IN THE SUPREME COURT OF FLORIDA

CASE NO. 67046

THE STATE OF FLORIDA,

Petitioner,

vs

JOSE CASTILLO,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the Appellee in the court below and the prosecution in the trial court. Respondent, JOSE CASTILLO, was the Appellant below and the Defendant in the trial court. The exhibits contained in the Appendix to Petitioner's Brief on Jurisdiction will be referred to by the letter assigned to them by Petitioner.

ISSUE PRESENTED FOR REVIEW

I

WHETHER THE DISTRICT COURT'S OPINION, 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, IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL?

II

WHETHER THE DISTRICT COURT'S OPINION, HOLDING THAT THE DECISION OF THE SUPREME COURT IN STATE V. NEIL, 457 So.2d 481 (Fla. 1984) SHOULD BE RETROACTIVELY APPLIED TO THIS CASE, IS IN EXPRESS AND DIRECT CONFLICT WITH THE NEIL DECISION?

STATEMENT OF THE CASE AND FACTS

Following a jury trial, Defendant was convicted of second degree murder and attempted second degree murder and he appealed (Exhibit A). This was prior to the decision of this court in State v. Neil, 457 So.2d 481 (Fla. 1984).

Subsequent to the jury being sworn, the defendant made an objection and motion for mistrial on the grounds that blacks were systematically excluded from the jury by the State's use of peremptory challenges (Exhibit B, C). The Third District reversed the Defendant's convictions on the grounds of Andrews v. State, 459 So.2d 1018 (Fla. 1984) and State v. Neil, 457 So.2d 481 (Fla. 1984).

SUMMARY OF ARGUMENT

I

The district court's opinion, holding that a timely objection may be made to the jury panel after the jury has been sworn, is in direct and express conflict with State v. Neil, 457 So.2d 481 (Fla. 1984) and other decisions of this court and other district courts of appeal.

II

The district court's opinion, holding that the decision of the Supreme Court in State v. Neil, 457 So.2d 481 (Fla. 1984) should be retroactively applied, is in direct and express conflict with the same case.

ARGUMENT

I.

THE DISTRICT COURT'S OPINION, 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, IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL.

This court specifically held in State v. Neil, 457 So.2d 481 (Fla. 1984) that a contemporaneous objection is necessary in order to properly preserve the point on appeal, citing to Castor v. State, 365 So.2d 701 (Fla. 1978).

This requirement has been held to mean that objections to a prospective juror being excused must be made prior to the time that the juror is excused. Brown v. State, 381 So.2d 690 (Fla. 1980); Paramore v. State, 229 So.2d 855 (Fla. 1969); Ellis v. State, 6 So. 768 (Fla. 1889). Further, objections to the jury panel must be made prior to the time the jury is sworn. See, Leach v. State, 132 So.2d 329 (Fla. 1961); Overstreet v. Sandler, 186 So. 247 (Fla. 1938); Peek v. State, 413 So.2d 1225 (Fla. 3d DCA 1982); Pet. for rev. denied, 424 So.2d 763 (Fla. 1982).

Nevertheless, the Third District Court of Appeal, in the case sub judice, held that a motion for mistrial made subsequent to the

swearing of the jury was timely. (Exhibit B,C). This is clearly in express and direct conflict with the case cited above.

II

THE DISTRICT COURT'S OPINION, HOLDING THAT THE DECISION OF THE SUPREME COURT IN STATE v. NEIL, 457 So.2d 481 (Fla. 1984) SHOULD BE RETROACTIVELY APPLIED TO THIS CASE, IS IN EXPRESS AND DIRECT CONFLICT WITH THE NEIL DECISION.

This court, in its Neil decision, specifically stated:

> Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral proceedings as set out in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).
>
> 457 So.2d at 488 (emphasis added).

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

Although one week later, the court remanded, on the basis of Neil, Andrews v. State, 459 So.2d 1018 (Fla. 1984), it did not recede from its prior position. This leads inescapably to the

conclusion that this court was following tha analysis used by the California Supreme Court in People v. Wheeler, 22 Cal. 3d 258 P.2d 748, 148 Cal. Rptr. 890 (Cal. 1978) and People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (Cal. 1978). This reasoning provided that, since Johnson was pending in the California Supreme Court at the time that Wheeler was decided, they would be treated as companion cases and both would be reversed. Nevertheless, the applicability of the Wheeler decision was limited to cases in which the voir dire proceedings were conducted after Wheeler became final and to death penalty cases. Wheeler, supra, 538 P.2d 766, n.31 See, also, People v McCray 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982) and People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981) in which the New York Court of Appeals failed to retroactively apply the Thompson rationale to the McCray decision.

This reasoning is clearly the proper reasoning to be applied where, in issues as this one, there has been "a clear break with the past". United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). It is therefore clear that express and direct conflict exists concerning this issue, as well.

CONCLUSION

This court should grant jurisdiction to resolve the conflicts between the decision in the present case and those in the cited above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furnished by mail to RICHARD E. GERSTEIN and PAUL M. RASHKIND, **Bailey, Gerstein, Rashkind & Dresnick**, 4770 Biscayne Boulevard, Suite 950, Miami Florida 33137, on this 17th day of May 1985.

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