A].

The trial began on March 26, 1984, and lasted until March 29, 1984. The jury then went into deliberation, and returned guilty verdicts on both counts [R.193-194]. The Defendant timely filed a motion for new trial [R.195-196a] which was denied. Jose Castillo was adjudicated guilty of attempted second degree murder as a first degree felony and sentenced to thirty (30) years in prison with a minimum mandatory of (3) three years without parole. He was also adjudicated guilty of second degree murder as a life felony, sentenced to a consecutive 134 years with a consecutive minimum mandatory of three years without parole [Transcript of Sentencing Hearing, 4/19/84, page 19].

The Respondent promptly filed a Notice of Appeal to the Third Circuit District Court of Appeal of Florida [App., Exh. B]. Jose Castillo raised four (4) points on appeal: first, whether or not the trial court erred by not declaring a mistrial based on the State's misuse of its peremptory jury challenges to systematically exclude black persons from the jury; second, whether or not the trial court erred by refusing to order a pre-trial line-up and by not limiting the in-court identification of the Respondent; third, whether or not the trial court erred by not granting the Respondent a new trial based upon substantial prejudice to the Respondent caused by prosecutorial misconduct; and, finally, whether the trial court erred by upwardly reclassifying the convictions, enhancing the statutory punishment, sentencing the Defendant to minimum mandatory sentences and sentencing the Respondent to

consecutive minimum mandatory sentences. Oral argument was on October 13, 1984. The court filed its opinion on March 12, 1985, reversing the case and remanding for a new trial [App., Exh. C].

On March 20, 1985, the State made a motion for Certification of Question to the Supreme Court [App., Exh. D], and also made a Motion for Rehearing and Clarification and a Motion for Rehearing En Banc. On March 25, 1985, the State filed an ammended Motion for Rehearing and Clarification, and Motion for Rehearing En Banc [App., Exh. E].

The Respondent filed a response to the State's motion for Certification of Question and the amended motion for rehearing and clarification and motion for rehearing en banc on March 27, 1985 [App., Exh. F]. On April 16, 1985, the Third District Court of Appeal denied the Petitioner's Motion for Rehearing [App., Exh. G]. Petitioner filed a Notice of Petition for Discretionary Review to this Court on May 13, 1985 [App., Exh. H] and filed its brief on jurisdiction on May 17. 1985. The Respondent filed his brief opposing jurisdiction on May 30, 1985.

On August 23, 1985, this Court entered an order granting discretionary review [App., Exh. I].

STATEMENT OF THE FACTS

Jose Castillo was arrested on Novmeber 11, 1983, more than three years after the alleged crime [R.40-114]. It was obvious to both the police investigators and other prosecutors that the only issue at trial would be the identity of the assailant; despite this, no physical line-up was ever conducted [R.259, 262, 263, 286, 294, 295, 327-328]. Prior to trial the defense asked the State to conduct a live line-up, but the State adamantly refused [T.4-5].

The defense repeatedly requested that the court order a pre-trial physical line-up [R.263, 294-295]. In order to emphasize the singular importance

of the identification issue at trial, the defense offered to stipulate to all of the facts of the case, other than the Respondent's identification, if only a pre-trial physical line-up were held [R.294-295]. The State responded to the motion by saying that it usually follows up a photographic line-up identification with a live line-up, but refused to do one here because they were afraid the witnesses could not identify Castillo in a line-up [R.263].

The defense reiterated that an in-court identification would be unfairly suggestive and a line-up was necessary to avoid the suggestiveness of an in-court identification [R.285-286]. The court ruled that it did not have discretion to order a line-up and denied the defense request [R.375].

The Respondent moved to suppress the in-court identification and the Court convened an evidentiary hearing [R.117-119a].

Mr. Morales was the first witness brought into the courtroom to testify on the Defendant's motion [R.231]. Mr. Castillo's presence had been waived by defense counsel with the court's permission in order to avoid, during this hearing, exactly what he wished to avoid at trial; a suggestive showup [R.297]. The prosecutor stood up during direct examination by defense counsel, and, cloaked in the form of an objection, told the witness that the Respondent was not in the courtroom:

> Q. (MR. O'DONNELL): Do you see the person in the courtroom today who shot you then?
>
> (MR. SCOLA [the prosecutor]): Judge, I am going to object --
>
> (MR. O'DONNELL): Now, just a minute.
>
> (MR. SCOLA): He knows that he is not here.

[R.339]. Defense counsel objected to Mr. Scola's intentional efforts to coach his witness in such an outrageous fashion, but the court overruled the objection [R.339-340].

The testimony at this pre-trial hearing caused the trial court to revisit the issue of conducting a physical line-up:

> THE COURT: . . . The only thing I am troubled about is the unbending attitude of the State Attorney here as far as where you have all these people who have at least expressed a willingness to try to do this physical line-up.

[R.374-375]. However, the court finally concluded that it "did not have the legal authority to force the State to hold a line-up" [R.375] and denied the motion.

During jury selection, the State abused its peremptory challenges by systematically excluding blacks from the jury. Even after the defense had used all of its peremptory challenges including an extra challenge that the court had granted to the defense, the State challenged another black juror, the alternate [T.169-170].

The State used five of its six challenges to exclude black persons from the panel. Because these challenges were exercised after the defense had exhausted all of its challenges, the prosecutor's plan to strike all blacks worked to perfection [T.165-177]. The jury was sworn immediately [T.172]. The trial judge then asked counsel for any further matters [T.175]. The defense promptly objected and requested a mistrial based upon the systematic exclusion of blacks from the jury by the State [T.175] and that this exclusion was done in a manner and at a time when they were incapable of remedying the situation [T.176]. The State responded to the motion:

> It wasn't until they started to systematically exclude the Latins on the panel that <u>I decided that there were other options which would be more preferable to the State</u>.

[T.176] (Emphasis added.) The court responded by stating that until the law changed, although there are present efforts to remedy this type of situation,

he was powerless to prevent the State's actions. [T.176]. The trial court denied the defense motion [T.177].

Officer Bill Press was the first witness called by the State. Officer Press testified that on August 8, 1980, at approximately 11:00 a.m., he was dispatched to Bird Road and 87th Avenue [T.217-218], and he was the first officer to arrive at the scene [T.218]. Barbara Matute was the officer's original reporter on the scene [T.226]. She described the assailant as a Caucasian, Latin male, approximately 5'9", 180-200 pounds, with brown hair and a brown mustache [T.227]. She further described him as wearing blue jeans and a light blue shirt [T.227]. Ms. Matute also described the vehicle that the assailant drove as being a Blazer-type vehicle [T.227-228]. The vehicle was found about two and one half hours later at a nearby residence [T.228].

The next witness for the State was Leonardo Vivancos, the person at whose residence the Blazer-type vehicle was found [T.237, 244-245]. He testified that he had previously met a man driving a Blazer-type vehicle at a gas station in order to discuss buying the vehicle [T.239-240]. Thereafter, they made arrangements to meet at his home to discuss the purchase of the truck [T.240-241].

The driver of the truck, "Joe", was described by Mr. Vivancos as having "dark colored hair, not too tall, not heavily set, muscular-type, dark and had a mustache" [T.241]. The State asked the witness to look around the courtroom and see if he could identify the person he knew as "Joe", the driver of the vehicle [T.246]. (The Respondent was present in the courtroom). The witness said that "Joe" was not in the courtroom [T.246]. The State asked Mr. Vivancos to examine State Exhibit 1-J, the driver's license photograph used by other witnesses to identify the Defendant, Jose Castillo [R.246]. Mr. Vivancos said that the person in the photograph was not the person that he had

met on those two occasions [T.246]. On cross-examination, Mr. Vivancos further clarified that the person whom he met at the gas station about buying the Blazer and who abandoned the truck at his house and broke the fence was not the Respondent, Jose Castillo [T.247-248].

The next witness called by the State was Jose Morales, one of the two victims. He first described how the accident took place. He had been driving west on Bird Road, when his car was involved in a minor traffic accident at 87th Avenue. After the accident, he, his wife and the driver of the Blazer-type vehicle that was involved in the accident with him got out of their respective vehicles, and an argument ensued. At that point the assailant went back to his vehicle, retrieved a gun and shot Mr. Morales and his wife [T.250-254]. The prosecutor then asked Mr. Morales if he could identify the gunman by looking around the courtroom [T.258]. Mr. Morales pointed to Jose Castillo [T.258]. During the identification, the setting in the courtroom was as follows:

> The persons located inside the courtroom were: **JUDGE MASTOS**, wearing judicial robe and sitting behind the bench; the **JURORS**, who were all seated in the jury box; the **BALIFF**, dressed in a uniform; a male court reporter, **ARTHUR W. BILLOTTI**, who was seated in front of his stenographer machine throughout the entire proceeding; a black male **DEPARTMENT OF CORRECTIONS OFFICER** who was in uniform; **ASSISTANT STATE ATTORNEYS, ROBERT SCOLA** and **GARY ROSENBERG**; a **BLACK FEMALE COURT CLERK** who administered the oath to each witness prior to their testifying; **DEFENSE ATTORNEYS RICHARD GERSTEIN** and **EDWARD O'DONNELL** who sat at the defense table; and the Respondent, **JOSE CASTILLO**, the only person in the courtroom who had the appearance of a Latin male.

[R.198-199].

On cross-examination, Mr. Morales confirmed the fact that he had never been to a live line-up. Mr. Morales also stated that there were some differences between Jose Castillo and the assailant, stating that his hair was

different, and that he was fatter [T.260]. Then, Mr. Morales asked the Respondent to stand up, as he looked him over. Then he said "it looks like the same person, but there have been a lot of changes, but the physical appearance is the same" [T.260-261]. Mr. Morales further stated that the assailant was not wearing glasses, was wearing cut-off dungerees and wore tennis shoes [T.263]. This description of the assailant given by Mr. Morales is important, since it was different than that given by other witnesses.

The next witness called by the State was Armando Matute. He, his wife, and daughter were in Morales' car at the time of the accident [T.282]. He described the assailant as 28 or 30 years old, with black hair, a mustache and well-shaven [T.285]. Although Mr. Matute claimed that he, his wife and his daughter had gotten out of the car after the accident [T.283, 392], Angel Nieves, the lead investigator, testified that his investigation showed that all three Matutes stayed in Morales' car during the accident and shooting [T.437-438]. Also, Rowland Neil, an independent eyewitness, testified that only Mr. and Mrs. Morales left the car at the time of the accident and shooting [T.342-343].

The following took place when the prosecutor asked Mr. Matute to identify the gunman: (The setting at this time was the same during the identification by Mr. Morales)

> Q. (MR. SCOLA): At this time, Sir, look around the courtroom very carefully, Sir. And if you have to stand up to do so, tell me, as you look around the courtroom today if you can see the person who shot Mr. and Mrs. Morales?
>
> A. (MR. MATUTE): Now this occurred four years ago. And it was a very short time. But I will try, anyway.
>
> Q. (MR. SCOLA): All right, Sir. Go ahead. Just do your best.
>
> A. (MR. MATUTE): More or less this gentleman (indicating).

Q. (MR. SCOLA): Which gentleman?

A. (MR. MATUTE): More or less this gentlemen.

Q. (MR. SCOLA): What is he wearing?

A. (MR. MATUTE): It looks like him. Could you stand up please?

Q. (MR. SCOLA): Is this the man?

A. (MR. MATUTE): That's the man, yes. Yes that's the man.

[T.290-291].

On cross-examination, Defense Attorney O'Donnell asked Mr. Matute if he remembered being in the courtroom several days earlier at a pre-trial hearing and, when asked if he saw the person in the courtroom who did the shooting, he picked out Assistant State Attorney John Kastrenakes, stating that he "looks like" the gunman [T.291-292]. Mr. Matute admitted this "mistake." [T.292].

Additionally, Mr. Matute testified that he had never been taken to a live line-up after the incident, but stated that he had been willing to do so [T.293]. Also, Mr. Matute's description of the gunman was totally contradictory to the description given by Mr. Morales. He described the gunman as wearing long pants, being short, having a slight to medium build, around 5'7" and about 155 pounds [T.294-296].

The prosecution's next witness was Juana Matute, another passenger in the Morales' vehicle at the time of the incident [T.299-300]. Mrs. Matute described the gunman as a handsome person not too tall and not very short, with dark colored hair, very white skin and a mustache [T.304]. During the in-court identification she stated:

> THE WITNESS: It looks like this gentleman. It looks like him, it looks like him but it has been changed. He has changed his hair. Can you take off your glasses (indicating the Respondent)? It looks like him. You have to understand that this has been four years that has gone by and I cannot guarantee because he has changed a little bit.

MR. ROSENBERG: Okay.

THE WITNESS: But it looks like him.

[T.309] (Emphasis added.)

During cross-examination, Mrs. Matute looked through the Respondent's eyeglasses, and acknowledged they were real [T.310]. She further stated that she did not remember the gunman wearing glasses and never told the police that he was wearing glasses [T.311-312]. She also agreed that she had testified several days earlier, at the pre-trial hearing, that a courtroom observer resembled the gunman [T.312-313]. She also stated that she had never been to a live line-up, but would have gone to one if she had been asked to do so [T.315].

Barbara Matute, Mr. Morales' goddaughter, was the next witness called by the State [T.318, 323, 324]. She described the gunman as having black/brown hair, as being chunky, and having a long mustache, and that he was wearing a light colored T-shirt and jeans [T.329].

Thereafter, Barbara Matute identified Jose Castillo as the gunman, and voluntarily stated that she was positive about it [T.334]. However, after stating that her memory was perfect about the entire incident, she was unable to recall whether or not the gunman had worn glasses [T.335-337].

The State's next witness was Rowland Neil, an independent eyewitness to the accident [T.342]. He testified that he could not see the gunman's face [T.344]. He stated that he could see the back of him and described the gunman as being of medium height, heavy set, with dark hair [T.344]. On cross-examination, Mr. Neil's testimony contradicted the testimony of the Matutes', because he said that only one man and one woman got out of the Morales' car during the incident, and that two older people and two children stayed inside the station wagon during the incident [T.346-347]. This testimony is impor-

tant because it questions the ability of the Matutes to have seen the gunman's face, as they testified they had, since their vantage point was vastly different depending on whether they were in or out of the car.

Officer Michael McAlhaney, a member of the Mobile Crime Scene Section of the Metro-Dade Police Department, was the next witness called by the State. His duties include taking photographs and lifting fingerprints [T.351]. He lifted latent fingerprints from the Blazer located at Mr. Vivancos' house [T.352]. He testified that he did not know at what time the prints were placed on the vehicle, and their location was consistent with someone standing outside of the vehicle, talking to another person sitting in the driver's seat [T.352-359]. He also admitted that there could have been someone else behind the wheel of the Blazer at the time of the incident [T.359]. Also, he testified that the only latent prints he took were from the outside of the vehicle [T.359], and that he took 38 of them, many of which did not belong to the Respondent [T.359].

James Galen, another police technician, testified next. He also lifted latent fingerprints from the Blazer, but from the inside of the vehicle, and also took photographs [T.366-367]. He testified that some of the latent prints were lifted from a musk oil bottle in the console [T.367-370].

Police Technician Richard Laite gave his expert opinion that the four latent prints lifted by Michael McAlhaney from the outside of the Blazer were Jose Castillo's [T.379]. He also testified that the latent prints lifted from the musk oil bottle was Jose Castillo's [T.380]. Of the four prints lifted from the inside of the vehicle only one was found to be of comparison value and 19 others were of comparison value [T.382-384] of which five were identified as belonging to Leonardo Vivancos, and two belonged to a person named "Jose Vanos" [T.386]. This left twelve (12) prints of comparison value unidentified [T.388].

Officer Richard Albrecht found the murder weapon in waters near Crandon Park [T.395]. Technician Robert Kennington testified that the bullets found in Mr. and Mrs. Morales were shot from the gun found by Officer Albrecht [T.401].

The next witness, Investigator Angel Nieves, testified that he found the Defendant's Florida Driver's License in the console of the Blazer truck [T.404]. He testified further that he took this driver's license photograph, and used it to prepare a photographic line-up to show to the witnesses [T.407]. Mr. Morales, Mr. and Mrs. Matute and their daughter identified this photograph of Jose Castillo as the assailant [T.407-418]. This was the only identification procedure ever used other than the in-court identifications.

On cross-examination, Detective Nieves testified to the witnesses' descriptions of the assailant that were given at the scene of the crime. Armando Matute told him that the gunman was a white male, with a stocky build, black hair and appeared to be in his mid-30's [T.433]. Mr. Matute's description made no mention of the gunman having facial hair or glasses [T.433-434]. Juana Matute said that the assailant was between 22 and 25 years of age, approximately 5' to 5'4", with brown hair and a mustache, and no weight was given [T.436]. Barbara Matute gave no description to Nieves [T.434]. Jose Morales said that he had dark hair, was about 5'8", and about 150 pounds or more, with a mustache and wearing blue jeans and a colored top. No mention was made of his wearing glasses [T.436].

Nieves' investigation also proved that none of the Matutes left the vehicle at the time of the accident or shooting [T.437-438]. This was contrary to their testimony in court.

Detective Anthony Soto testified next. He arrested Jose Castillo, who said that his name was Mario Palov [T.451-452]. In fact, he provided a

Florida Driver's License, a vehicle registration card and a social security card in that name [T.452].

On cross-examination, Detective Soto admitted that upon arrest, Jose Castillo said: "you are wrong; you've got the wrong guy; you're not going to get the right guy; you are not going to get the right guy." [T.464-465]. He repeated these phrases two times right after his arrest.

After this witness, the State rested [T.465]. Thereafter, the defense made a motion for judgment of acquittal, which was denied [T.471-476].

The defense presented three (3) witnesses. The first was Michael McCloskey. He was an independent eyewitness to the entire accident and shooting [T. 491]. He testified that he saw the person who was driving the station wagon reach into the car and pull out what looked like "channel-locks"[1] [T.492-493]. He described the gunman as about 5'5" or 5'7", about 160 or 180 pounds, with a husky build, mustache and dark brown hair, wearing jeans and a pullover sweatshirt or T-shirt [T.494]. He testified that he told the police that if he had seen the gunman again, he would be able to identify him [T.495]. But when he was shown a photograph of Jose Castillo, as State's Exhibit No. 15 in evidence and asked to view Jose Castillo in court, Mr. McClosky walked within two feet of the Respondent and said that he was not the gunman [T.495-496]. Mr. McClosky also agreed that when Detective Nieves had asked him to view the photo line-up, that he had gotten the feeling that he was supposed to identify a certain photograph, and that he felt as if he was not helping out too much because he would not agree that the photograph showed to him was, in fact, the gunman [T.498-499].

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[1]"Channel-locks" are large tools that are similar to pliers. The witness worked at Poe's Rentals [T.491] which rents tools and so he would be familiar with this type of tool.

The next witness for the defense was Maria Chamizo, who is Jose Castillo's mother-in-law [T.510]. She testified that back in August of 1980, Castillo always wore eyeglasses because he needed them all of the time to see [T.511]. She also testified that Jose Castillo did not have a mustache in August of 1980 [T.511], although he had one before that [T.511]. She further testified that she had seen Mr. Morales, one of the victims, in court at a pre-trial proceeding, when Jose Castillo was also in the courtroom [T.512-513]. She stated that she had overheard a conversation between Mr. Morales and another gentleman seated next to him, and that she had heard Mr. Morales tell this other gentleman that Jose Castillo was not the man who had shot him [T.513-514].

During cross-examination of Mrs. Chamizo by Assistant State Attorney Robert Scola, the following took place:

> Q. (MR. SCOLA): Okay, now, you went out to the house of Mr. Morales, did you not and spoke to his present wife?
>
> A. (THE WITNESS): Yes, I went once.
>
> Q. (MR. SCOLA): Okay, and you offered him money not to testify against your son-in-law?
>
> A. (THE WITNESS): (Witness shaking her head in the negative) Well, I went there once to speak with her.
>
> Q. (MR. SCOLA): All right, what did you do?
>
> A. (THE WITNESS): With his wife, yes.
>
> Q. (MR. SCOLA): And you went there to offer him money so that he would not testify against your son-in-law?
>
> MR. O'DONNELL: Objection, your Honor, and if that's true, then why are you not charging her with a crime?
>
> MR. SCOLA: I am considering it.

[T.517-518].

The defense objection was overruled [T.518]. The State Attorney did not proffer or present any evidence in support of these allegations.

The last witness for the defense was Jose Noreiga, a television repairman [T.528]. He testified that he knew Jose Castillo, that he did not have a mustache in August of 1980, and that he always wore glasses [T.518-519]. Mr. Noreiga testified that he was repairing the antenna at Mr. Castillo's home on the day of the shooting and that he arrived at his home about 9:30 or 9:45 in the morning [T.530, 531]. He also stated that Mr. Castillo was in the house with him until he left at about noon [T.533]. He testified that he left the house with Mr. Castillo since he was at home without a car and needed a ride [T.533-534]. Mr. Noreiga further testified that he saw the 11:00 p.m. News that night, and that he did not believe that the gunman identified on the News was Jose Castillo because Jose looks different; he had no mustache and he always wore glasses [T.535-536]. The person pictured had a mustache and did not wear glasses [T.536].

The defense then rested and renewed its motion for acquittal [T.549].

Thereafter, the jury began deliberating at 1:15 p.m., and returned a verdict of guilty at 4:30 p.m [T.660]. The jury was not given a copy of the Information while deliberating.

The Respondent timely filed a motion for new trial which was denied.

The day before the sentencing hearing, the trial court received a letter and photograph from a person claiming to be the real killer [T.240-244]. The letter gave a detailed confession to the crime by "Joe Acosta" who said that he had threatened to kill the Respondent's family if he disclosed his identity. The court would not address this issue as part of the request for a new trial, stating that it should be raised by a Writ of Coram Nobis. [Transcript of Sentencing Hearing, 4/19/84, page 8].

Before sentencing, the defense objected to the reclassification of the offense, stating that the State had failed to obtain a proper jury verdict

which found the use of a firearm in the commission of a felony [Transcript of Sentencing Hearing, 4/19/84, pages 11-16]. The trial court disagreed, and reclassified the offenses and enhanced the punishment. Thereafter, Jose Castillo was sentenced [R.247-248].

Defense counsel objected to the lawful sentence, the reclassification and enhancement and the fact that the sentence was consecutive [Transcript of the Sentencing Hearing, 4/19/84, pages 20-22].

The Respondent timely appealed, and the Third District Court of Appeal reversed the trial court and remanded the case for a new trial [App., Exh. C].

SUMMARY OF THE ARGUMENT

I.

The District Court of Appeal properly applied the case of State v. Neil, 457 So.2d 481 (Fla. 1984).

a) The Third District Court of Appeal did not rule that Neil was applied retroactively to this case.

b) Since this case was on appeal at the time of the Neil decision, there was no retroactive application.

c) Application of Neil by Florida District Courts of Appeal to cases pending appeal at the time of Neil was decided mandates application of Neil to this case.

d) This court has also decided that Neil should be applied to cases pending appeal at the time of the Neil decision.

II.

The issue of the systematic exclusion of blacks from the jury is preserved for appeal where motion for mistrial is made at a time when the Court can take remedial action.

III.

The prosecutor's admission that he excluded black jurors solely because of race denied the Defendant a fair trial under both the Equal Protection Clause and the Sixth Amendment and even met the Swain Test so this Court need not decide the Neil retroactivity issue.

IV.

The District Court of Appeal properly found prosecutorial misconduct in questions to a defense witness imputing the crime of bribery to the Defendant and his mother-in-law where there was absolutely no support for the allegation.

V.

The court abused its discretion and violated the Defendant's due process right by failing to order a line-up

VI.

The trial court erred by: (1) upwardly reclassifying the convictions, (2) enhancing the statutory punishment, (3) sentencing the Defendant to minimum mandatory sentences and (4) sentencing the Defendant to consecutive minimum mandatory sentences.

I.
THE DISTRICT COURT OF APPEAL PROPERLY APPLIED THE CASE OF STATE V. NEIL, 457 SO.2D 481 (FLA. 1984).

A. THE THIRD DISTRICT COURT OF APPEAL'S APPLICATION OF NEIL TO THIS CASE WAS ENTIRELY PROPER AND NOT RETROACTIVE.

What does "retroactive" mean? An examination of how this Court and the United States Supreme Court applied changes in the law will help us in reaching a definition.

The leading United States Supreme Court case, is Linkletter v. Walker, 381 U.S. 618 (1965). While Linkletter was contesting his conviction on appeal, the United States Supreme Court decided Mapp v. Ohio, 367 U.S. 643 (1961) and of course, applied the exclusionary rule to state court proceedings. Mapp specifically held that it would not apply retroactively. In Linkletter, the Supreme Court declined to apply Mapp to state convictions which had become final prior to the overruling of Wolf, however it applied Mapp to State cases still pending on direct appeal at the time it was handed down.

This Court, in Yates v. St. Johns Beach Development Company, 165 So. 384, held:

> The power of this court, not only to correct errors in the judgment under review, but to make such disposition of the cases as justice may require in order that a correct principle of decision arising since the judgment, and having a bearing upon the right disposition of the case, may be considered and past upon by an inferior court whose judgment will be vacated. . . .

Id. at 385.

In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) this court radically altered tort litigation in this State by replacing the contributory negligence rule with one of comparative negligence. Because of this radical change, and due to the large number of pending and resolved negligence cases, this court fashioned a test to determine which cases the opinion should apply to. This court ruled the decision should not be applied retroactively, but would apply in those cases where a verdict had been rendered if the issue of comparative negligence was properly raised during the litigation and to those cases pending on appeal where the issue had been preserved and was part of the appellate review. Id. at 440.

In Neil this court ruled that its opinion would not apply to cases that were final at the time of the decision. This does not prohibit the applica-

tion of Neil to cases on appeal or at some intermediary stage prior to being a final decision.

B. SINCE THIS CASE WAS ON APPEAL AT THE TIME OF THE NEIL DECISION, THERE WAS NO RETROACTIVE APPLICATION.

Florida Law plainly requires that Neil be applied to the instant appeal. In Wheeler v. State, 344 So.2d 244 (Fla. 1977), this court held that "decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial". See also, Evans v. St. Regis Paper Company, 287 So.2d 296 (Fla. 1973) (where neither trial court nor District Court of Appeal had benefit of subsequent Supreme Court decision at time cause was considered, cause should be remanded in light of recent decisions); Williams v. Wainwright, 325 So.2d 485 (Fla. 4th DCA 1975) (cause remanded in light of recent decision); Cosby v. State, 297 So.2d 617 (Fla. 1st DCA 1974) (While this case was on appeal, the Supreme Court rendered a decision bearing directly on point and since the trial court did not have benefit of the decision, the District Court remanded, with a direction to trial court to reconsider the case in light of the new Supreme Court decision).

In Wheeler, this Court applied the rule established in Roberts v. State, the so-called "Lyles Rule",[2] which applied a rule established after the trial court had rendered its decision and while the case was pending appeal. Id. at 245. This Court agreed that the "Lyles Rule" should be applied to Wheeler's cause, since Roberts was a change in the decision of law which came into effect at the time the case was pending appeal. Id. at 245.

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[2]The so-called "Lyles Rule", established in Roberts v. State, requires that the trial judge instruct the jury as to consequences of a verdict of not guilty by reason of insanity, and defense counsel in Wheeler requested such an instruction during the trial, but the trial judge, who did not have the benefit of Roberts v. State at the time of trial, did not apply that rule.

Just as in Wheeler, Evans, Williams and Cosby, Neil established a rule to be applied to cases on appeal at the time of the decision. The present appeal must be decided based upon the law in existence at the time of the appeal, even though there was a change in the law since the time of trial. Although the Neil court specifically held that it was not to apply retroactively, its application to the present case would not be a retroactive application since this case is on appeal, and the issue on appeal was properly and timely raised in the trial court below [T.165-177].

C. APPLICATION OF NEIL BY FLORIDA DISTRICT COURTS OF APPEAL TO THE CASES PENDING APPEAL AT THE TIME NEIL WAS DECIDED MANDATES APPLICATION OF NEIL TO THIS CASE.

All the District Courts of Appeal, except one, have determined that Neil should be applied to cases on appeal at the time of the decision.

In City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985), the question was whether the exercise of peremptory challenges in civil proceedings was subject to the rule expressed in Neil.[3] The Cornett court held that the principle upon which Neil was founded -- that parties have a right to an impartial jury -- applied with equal force in a civil trial. Id. at 402. See also, Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985).

In Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1984), the Fourth District Court of Appeal addressed the same issue that was addressed in Cornett, namely, whether or not this court's decision in Neil should apply to

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[3]The Cornett Court, in a footnote, stated that "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", the Florida Supreme Court court's later action in the substantially identical case of Andrews v. State, quashing the proceeding at the trial level, establishes that Neil applies to cases as the present one, in which the issue is raised at trial and which was pending when Neil was decided.

cases tried before September 27, 1984 (the date of Neil's issuance). The Franks court, in relying on this court's decision in Andrews v. State (applying Neil to a case tried before September 27, 1984) stated that "We join the Third District and hold that Neil governed so-called 'pipeline' cases such as this one, in which the issue is properly preserved below and which was pending when Neil was decided". Id. at 400-401. See also, Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985).

In Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985), the First District, following the Third and Fourth Districts, held that the application of the test, set forth in Neil, for determining whether jurors were improperly excluded on the basis of race, to cases on direct appeal at the time of Neil would not be retroactive application of that decision. Id. at 610. Citing, Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985) and Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985).

The only District Court in opposition to application of Neil to cases pending appeal at the time Neil was rendered is the Fifth District in Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985). The Wright court would not apply the Neil test, stating that, in their opinion, the Supreme Court intended Neil to apply only to those cases going to trial subsequent to Neil. Id. at 1296.

So, in summary the First, Third and Fourth District Courts of Appeal have applied Neil to the case pending appeal while the Fifth stands alone in opposition.

D. THIS COURT HAS ALSO DECIDED THAT NEIL SHOULD BE APPLIED TO THE CASES PENDING APPEAL AT THE TIME OF THE NEIL DECISION.

In Andrews v. State, 459 So.2d 1018 (Fla. 1984), decided one week after Neil, this court summarily quashed a conflicting District Court of Appeal decision and remanded for a new trial on the authority of State v. Neil.

This Court took the same approach in the case of Jones v. State, 464 So.2d 547 (Fla. 1985), reversing and remanding the cause for a new trial based on the Neil decision.

The most recent application of Neil to a case pending appeal and tried before the rendering of the Neil decision was by this Court in Parker v. State, ____ So.2d ____, 10 FLW 415 (Supreme Court of Florida, Case No. 63,177, decided August 22, 1985). This court again was given the task of addressing the issue of the use of peremptory challenges to systematically exclude blacks from a jury panel. Id. at 416.

The facts detailed in the opinion reveal that J.B. Parker was tried and convicted of first degree murder of a convenience store clerk. Id. at 415. The jury imposed the death sentence and this court accepted the case pursuant to Article V, Section 3(b)(1) of the Florida Constitution. Id. at 415. Thereafter, Neil was decided by this court, and, pursuant to that decision, J.B. Parker submitted a supplemental brief contending that, based on Neil, the trial court had erred by overruling his counsel's objection that the State had systematically excluded blacks from the jury panel.

This court disagreed, and held that it found no error in that stage of the proceedings. Id. at 416-417. But this court applied the Neil test to Parker's case. Id. at 417. After applying Neil, this court stated that the "record did not reveal the requisite likelihood of discrimination to require an inquiry by the trial court, and a shifting of the burden to the State." Furthermore, this court found that Parker's trial record "reflects nothing more than a normal jury selection process" and "found no error in the jury selection process". Id. at 417.

The important point to note is that this Court clearly applied the Neil test, and no reference was made to its application to this particular case

where the trial court's decision was rendered before Neil and without the benefit of the Neil decision. By applying Neil, this court ruled that Neil, when applied to a case pending review, was not being applied retroactively and was properly applied to cases of this type.

Due to the application of Neil to pending appeals by this Court and the District Courts, it is respectfully submitted that the District Court did not err in its application of State v. Neil to the present case; this was not a retroactive application since this cause was on appeal at the time Neil was rendered, and the issue on appeal was properly and timely raised in the trial court below.

The State argues that Parker, Jones and Andrews are distinquishable from "pipeline" cases like this. The State argues that Andrews is a "companion case" and that Jones and Parker are death penalty cases, and thus are not "pipeline cases."

This new type of test, suggested in the State's brief, would open up a "pandora's box" by creating different types of "pipeline cases." For example, why should a misdemeanor companion case receive the benefit or a new decision like Neil, while a man sentenced to 164 years like Jose Castillo should not? The State also proposes that the "pipeline doctrine" should only apply to big dollar civil lawsuits like City of Miami v. Cornett and not to smaller civil cases that don't reach the size of Cornett.

Clearly, the "pipeline doctrine" applies to all cases which are on appeal as a matter of right (such as the death penalty cases discussed in the State's brief). Attempts to distinquish types of "pipeline cases" like Parker, Jones, Andrews and others, only create confusion in a rule that is otherwise simple. The State's proposed new pipeline test would create a crazy quilt of exceptions that would be impossible to administer by this State's lower courts.

The test should be simple. If the case is not final at the time of the Neil decision, the issue may be raised but only if properly preserved in the trial court.

II.

THE ISSUE OF THE SYSTEMATIC EXCLUSION OF BLACKS FROM THE JURY IS PRESERVED FOR APPEAL WHERE A MOTION FOR MISTRIAL IS MADE AT A TIME WHEN THE COURT CAN TAKE REMEDIAL ACTION.

In its brief on the merits, the State contends that the defense failed to make a timely objection to the State's abuse of its peremptory challenges because they waited until after the jury was sworn before objecting[4].

A complete analysis of this issue first requires a short discussion of the State's obvious abuse of its peremptory challenges at trial.

The record proves the State used five of its six challenges against black jurors [T.165-177]. At the close of the jury selection, the defense moved for a mistrial, alleging that the State had systematically excluded blacks from the jury [T.175]. The Assistant State Attorney, Robert Scola, when given the opportunity to respond, did not deny the allegation that five of his last six peremptory challenges had been used to strike blacks, and, in fact, admitted he challenged jurors based on race. He tried to justify his actions by claiming the defense did it first:

> MR. SCOLA: I did not set out to excuse blacks from the prospective panel. In fact, I wanted some blacks on it. It wasn't until they started to systematically exclude the Latins on the panel that I decided that there were other options which would be more preferable to the State.

[T.176] (Emphasis added.)

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[4]The State claims in its brief that this was "an obvious attempt to place the respondent in a double-jeopardy situation." Petitioner's Brief at 25. This is a silly argument because the Defendant moved for a mistrial which, if granted, waived any jeopardy claim [ ].

The reference to "other options" is clearly an admission that the prosecutor decided to deliberately improperly exclude blacks from the jury. The discourse continued:

> MR. GERSTEIN: Of course, your Honor, is correct about that and have also seen first hand in this trial a blatant systematic exclusion of blacks from the jury.
>
> MR. O'DONNELL: And it was done in a manner and at a time when we were incapable of remedying the situation.
>
> THE COURT: You had exercise your challenges.
>
> MR. O'DONNELL: We had done that, yes, Judge, and there were remaining jurors and two of those, Mrs. Knochs (sic) and Mrs. Allen were black, and we thought that they would be left. It was not a matter of counsel running from number six on down; he went back and took off the two remaining black ladies that we wanted on the jury and we were, of course, powerless to do anything about it, and then he excluded the two black man.
>
> THE COURT: -- and a black woman.
>
> MR. O'DONNELL: And a black woman, five of the next, I think, six challenges were against blacks.
>
> MR. GERSTEIN: In our position it was just an absolutely flagrant abuse.
>
> THE COURT: All right, is there anything you care to say, Mr. Scola?
>
> MR. SCOLA: No.
>
> THE COURT: Motion is denied.

[T.176-177] (Emphasis added).

The number of challenges, taken together with their timing, the "other options" statement and the statement that "I did not set out to excuse blacks" by Mr. Scola, clearly demonstrates purposeful exclusion of blacks from the jury. The State made no attempt to justify the challenges even though they were given the opportunity by the court to do so [T.177]. This purposeful exclusion of blacks from the jury denied Jose Castillo of his right to a fair trial.

The State contends that Jose Castillo failed to timely object to the State's improper use of peremptory challenges and that counsel accepted the jury and waived the opportunity to object on appeal. However, defense counsel did timely object and the jury was never accepted by them. The record is to devoid of any statment by defense counsel having "accepted the jury". (Note that there is not a record reference designated in petitioner's brief for this allegation).

In its decision, the District Court of Appeal does not discuss the timeliness of the objection at all. The District Court's entire discussion of the facts and holding on the jury selection issue was as follows:

> 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.

[App., Exh. C]. The court follows with a footnote:

> 1. A sub-issue under this point is whether the defendant may protest that an identifiable group other than his own is being systematically excluded. The question has been answered affirmatively by the United States Supreme Court in Peters v. Kiff (citation 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 petite jury.

[App., Exh. C].

Furthermore, the decision of the District Court of Appeal does not expressly or directly conflict with the State v. Neil, 457 So.2d 481 (Fla. 1984). Neil does not hold that an objection is untimely if made after the jury is sworn. The Neil opinion creates no new procedural rule. The objection issue is not mentioned by the court at all; accordingly, there is no reason for ths Court to concern itself with this issue. In any event, the objection was not untimely.

Davis v. State, 397 So.2d 1005 (Fla. 1st DCA 1981), applies the contemporaneous objection theory. In Davis the defendant was charged with and convicted of second degree murder. Id. at 1005. At trial, the jury was given a re-instruction of the elements of second degree murder, and, after this, they retired to the jury room. Id. at 1006. At this time the defense counsel objected, stating that the re-instruction was improper and that it did not include all three elements of the crime involved. Id. The court held that these objections were "sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal". Id. at 1006[5].

Here the objection to the jury panel was both properly and timely made. Defense counsel's objection and motion for mistrial was sufficiently specific since the trial court was apprised of the error and defense counsel gave specific and succinct reasons for the motion.

In Wright v. Wainwright, 537 F.2d 224, 225 (5th Cir. 1976), the court held that the failure of the defendant to make an objection regarding the selection of either the grand or petit jury at or prior to trial, constituted a waiver of any irregularities in the jury selection procedure, including the systematic exclusion of blacks from the jury. In Wright, no objection was made either prior to or at trial regarding the jury selection, Id. at 225.

Similarly, in Foxworth v. State, 267 So.2d 647, 654 (Fla. 1972), the defendant claimed on appeal that there was a systematic exclusion of blacks from the jury at trial. The court held that "one may not collaterally attack the composition of the grand jury and petit juries without having first objected to the same at the time of trial". Id. at 653. The record of the

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[5]Here, the court cites Castor v. State, 365 So.2d 701 (Fla. 1978). In Castor, the court held that an objection, to be timely, must be contemporaneously made, and, to meet the objectives of this rule, an objection "must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. An objection is

trial proceeding disclosed that no objections were ever voiced regarding the composition of the juries, and, as such, the objections could not now be voiced on appeal. Id. at 654.

In their brief on the merits, the State cites Brown v. State, 381 So.2d 690 (Fla. 1980); Paramour v. State, 229 So.2d 855 (Fla. 1969) and Ellis v. State, 6 So. 768 (Fla. 1869) in support of the proposition that "the requirement for a contemporaneous objection has been held to mean that objections to a prospective juror being excused must be made prior to the time he is excused" (Petitioner's Brief on the Merits, page 25). However, a careful reading of these cases reveals that the citation for the principle stated is clearly inapplicable to the case at bar. To set the record straight, these three cases were capital crimes cases and specifically involved situations where a juror or jurors were excused because they had an unwilligness to impose the death penalty if such was warranted. These cases were specific to the death penalty situation and involved objections to jurors who were being excused for cause. Only under these specific circumstances should objections to prospective jurors be made before the juror is excused. The reason is obvious since the error could be cured by questioning the juror. The attorneys failed to object to the juror's exclusion and failed to give any reasons or make any efforts to qualify them for service.

In the Neil type of case, the test proposed by the State would be impossible to apply. How could defense counsel have objected to a pattern of systematic exclusion of blacks from the jury until the State had exercised all

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timely when it places the trial judge on notice that an error may have been committed, and gives the court an opportunity to correct any error at an early stage in the proceeding. Id. at 703. The trial judge here was certainly given the opportunity to correct the error.

of its peremptory challenges? There certainly could have been no basis for objecting after the first black juror was excused, since such exclusion obviously could not have established any pattern of exclusion of blacks from the panel.

To reiterate, the defense timely sought remedial action within the requirements of Castor v. State, supra, since the motion for mistrial placed the trial court on notice of the error and provided it with an opportunity to correct the error. The remedy sought was to begin jury selection anew, the remedy offered by Neil.

Finally, in its brief, the State cites Leech v. State, 132 So.2d 329 (Fla. 1961), Overstreet v. Sandler, 186 So. 247 (Fla. 1938) and Peak v. State, 413 So.2d 1225 (Fla. 3d DCA 1982), as standing for the proposition that "objections to the jury panel as a whole are waived when the parties accept the jury and it is sworn." (Petitioner's Brief on the Merits, page 26). However, a close reading of the cases cited clearly indicate that they do not stand for this proposition.

In Leech v. State, 132 So.2d 329 at 333 (Fla. 1961), the court held that while the jurors could have been challenged for cause during the voir dire examination, the objection was waived when the appellant "accepted the jury and the verdict rendered". This is contrary to the present case since the defense never accepted the jury. Although the jury may have been sworn before the defense made its motion, the defense counsel clearly did not accept the jury and the court was timely apprised of the problem and given ample opportunity, before the trial commenced, to excuse the jury and enpanel a new one.

Peak v. State, 413 So.2d 1225, 1226-1228 (Fla. 3d DCA 1982), did not involve a case of an objection to the jury panel as a whole, but, quite the opposite, involved a situation where the defense counsel attempted to excuse

one juror for cause after he had exhausted all of its peremptory challenges in reliance on the court's previous ruling striking the juror for cause. The Peak court ruled that the trial court erred by disallowing defense counsel's challenge for cause, and, in fact, stated that such impaired the defendant's right to a fair trial and mandated reversal of the trial court. Id. at 1226. The court certainly did not state that there was an objection to a jury panel nor did it hold that the objection was waived when counsel accepted the jury and it was sworn.

In this case, defense counsel moved for a mistrial on the grounds that the State was systematically excluding blacks from the jury. Furthermore, counsel made a substantial showing that the State had used its challenges to eliminate the last two black prospective jurors by backstrikes after the defense had exhausted all of its challenges, and that five of the State's last six challenges were exercised against black persons. Also, the statement by the prosecutor was an admission of purposeful exclusion of blacks from the panel. All of these actions clearly indicated that the State purposefully and systematically excluded a race from the panel.

Finally, the only waiver due to an untimely objection has been by the State. The State never raised the issue at trial that defense counsel's objections were untimely.

This issue was not presented to the trial judge because it was obviously frivolous; the trial judge clearly could have corrected the error at the time the motion and objection was raised. A mistrial could have been granted and jury selection begun anew with an untainted venire. There is no prejudice at all due to the timing of the Respondent's objection; and the best evidence of lack of prejudice is the failure of the prosecutor to complain to the trial judge.

The raising of the issue now is merely a last minute attempt to escape the consequences of their own misconduct.

III.
THE PROSECUTOR'S ADMISSION THAT HE EXCLUDED BLACKS SOLELY BECAUSE OF RACE DENIED THE DEFENDANT A FAIR TRIAL UNDER BOTH THE EQUAL PROTECTION CLAUSE AND THE SIXTH AMENDMENT AND EVEN MET THE SWAIN TEST SO THIS COURT NEED NOT DECIDE THE NEIL ISSUE.

Because the Third District relied upon our State Consitution, as interpreted by this Court in Neil, as authority that the systematic exclusion of black jurors denied the Respondent a fair trial, it did not need to fully address whether Castillo's rights under the United States Consitution were violated. However, in a footnote to its opinion, the Court stressed that the systematic exclusion of an identifiable group from a petit jury is unconsitutional under the United States Constitution.

The Court did not cite United States Constitutional Law merely as authority that Castillo, a Latin, could complain, pursuant to Neil, that blacks were excluded from his jury. Obviously, that was superfluous since Neil had already created a test under the Florida Constitution which forbid the exclusion of a distinct racial group regardless of whether the Respondent was a member of that group. This Court established, in Neil, that any defendant may complain of racial discrimination. Because Neil rested upon the Florida Constitution and was never meant to establish a test based on the United States Consitution, the Court's reference to Peters v. Kiff was as additional authority for the ruling that Castillo was denied a fair trial. This was required because this Court in Neil specifically rejected the test formulated by the United States Supreme Court in Swain. See Neil, 457 So.2d at 486. Accordingly, we must examine the case law prior to this Court's pronouncement in Neil to determine if Castillo's rights under the United States Constitution were violated as well.

A. JOSE CASTILLO WAS DENIED A FAIR TRIAL UNDER THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

As the United States Supreme Court noted in Swain v. Alabama, 380 U.S. 202 (1965), there is no doubt that "a State's purposeful or deliberate denial to negroes on account of race of participation as jurors in the administration of justice violates the equal protection clause. Ex parte Virginia, 100 U.S. 339 (1880); Gibson v. Mississippi, 162 U.S. 565." Id. at 204. Swain established a test to determine when a defendant's right to a fair trial were being violated under the equal protection clause. Swain held that purposeful discrimination may not be assumed, and that there was a presumption that the State exercised its challenges in an effort to obtain a fair and impartial jury.

As the court itself noted in McCray v. New York, 461 U.S. 961 (1983), this test was seldom met. That is because it is difficult to prove, circumstantially, the intent of the prosecutor in excluding particular jurors. One can always hypothesize a legitimate reason for excluding black jurors so the excusing of them, standing alone, does not make out a case; you need additional proof. So, the court created a test that required proof of systematic exclusion through a number of cases and not just the case under review.

The court reasoned that this test could prove intentional discrimination and that you need not force an actual admission from a prosecutor since that was highly unlikely to occur:

> This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need to elicit an admission from the prosecutor that discrimination accounted for his rejection of negros . . . .

Id. at 227.

This statement is ironic because in this case the prosecutor has made such a damning admission. We do not have to use the Swain circumstantial evi-

dence test since we have actual proof in this case of intentional discrimination.

The State used five of its six challenges to excuse black jurors [T.165-177]. When, at the close of jury selection, the defense moved for a mistrial, because the State had systematically excluded blacks from the jury, the prosecutor did not deny that allegation. His statement implicitly contained an admission that he had challenged jurors based on their race. His only justification was that it was in reaction to what he perceived the defense was doing:

> MR. SCOLA: I did not set out to excuse blacks from the prospective panel. In fact, I wanted some blacks on it. It wasn't until they started to systematically exclude the Latins on the panel that I decided that there were other options which would be more preferable to the State.

[T.176].

An analysis of Mr. Scola's words make it clear that he was admitting to systematically excluding blacks. First he says: "I did not set out to excuse blacks . . . ." The only possible meaning of that statement was that while he did not begin to do it, he was certainly doing it now. He then goes on to say that "it wasn't until they started" that he exercised his "other options." His only justification is his perception that the Respondent began the improper conduct by systematically excluding Latins. He used the old canard that his improper conduct was allowable because the other side did it first.

The Court, after hearing extensive argument from the defense, gave Mr. Scola an opportunity to explain his conduct:

> THE COURT: All right, is there anything you care to say, Mr. Scola?
>
> MR. SCOLA: No.

[T.177].

The prosecutor did not even make a pretense of justifying his challenges even though they were clearly called into question by the defense. Defense counsel specifically accused him of deliberately and systematically excluding blacks from the jury. This was not an ambiguous charge. Despite this, the prosecutor declined to give any explanation. This combined with his earlier statements clearly sets out proof that he systematically excluded blacks in this jury selection and that even the difficult Swain test was met.

B. CASTILLO WAS DENIED A FAIR TRIAL UNDER THE SIXTH AMENDMENT

In Duncan v. Louisianna, 391 U.S. 145 (1968) the United States Supreme Court held:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right to jury trial in all cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee.

Id. at 149.

The Supreme Court in interpreting Duncan, and the Sixth Amendment, has held that the systematic exclusion of blacks (Peters v. Kiff, 407 U.S 493)(1972) and women (Taylor v. Louisianna, 419 U.S. 522 (1975)) from juries, violates a defendant's Sixth Amendment right to impartial jury. See also, Mayfield v. Steed, 473 F.2d 691 (8th Cir. 1973). As the United States Supreme Court dissent in Bagley v. United States, 105 S.Ct. 3375 (1985) stated:

> In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the system of justice has to require reversal in all cases, such as discrimination in jury selection. See, e.g., Peters v. Kiff, 407 U.S. 493 (1972). A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses is anathema to our basic vision of the role of the State in the criminal process.

Id. at 3395.

T'e United States Supreme Court has never addressed the issue of whether Peters overrules Swain and holds that the prosecutor's abuse of his peremptory challenges violates the defendant's Sixth Amendment right to a fair trial. In McCray v. New York, supra, the court specifically chose not to decide this issue as this Court noted in Neil.

No court in Florida, with the exception of the Third District Court of Appeal in this case, has addressed the issue of whether the Sixth Amendment of the United States Constitution forbids a prosecutor from using his peremptory challenges in a discriminatory manner. Because the prosecutor's challenges in this case were so blatantly discriminatory this Court should find that Castillo's right to Equal Protection and his Sixth Amendment right to a fair jury were violated and therefore need not address the issue of Neil's application to this case.

IV.
THE DISTRICT COURT OF APPEAL PROPERLY FOUND PROSECUTORIAL MISCONDUCT IN QUESTIONS TO A DEFENSE WITNESS IMPUTING THE CRIME OF BRIBERY TO THE RESPONDENT AND HIS MOTHER-IN-LAW WHERE THERE WAS ABSOLUTELY NO SUPPORT FOR THE ALLEGATION.

The classic statement of prosecutorial ethics in a criminal case was formulated by the Supreme Court almost 50 years ago:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so, but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

The blows struck here during the cross examination of Maria Chamizo were foul. The prosecutor made the outrageous claim that the Respondent, in conjunction with his mother-in-law, attempted to bribe a State's witness.

The following excerpt from the record expresses the true intensity of the encounter and, also, the obvious inappropriateness of the prosecutor's conduct:

> Q. (MR. SCOLA): Okay, now you went out to the house of Mr. Morales, did you not and spoke to his present wife?
>
> A. (MRS. CHAMIZO): Yes, I went once.
>
> Q. (MR. SCOLA): Okay, and you offered him money not to testify against your son-in-law?
>
> A. (MRS. CHAMIZO): (Witness shaking her head in the negative) Well, I went there to speak to her, with her.
>
> Q. (MR. SCOLA): All right, what did you do?
>
> A. (MRS. CHAMIZO): With his wife, yes.
>
> Q. (MR. SCOLA): And you went there to offer him money so that he would not testify against your son-in-law?
>
> MR. O'DONALD : Objection, your Honor, and if that's true, then why are you not charging her with a crime?
>
> MR. SCOLA: I am considering it.
>
> MR. O'DONNELL: Don't consider it; do it.
>
> THE COURT: Gentlemen, I don't want to have any dialogue between any of the lawyers during the trial. Overrule the objection.

[T.517-518] (Emphasis added).

After this heated exchange, the State never presented any evidence in support of this allegation. The court overruled the Respondent's objections allowing both the questions and answers to be considered by the jury; despite this, the prosecution never substantiated this outrageous allegation. The prosecutor acted improperly by asking questions totally unsupported by any

evidence solicited at trial, and communicated a false impression to the court and jury about the witness and more importantly the Respondent.

In its opinion, the District Court of Appeal found that this conduct was inappropriate and stated that it "found error also in the State's cross-examination of the Respondent's mother-in-law, which attempted to portray her as involved in a plot to bribe a witness where there was no evidence to support the suggestion." The Court made reference to Harris v. State, 447 So.2d 1070 (Fla. 3d DCA 1984) and Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982) as authority for its decision (App., Exh. C).

The District Court of Appeal correctly analyzed the situation as one constituting harmful and prejudicial error to the Respondent and properly so. What could be worse than an accusation by the prosecutor that a relative of the Respondent tried to bribe a State witness?

Courts have consistently condemned prosecutor's attempts to create impressions on the jury by innuendos, suggestions and questions where no supporting evidence existed. See, Butler v. State, 113 So.2d 699 (Fla. 1927); Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982); Richardson v. United States, 150 F.2d 58 (6th Cir. 1945). Allowing the prosecutor to conduct this type of questioning that has no basis, in fact, leaves false and prejudicial impressions in the minds of the jurors and this substantially affects the Respondent's right to a fair trial. See, e.g., United States v. Hughes, 685 F.2d 317 (5th Cir. 1981); Thorpe v. State, 350 So.2d 552 (Fla. 1st DCA 1877); and Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980). The American Bar Association Standards for Criminal Justice, Prosecution Function, states that unfounded and unsupported questions by a prosecutor constitutes misconduct. The commentary in support of Standard 305.7 states:

> It is an improper tactic for a prosecutor to attempt to communicate impressions by innuendo through questions . . . when the questioner has no evidence to support the innuendo.

Also, Disciplinary Rule 7-106(c)(1) and (2) of the Code of Professional Responsibility plainly prohibits such misconduct and deems it unethical:

> (C) In appearing in his professional capacity before a tribunal a lawyer shall not:
>
> (1) State or elude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be support by admissible evidence.
>
> (2) Ask any questions that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

A trial court has the authority to award a new trial because of misconduct of the prosecuting attorney. Hopper v. State, 54 So.2d 165 (Fla. 1951). Florida courts have held that where there is a considerable question of substantial prejudice to a defendant by reason of misconduct of the prosecutor. "[T]he ends of justice are best served by a new trial." Lee v. State, 324 So.2d 694, 698 (Fla. 1st DCA 1976).

Florida has codified this holding in Rule 3.600(b)(5), Florida Rules of Criminal Procedure, which requires that a new trial be granted when prosecutorial misconduct prejudices the substantial rights of the defendant:

> (b) The court shall grant a new trial if any of the following grounds is established, providing substantial rights of the defendant were prejudiced thereby. . .
>
> (5) That the prosecuting attorney was guilty of misconduct, . . .

(Emphasis added.)

In reaching its decision, the District Court of Appeal referred to Harris v. State, 447 So.2d 1020 (Fla. 3d DCA 1984). The Harris court held that the prosecutor's cross-examination of the defendant and his girlfriend was totally irrelevant and highly prejudicial since the prosecutor inferred through his questions that the defendant was a procurer and the defendant/witness was his prostitute. Id. at 1020.

In their brief, the State misinterprets the holding in Harris, which leads them to the conclusion that the District Court of Appeal relied on a case that "provides extremely little support of the District Court's positions" [Brief of Petitioner on the Merits, p.28]. The Harris decision does not state that the case "involved strong implications that the defendant was a procurer and his girlfriend, a witness, was a prostitute." (Brief of Petitioner on the Merits, pages 28-29). Harris simply involved a case where the court found the prosecutor's questions, on cross-examination to be totally irrelevant and highly prejudicial to the defendant since they were asked without any evidentiary support. The Harris decision can certainly be compared to the case at bar. Here, the prosecutor's questions were totally irrelevant to the sole issue in the case -- that of witness identification. However, the question certainly prejudiced the Respondent by claiming that he and his mother-in-law attempted to bribe a State witness. The prejudice here is of far greater magnitude than in Harris.

In deciding whether an error is harmless, the courts consider a variety of factors. Probably the most important single factor that the courts have relied on is the strength of the evidence against the defendant. If the evidence of guilt is overwhelming, the error will most likely be considered harmless. See, e.g., O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). If the evidence of guilt is close, the error will mandate reversal. See, e.g., Berger v. United States, 295 U.S. 78,89 (1935); Bennet v. State, 316 So.2d 41 (Fla. 1935); Porter v. State, 94 So. 680 (Fla. 1923). Other factors that have a bearing on the issue of prejudicial error include viewing the incident in light of the entire transcript to determine any possible impact of the error upon the jury, the deliberateness of the misconduct, other possible acts of misconduct, and whether or not there was any possibility that the error could

have contributed to the conviction. See, e.g., Russell v. State, 445 So.2d 1091 (Fla. 3d DCA 1984) (court reversed defendant's conviction, since questions by prosecutor on identification of defendant were improper because identification of defendant was not in issue and questions begged for highly prejudicial answers that may have created unfair inferences in jury's minds). Harrington v. California, 395 U.S. 250 (1969); Fahy v. Connecticut, 375 U.S. 85 (1963); Chapman v. California, 386 U.S. 18 (1967).

In Bennett v. State, 316 So.2d 41, 43 (Fla. 1975), this court held that the questions propounded by the prosecutor in his cross-examination of the defendant were improper and constituted prejudicial error, since they were asked for the purposes of suggesting, by innuendo, some involvement by the union in the alleged crime committed by the defendant. The court found that the suggestion that the defendant could be an "enforcer" for the union was "bound to arouse in the minds of the jury a spirit of resentment against the defendant under the facts of this case". Id. at 43-44.

In its brief on the merits, the State cites cases that provide little support since their facts are easily distinquishable from those in the present case. In O'Callaghan v. State, 429 So.2d 691, 696 (Fla. 1983), this Court held that, although the comment of the prosecutor was unquestionably improper, the appellant was not prejudiced at trial because the prosecutor's comments concerned collateral manners and the evidence of appellant's guilt was overwhelming. However, in this case, the prosecutor's questions stated that Mr. Castillo and his mother-in-law were involved in a plot to bribe a witness. Furthermore, the evidence against Mr. Castillo was certainly not overwhelming; this was a single issue case of eyewitness identification based on shakey and contradictory identifications; the entire case was riddled with errors; so an allegation of bribery by the prosecutor certainly would have affected the jury's decision.

The State also cites Lynn v. State, 395 So.2d 621 (Fla. 1st DCA 1981), to support its contention that the defense had failed to establish the kind of prejudice which requires reversal. In Lynn, the court held that the statements made by the prosecutor in his closing argument were not prejudicial to the defendant and did not require reversal. Id. at 622. But that's because the prosecutor's comments were made in direct response to the defense attorney's improper argument. Id. at 622-623. Again, such was not the case here. The prosecutor's questions and comments were totally unsolicited and unsupported by any evidence elicited at trial and were designed to smear the Respondent by claiming he and his mother-in-law were involved in a plot to bribe a witness.

The District Court of Appeal correctly decided this was prosecutorial misconduct which was highly prejudicial to Mr. Castillo. This misconduct, in and of itself, constituted reversable and harmful error, thus requiring the District Court's reversal of Jose Castillo's conviction. This act of misconduct was further enhanced by the overall pattern of misconduct exhibited by the prosecution throughout the course of this proceeding.

During the pre-trial proceeding, Mr. Morales, one of the witnesses who never physically identified Jose Castillo in a line-up was brought into the courtroom to testify [R.231]. Mr. Morales took the stand, and was examined by Defense Attorney O'Donnell. During the examination, the prosecutor, Mr. Scola, stood up and told the witness that the Respondent was not in the courtroom:

> Q. (MR. O'DONNELL): Do you see the person in the courtroom today who you saw then?
>
> MR. SCOLA (the prosecutor): Judge, I am going to object --

MR. O'DONNELL: Now, just a minute --

MR. SCOLA: He knows that he is not here.

[R.339].

Defense counsel objected to Mr. Scola's coaching of his witness, but the objection was overruled [R.339-340].

This type of misconduct has been condemned by the Florida Supreme Court for over 60 years. As stated in Haager v. State, 90 So. 812 (Fla. 1922):

> It is not proper for a State Attorney to interrupt the cross-examination of a witness and make a suggestion at a critical point in the development of the cross-examination, as he may thus save and protect a false witness from betraying himself . . . .

Mr. Scola's conduct was extremely outrageous within the context of this single-issue case of witness identification. Mr. Scola unfairly strengthened his case by avoiding the imminent misidentification.

Finally, in its brief on the merits, the State improperly attempts to argue alleged facts which are dehors the record. The Assistant State Attorney General, writing the State's brief, relies upon something the trial prosecutor allegedly told him in a private conversation after the trial had concluded, and dicussed by the Assistant Attorney General during oral argument in front of the Third DCA panel (Brief of Petitioner, page 28, note 5)[6].

Jose Castillo does not concede the truth of any such statements. The alleged statements had no basis in fact, and are totally unsupported by the record and transcript of the trial. Furthermore, this court must ignore such statements in petitioner's brief. It was for the trial court, at the time of the cross-examination of Mrs. Chamizo, to inquire to the basis for such

---

[6]This post-trial attempt at justification is hardly convincing. If Mrs. Morales was willing to testify to this matter, why wasn't it brought out at trial? The failure to recall her in rebuttal to substantiate this charge left the defense without a remedy.

questions and allegations, and, the State Attorney introduced no evidence at trial to support or defend such allegations.

V.

THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION AND VIOLATED THE RESPONDENT'S DUE PROCESS RIGHT BY REFUSING TO ORDER A LINE-UP.

The Respondent is the victim of an overly-suggestive identification process by which the prosecutor made sure that his witnesses would identify Jose Castillo as the assailant.

Jose Castillo continually asked for a line-up [R.251, 257, 26-61, 262, 263, 286, 294-295, 371, 376]. The defense asked the State to produce its witnesses for a line-up [R.376]. The State adamantly refused to allow its witnesses to participate in a line-up and objected to defense efforts to have a court ordered line-up; the court stated that it did not have the power to order a line-up over the prosecution objection although he personally suggested to them that one be conducted [R.374-5].

The State admitted that their witnesses could not identify the Respondent in a non-suggestive atmosphere. When asked why he would not conduct a line-up, the prosecutor responded:

> I believe it would be totally unfair to go ahead and ask these people to come in here and ask them to go ahead and to do something which is basically impossible.

[R.276]. Yet that is exactly what the prosecutor had them do!

Despite the admission that the State's witnesses could not fairly identify the Respondent, the prosecutor had these same witnesses identify the Respondent at trial!

The prosecutor was not satisfied to just prevent a fair line-up from being conducted; he then intentionally sabatoged Respondent's crossexamination of the victim during an evidentiary hearing on the Respondent's "Motion for an

In-Court Identification." This was a blatant attempt to improperly bolster his witness' identification of the Respondent.

During the cross-examination of victim Jose Morales, at this hearing, defense counsel asked:

> Q. (MR. O'DONNELL): Do you see the person in the courtroom today who shot you then?

Before the witness could answer for himself, the prosecutor immediately interjected and told the witness how to answer:

> MR. SCOLA: Judge, I am going to object --
>
> MR. O'DONNELL: Now, just a minute --
>
> MR. SCOLA: He knows that he is not here.

[R.339].

The prosecutor did all he could to prevent the defense from fairly testing the witness' ability to identify the Respondent. The prosecutor knew his witness could only identify the Respondent if he was sitting at the defense table in the courtroom.

The trial judge ruled that he did not have the authority to order the State to hold a line-up [R.375]. Although this Court has never ruled whether a defendant has a right to a line-up, authority for ordering a line-up can be found in Rule 3.220(a)(5)(b)(1), Florida Rules of Criminal Procedure:

> (5) Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

Subsection (b)(1) of the same Rule states:

> (1) After the filing of the indictment or information and subject to constitutional limitations, a judicial officer may require the accused to:
>
> (i) Appear in a line-up; . . .

Thus, it was within the judge's discretion to order a line-up, and the court failed to exercise its discretion here. The trial judge was under the mistaken belief he had no discretion to order a line-up. The court stated:

> Well, the only reason that I say that, and again, I think that the law is such that -- and I will add that I have read that rule on discovery. I don't think that the court has the ability to compel.
>
> The court is satisfied that I do not have the legal authority to force the State to hold a line-up.

[R.375].

Several state and federal courts have held that a defendant's due process rights are violated by not holding a line-up. In United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976), the court held that:

> Even though there is no constitutional right to compel the government to conduct a line up . . . many times court can and should compel the government to do so if the interests of justice and fair play require it.

The Second Circuit in Brown v. United States, 699 F.2d 585 (2d Cir. 1983) went further than the court in Lewis, when it held:

> [W]hen a defendant is sufficiently aware in advance that identification testimony will be presented at trial and fears irreparable suggestivity, as was the case here, his remedy is to move for a line-up order to assure that the identification witness will first veiw the suspect with others of like description rather than in a courtroom sitting alone at the defense table.

See also, United States v. Key, 717 F.2d 1206 at 594; United States v. Archibald, 734 F.2d 938.

In addition to the authority found in Rule 3.220 and the authority in federal cases, this Court can look to other States which hold that a court has the inherent power to order a line-up at the defendant's request. State v. Walls, 426 A.2d 50 (N.J. 1981), cert. denied, 343 A.2d 80 (1981) ["We are satisfied that we possess the inherent judicial authority to order pre-trial line-ups as a part of the discovery proceedings ." - motion for line-up made by defendant]; Commonwealth v. Sexton, 400 A.2d 1289 (Pa. 1979); Evans v. Superior Court of Contra Costa County, 522 P.2d 681 (Cal. 1974); United

States v. Caldwell, 465 F.2d 669, 671 (D.C. Cir. 1972); United States v. MacDonald, 441 F.2d 259 (9th Cir. 1971), cert. denied, 404 U.S. 840 (1971); United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970), cert. denied, 400 U.S. 834 (1970); State v. Boettcher, 338 So.2d 1356 (La.Sup.Ct. 1976); Commonwealth v. Johnson, 216 N.E.2d 763 (Mass. 1974); People v. Maire, 201 N.W.2d 318, 323-24 (Mich. 1972).

This Court should now rule, as a matter of first impression in this State, that a defendant, under certain circumstances, has the right to a line-up. This Court should formulate a test giving the trial judge discretion to order a line-up when the defendant can establish that a real question of identity exists and that it is in the interests of justice to test the witnesses identification in a line-up.

VI.

THE TRIAL COURT ERRED BY (1) UPWARDLY RECLASSIFYING THE CONVICTIONS, (2) ENHANCING THE STATUTORY PUNISHMENT, (3) SENTENCING THE DEFENDANT TO MINIMUM MANDATORY SENTENCES AND (4) SENTENCING THE DEFENDANT TO CONSECUTIVE MINIMUM MANDATORY SENTENCES.

The trial court erred when it misapplied Florida Statute Section 775.087 and upwardly reclassified and enhanced the punishment and imposed consecutive minimum mandatory sentences upon Jose Castillo. This was done without any finding by the jury that a firearm was used in the commission of a felony. The Third District specifically declined to rule on this point because it had already ordered a new trial on two other points:

> The issue raised in appellant's fourth point on appeal -- that the enhanced and mandatory sentence was not supported by the evidence -- is not likely to re-occur after a new trial and therefore required not treatment here.

This court has decided this issue. The case law is clear and simple:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with

> the criminal episode when rendering a sentence, it is the juries function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply Section 775.087 would be an invasion of the jury's historical function . . . .

State v. Overfelt, 457 So.2d 1385 at 1387 (Fla. 1984), see, State v. Smith, 462 So.2d 1102 (Fla. 1985).

Because the use of a firearm was not an element of any of the crimes charged against Jose Castillo, the jury was required to specifically find that a firearm was used in the commission of a felony. See, Cline v. State, 443 So.2d 1065 (Fla. 3d DCA 1984); see also, Pedrera v. State, 401 So.2d 823 (Fla. 3d DCA 1981); Streeter v. State, 416 So.2d 1235 (Fla. 3d DCA 1982). In Cline, the court held that "the minimum mandatory sentences must be vacated because the verdict form relating to the second degree murder and attempted second degree murder failed to indicate whether the defendant possessed a firearm". Id. at 1066. (We note that the improper application of Section 775.087 in Cline was by the same trial judge who again misapplied Section 775.087 in the sentencing of Jose Castillo).

In Streeter v. State, the court held that the verdict form upon which a defendant is convicted, must specifically state that the defendant used a firearm in the commission of a felony. 416 So.2d 1203 at 1206.

Some courts have been confused by the teachings of Streeter, which requires that the verdict forms specifically state that the defendant used a firearm in the commission of a felony; and Overfelt, which holds that the jury must make a specific finding that a firearm was used in the commission of a felony. See Abraham v. State, 467 So.2d 498 (Fla. 4th DCA 1985); Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984).

For example, a verdict form might merely make reference to the use of a

firearm as charged in the Information, where the information is incorporated into the charge to the jury, Abraham v. State, 467 So.2d 498 (Fla. 4th DCA 1985), or the information which charges the use of a firearm might be read by the trial judge as part of the charge to the jury, Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984).

The subtle differences between Overfelt and Streeter are not applicable to this case. Jose Castillo's charging Information was not part of the charge to the jury.

The Information was referred to twice. It was read to the jury prior to jury selection when at least five of the prospective jurors were not present in the courtroom [T.16]. The Information was also referred to by the prosecutor in opening argument, but only after the jury was told that opening arguments are not evidence in the case and that later they would be instructed on "the law applicable to this case" [T.171].

Thus, there can be no argument that the charging Information in some way was incorporated into the jury charges and verdicts. Neither the verdict form nor the jury instructions ever mention the words "firearm" or "weapon" [T.613-629, 193-194]. Yet, the State specifically approved the verdict forms [T.533], and the jury instructions [T.613-629].

Further, the imposition of consecutive minimum mandatory sentences is "double error" not only because of the above discussion, but also because consecutive sentences may not be imposed when the offense arises out of the same nexus of facts. Palmer v. State, 438 So.2d 1 (Fla. 1983); Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984); Parson v. State, 450 So.2d 924 (Fla. 4th DCA 1984); James v. State, 462 So.2d 858 (FLa. 2d DCA 1985). In the present case both offenses occurred at the same time and place, not as separate incidents as required by Palmer, supra, to impose consecutive sentences.

In summary, it is clear that Section 775.087 may not be applied to Jose Castillo. Should this Court reject all of Respondent's other points, this Court must remand for proper judgments and sentences in the following manner:

1. The judgment for Count 1, attempted second degree murder as a first degree felony, must be entered as a judgment of guilty as to attempted second degree murder as a second degree felony.

2. The sentence for Count 1, thirty (30) years, with a minimum mandatory three (3) years for use of a firearm, must be reduced to a maximum fifteen (15) year sentence, with no minimum mandatory term.

3. The judgment for Count 2, second degree murder as a life felony, must be entered as a judgment of guilty as to second degree murder as a first degree felony.

4. The sentence for Count 2, a consecutive one hundred and thirty four (134) years, with a consecutive three (3) year mandatory minimum sentence, must be reduced to a concurrent sentence, with no minimum mandatory sentence.

CONCLUSION

For all the reasons set forth above, the convictions must be reversed on all counts and remand to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: CHARLES FAHLBUSCH, ESQ., Assistant United States Attorney, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida, 33128, this 26th day of November, 1985.

By _____
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