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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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# BRIEF OF PETITIONER ON THE MERITS

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## PRELIMINARY STATEMENT

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 the appellant in the Third District Court of Appeal of Florida. Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the district court. In this brief, the parties will be referred to as they appear before this court.

The symbol "R" will be used, in this brief, to refer to the Record-on-appeal and the symbol "T" will identify the transcript of trial court proceedings. The appendix to this brief will be referred to as "App." and by the exhibit letter assigned. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE CASE

Jose Castillo was charged by information with the attempted second-degree murder of Jose Morales on August 8, 1980 by shooting him with a firearm and with the second-degree murder of Idolidia Morales on the same date, by shooting her with a firearm. The Information was filed in December, 1983, subsequent to respondent's arrest (R.1-4A).

He was tried by jury and verdicts of guilty were returned on both counts (R.194-195). A judgement of guilty was entered on both counts on April 19, 1984 (R.246-246), and he was sentenced, on Count I, to a term of thirty (30) years with a three-year minimum mandatory (R.247). On Count II, he was sentenced for a term of one hundred thirty four (134) years with three (3) years minimum mandatory with both the prison term and the minimum mandatory to run consecutive to those in Count I (R.248).

Respondent then appealed to the Third District Court of Appeal, raising four (4) points on appeal (a number of which included sub-points). Among other things, the respondent alleged that the trial court erred by not declaring a mistrial due to the state's alleged misuse of peremptory challenges to exclude black persons from the jury and that a question asked of a defense witness by the prosecutor constituted prosecutorial misconduct and reversible error. (App., Exh. A). The Third District filed an opinion on March 12, 1985 reversing the case and remanding the cause for a new trial. (App. Exh. A). Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985). The Court stated that it reversed "on authority of Andrews v. State, 459 So.2d 1018 (Fla. 1984), State v. Neil, 457 So.2d 481 (Fla. 1984), and City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985)...." (App., Exh. A). The court also found error in

the State's cross-examination of defendant's mother-in-law. (App., Exh. A).

A motion for certification of question was filed on or about March 20, 1985 (as was a motion for rehearing), and an amended motion for rehearing was filed on or about March 25, 1985. (App., Exhs. B and C). Said motions were denied on April 16, 1985. (App., Exh. F). On May 13, 1985, Petitioner filed a Notice of Petition for Discretionary Review, invoking the discretionary jurisdiction of this court. Jurisdictional Briefs were subsequently filed. This court accepted jurisdiction and dispensed with oral argument pursuant to its Order of August 23, 1985. The time within which Petitioner's Brief is to be served was extended to October 2, 1985 pursuant to the corrected Order of this court of September 4, 1985.

## STATEMENT OF THE FACTS

The respondent, on March 26, 1984, filed a Motion to Limit In-Court Identification (R.117-119), over three months subsequent to being charged (R.1-4A). He requested the court to refuse to permit any in-court identification of him during trial and to suppress evidence of any pre-trial photographic identifications of him. (R.118). A hearing was held on the motion on March 26, 1984. Although the defense

did orally ask the court to order a lineup to be held (R.263), no motion requesting it was ever filed. The judge denied defense request for a live lineup (R.265) and took testimony at the hearing on the issue of whether or not the photo identifications were too suggestive (T.268). The defense subsequently asked, again, that a lineup be held, but without the defendant in it, which the court denied (T.296).

Defense waived the defendant's presence at the hearing and he was excused (R.297-298). After hearing the testimony of Sergeant Angel Nieves, who conducted the photo lineups (R.299-330); the victim, Jose Morales (R.331-340); Armando Matute (R.340-353); Juana Matute (R.353-362) and Barbara Matute (R.362-370); the defense admitted that the identification process was not suggestive and the court stated it was "probably excellent" (R.373). The court stated that it would not order a live lineup (R.375-376). The defense did not argue its motion to limit in-court identification further (R.376-383).

After the jury had been accepted and sworn, the defense moved for mistrial on the grounds that the State had used five of its last six challenges to exclude blacks from the jury (T.170-177). The motion was denied by trial court (T.177), which stated to the defense, "Well, until the law

changes, Mr. Gerstein, you know that the peremptory system does not require, at least at this point, justification for exercising challenges." (T.176).

At the trial, the first State witness was Officer Bill Press, who had been the original officer to arrive at the crime scene. He had been dispatched to Bird Road and 87th Avenue at 11:00 a.m. on August 8, 1980 (T.218). Barbara Matute was his original reporter on the scene. She described the assailant as Caucasian, Latin male, approximately 5'9", 180-200 pounds, with brown hair and a brown mustache. He was dressed in blue jean pants and a light blue shirt (T.226-227) and drove a Blazer-type vehicle (T.228). The vehicle was found about 2-1/2 hours later at a nearby residence (T.228-230).

Leonardo Vivancos, whose residence it was, testified next (T.237-238). He had met a man driving the Blazer at a gas station, some days before, and had talked about buying it, later meeting him at the witness' home (T.240). However, the person that Vivancos met was not the respondent and was not in the courtroom (T.246-248).

Jose Morales, the surviving victim, then testified (T.250). He was driving down the road in his station wagon, pulling a trailer, when he pulled to the right to let an

ambulance pass (T.252). The station wagon/trailer combination was then struck by a car from the rear four or five times (T.253). Mr. Morales got out to check the damage and; when the driver of the vehicle that had hit him started to leave, Morales told him not to leave because he was going to call the police (T.253). Morales checked the trailer, found that it wasn't loose, and turned to tell the driver he could go (T.253). The driver already had a pistol in his hands, so Morales said, "....you're crazy...." and the driver answered that if he wanted war, he would have it, and shot Morales (T.253-254). Morales told his wife to call the police, and the driver shot her (T.254). He spent five (5) weeks in the hospital and had three (3) operations due to the wound (T.254). Two or three days after the shooting, Mr. Morales picked the respondent's picture out of a photo lineup and identified it as a picture of the man who shot him and killed his wife (T.256-258). When asked if he saw the person in court who shot he and his wife, the victim pointed to the respondent and said, "This is the man." (T.258).

The parties then stipulated as to the identity of Idolidia Morales and as to her death by gunshot wound to the abdomen (T.279-280).

The next witness was Armando Matute, who was in the

Morales car with his wife and daughter on the day of the shooting (T.279-282). He stated that he got out of the car after Mr. Morales (T.283). He saw the murderer get his gun from by the door of his truck (T.286), and the shooter pushed him out of the way to shoot Mr. and Mrs. Morales (T.286-287). He picked the respondent's photo out of a photo lineup as the murderer (T.288-289). He then identified the respondent, in-court, as the man who did the shootings (T.290-291).

Juana Matute, Armando's wife, then testified (T.298). She also picked the respondent's picture out of a photo lineup as the shooter (T.307-308). She testified that the respondent, in-court, looked like the man, but she couldn't guarantee, since it had been four years and he had changed (T.308-309).

Barbara Matute, the daughter of Armando and Juana and Mr. Morales' goddaughter, then testified (T.322). She also had picked the respondent's picture out of a photo lineup the day after the shootings as the murderer (T.332.333). She was positive in her in-court identification of the respondent as the shooter (T.334).

Rowland Neil was the next witness (T.341). He could not see the gunman's face, although he was able to provide a general description (T.341-345). He also was able to write down the license number of the murderer's truck (T.345), which turned out to be registered to the respondent's wife (R.147). He did testify that he only saw one older man and one older woman get out of the station wagon prior to the shooting (T.346).

Police Technician Michael McAlhaney then testified that he had lifted thirty-eight latent prints from the outside of the Blazer that was involved, and photographed the scene (T.350-364).

Police Technician James Galen testified that he photographed the vehicle and lifted latent prints from inside the Blazer, including from a musk oil bottle in the console (T.365-375).

Police Technician Richard Laite was stipulated to as an expert by the parties (T.375-377). He testified that four of the latent prints lifted from the outside of the Blazer were respondent's (T.379). The print found on the bottle inside the console was also respondent's (T.380).

Officer Richard Albrecht found the murder weapon in

waters in the area of Crandon Park (T.394-397) and Officer Robert Kennington gave his expert opinion that the bullets shot into Mr. and Mrs. Morales were shot from the gun (T.397-403).

Detective Angel Nieves, the lead investigator, testified that the respondent's driver's license was found in the console of the Blazer (T.404-405). Using the photograph from the license to prepare a photo lineup for the witnesses (T.407), Jose Morales and each of the three Matutes picked the photograph of the respondent out as the assailant and each was positive that it was a picture of the shooter (T.408-417). A warrant was issued for the respondent (T.421), and the Detective began his search for the respondent in August, 1980 (T.421). The respondent was finally arrested by Detective Soto in November, 1983 (T.426).

Detective Soto testified that police received a tip that respondent had changed his identity and appearance and carried a beeper (T.449). Soto discovered information concerning the beeper number and, after further investigation, discovered respondent's address (T.449-451). Surveillance was conducted and respondent was arrested (T.452-455). Respondent claimed, at that time, that his name was Mario Palov and produced a driver's license, social security card,

and vehicle registration in that name (R.165, T.452-453). When arrested, respondent claimed he was the wrong guy and they wouldn't get the right guy (T.464-465). The State then rested (T.470).

The defense then presented Michael McCloskey, who had witnessed the shooting (T.490-500). He testified that, after an initial argument between two people involved in the accident, a man from the station wagon got a pair of pliers or channel-locks from his vehicle and held them up as a defense (T.492-493). He saw the man who did the shooting and described him (T.493-494). Although he believed he could identify the shooter, he could not identify either a picture of the defendant or the defendant as the man who did the shooting (T.495-496). He was shown photographs by the police and was unable to identify a photo of the man who did the shooting (T.498-499), although he did feel that the police wanted him to identify a photo of a tall, much older man with grey hair (T.499-502).

Maria Chamizo, the respondent's mother-in-law then testified (T.510). She had seen respondent in August, 1980 and testified that he always wore eyeglasses because he needs them to see (T.510-511). She then testified that he didn't have a mustache in August, 1980, because her daughter didn't like them (T.511). She said he was a boy, very small when

had a mustache and then cut it off (T.518-519). However, she then admitted that she had no idea whether he had a mustache in January, 1977 or not (T.519). Then, when confronted with a picture of respondent taken in January 1977 (R.164, T.519), she admitted that he had a mustache, then (T.510); couldn't remember when he cut it off (T.520); then couldn't remember if he had cut it off before August, 1980 or not (T.520). Then she, again, testified that he didn't have a mustache in August, 1980 (T.520). She also testified that she had overheard Mr. Morales, the victim, tell another man in court that the respondent was not the man who shot him (T.512-514). The prosecutor, during his cross-examination of Chamizo, got her to admit that she went to victim's house, after seeing him in court, and spoke to his present wife (T.517). The prosecutor then asked if she went there to offer him money to not testify against her son-in-law, which she denied (T.517-518). The defense objection was overruled (T.517-518). Mrs. Chamizo was completely unable to describe the respondent's hair color, although he was in-court at the time, saying, "....How can I say as to whether it is white, or red, or green?" (T.523-524).

Jose Noreiga, a television repairman, then testified for the defense (T.527). He was repairing the antenna at raespondent's home at the time of the shooting and testified that the respondent was present and he gave him a ride

when he left, around noon (T.528-533). He saw the 11:00 o'clock news that night, including a report of the shooting and picture of the alleged gunman, but did not believe it was respondent because respondent looked different, and had no mustache (T.535-536). Noreiga never went to the police, at all, even after he knew of respondent's arrest (T.540-541) and never went to the State Attorney's Office (T.541). He keeps no records of his work (T.542).

Petitioner reserves the right to argue additional facts in the argument portion of this brief.

## QUESTIONS PRESENTED

I

WHETHER THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS NOT TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THE DECISION BECAME FINAL?

II

WHETHER A MOTION FOR MISTRIAL MADE DUE TO ALLEGEDLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES, AFTER THE JURY IS SWORN, IS NOT A TIMELY OBJECTION PURSUANT TO STATE V. NEIL, 457 SO.2D 481 (FLA. 1984)?

III

WHETHER ASKING A DEFENSE WITNESS, DEFENDANT'S MOTHER-IN-LAW, IF SHE WENT TO THE VICTIM'S HOUSE TO OFFER HIM MONEY NOT TO TESTIFY, WAS, IF ERROR, NOT REVERSIBLE WHERE SHE ADMITTED GOING TO THE VICTIM'S HOUSE AFTER HER SON-IN-LAW HAD BEEN ARRESTED?

## SUMMARY OF THE ARGUMENT

I

State v. Neil, 457 So.2d 481 (Fla. 1984) should not be applied retroactively to this case since both the court and prosecution relied on the state of the law at the time as not requiring the State to justify its use of challenges and because case law strongly indicates that the kind of change concerned should not be retroactively applied.

II

Pursuant to present law concerning the timeliness of objections to the use of challenges and to the jury panel, a motion for mistrial made after the jury is sworn is not a timely objection under State v. Neil, 457 So.2d 481 (Fla. 1984).

III

Asking a witness, the defendant's mother-in-law, who admits going to the victim's house, if she went there to offer him money not to testify is not reversible error where she was a minor witness as to a collateral matter whose credibility was already severely impeached.

## ARGUMENT

THE DECISION STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS NOT TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THE DECISION BECAME FINAL.

In State v. Neil, 457 So.2d 481 (Fla. 1984), the court established a rule of law wherein any systematic exclusion of jurors based upon allegedly racial grounds must be examined by the trial court. In Neil, the court affirmatively held that the application of Neil was not retroactive. The Third District Court nevertheless has applied Neil retroactively based upon Andrews v. State, 459 So.2d 1018 (Fla. 1984); City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985)(citing Safford v. State, holding the Neil rule to be retroactive); Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), cert. granted, Case No. 046, August 23, 1985; and Hernandez v. State, ___So.2d___ (Fla. 3d DCA decided Aug. 6, 1985)[___F.L.W.___].

Presumably, the Third District Court and other district courts[1] have attempted to interpret this Court's reasoning of Neil's retroactive application based on two subsequent

[1]Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985); Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985) and Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985).

decisions, Andrews v. State, 459 So.2d 1018 (Fla. 1984) and Jones v. State, 464 So.2d 547 (Fla. 1985).

Without regard for the distinguishing features of Andrews v. State, supra (a companion case to Neil), or Jones v. State, 464 So.2d 547 (Fla. 1985)(a death case decided upon the authority of Neil),[2] the Third District in Safford, Castillo and other cases has continued to apply Neil to pipeline cases in spite of the clear language in Neil of no retroactive application.

The only court to adhere to Neil's non-retroactive application has been the Fifth District Court speaking through Judge Upchurch in Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985). The Court correctly opined:

> The Third District, in Jones v. State, 10 F.L.W. 528 (Fla. 3d DCA February 26, 1985), and the Fourth District, in Franks v. State, 10 F.L.W. 798 (Fla. 4th DCA March 27, 1985), have applied Neil to "pipeline" cases. Because of specificity of the language of Neil set out above, we do not come to the same conclusion. The Court in Neil gave as its reason for not applying the decision retroactively, "the difficulty of trying to second-guess records that do not meet the

[2]See Parker v. State, ___ So.2d ___ (Fla. Case No. 63,177, decided August 22, 1985)[___ F.L.W. ___](holding Neil applicable, but no violation since there was an insufficient showing that the challenges were used solely based on race).

> standards set out herein as well as the extensive reliance on the previous standards...." (Emphasis added). Since these reasons apply equally to "pipeline" cases as to cases tried and appeals completed before the decision in Neil was announced, it is our conclusion that the supreme court intended Neil to apply only to those cases going to trial subsequent to Neil.
>
> In the instant case, the trial court predated the decision in Neil and the test described there was not available to the trial court. (footnote omitted).
>
> 471 So.2d at 1295.

That decision not only strictly applies Neil's language, but follows sub silencio the reasoning in People v. Thompson, 79 A.D.2d 87, 435 N.Y.D.2d 739 (1981) and People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) relied upon by this Court in Neil.

In Neil, the Court adopted in material part, the procedures enunciated in People v. Thompson, supra. Specifically discussing retroactive application, the Court concluded:

> [13] Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. 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.

This Court in fashioning the Neil test relied heavily on People v. Thompson, supra, which looked to People v. Wheeler, supra, and Daniel v. Louisiana, 420 U.S. 31 (1975) for support and guidance regarding retroactive effect. In Thompson, supra, the court observed:

> We add that the difficulty of reconstruction jury selection procedures, particularly as they relate to the particular manner in which peremptory challenges were employed, and other factors, such as undoubted extensive reliance by prosecutors on the heretofore statutory inviolability of the peremptory challenge, militate against retroactive application of our decision in this case. (see People v. Wheeler, supra 148 Cal.Rptr.P. 908, 583 P.2d p. 766 N. 31; Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790).

In People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978), that court originally observed:

> 31. The rule we adopt herein applies to defendants in the case at bar and in the companion matter of People v. Johnson, post, page

> 915, of 148 Cal.Rptr., page 774, of 583 P.2d and to any defendant now or hereafter under sentence of death. (Cf. In re Jackson (1964) 61 Cal.2d 500, 39 Cal.Rptr. 220, 383 P.2d 420). In all other cases the rule will be limited to voir dire proceedings conducted after the present decision becomes final. (See People v. Cook, (1978) 22 Cal.3d 67, 99, fn. 18, 148 Cal. Rptr. 605, 624, 583 P.2d 130, 149, and cases cited.)
>
> 583 P.2d at 766 n. 31.

The Wheeler court approved the foregoing limited retroactivity of its decision since it was only by luck of the draw that the companion case to Wheeler was not the case that changed the law and therefore it would be unfair not to apply the decision to the companion case. See People v. Johnson, 583 P.2d 775, 148 Cal.Rptr. 915 (1978). The Wheeler court also included all death cases within its scope of retroactivity inasmuch as death is different, and it would have limited application affecting only those defendants who, sentenced to death, suffered the same prejudicial error as the case that overruled the precedent. The Court found that since this category would contain a small, finite group, and no further members to that group would be added, the decision could be retroactively applied because it would not overburden the admnistration of the criminal justice system. See, In re Jackson, 61 Cal.2d 500, 393 P.2d 420, 39 Cal.Rptr. 220 (1964). Moreover, the Wheeler court held

that its decision would not be retroactive to all other cases where voir dire proceedings were conducted prior to Wheeler becoming final. The Court reasoned that because official reliance had doubtless been placed on the prior unrestricted use of peremptory challenges, the rule now adopted would only be applicable to voir dire conducted after Wheeler became final. See, People v. Cook, 22 Cal.2d 67, 583 P.2d 130, 148 Cal.Rptr. 605 (1978).

This rationale is supported by the decision in Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975). In Daniel, the United States Supreme Court held that its decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1970) which held the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury from a fair cross-section of the community, was not to be applied retroactively to convictions obtained by juries impaneled prior to the date of the Taylor decision. The Court reasoned:

> As we stated in Taylor v. Louisiana, supra, at 535-536, 95 S.Ct., at 700, "until today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." Given this statement, as well as the doctrinal underpinnings

of the decision in Taylor the question of the retroactive application of Taylor is clearly controlled by our decision in DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), where we held Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, L.ED.2d 491 (1968), to be applicable only prospectively. The three relevant factors, as identified in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed. 2d 1199 (1967), are

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

In Taylor, as in Duncan, we are concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In Taylor, as in Duncan, our decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest

> at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.
>
> 95 S.Ct. at 705.

Although, this Court intended to further rather than impede Article I, Section 16 of the Florida Constitution by discarding the test set-out in Swain v. Alabama, 380 U.S. 202 (1965), the analysis by the United States Supreme Court in Taylor v. Louisiana, supra, is applicble. This is especially true when a similar analysis was employed in Thompson, supra, and Wheeler, supra, wherein the retroactive rule created in Neil germinated. See: State v. Neil, 457 So.2d at 487 n.12; See also Abrams v. McCray, Case No. 84-1426, 37 Cr.L. 4031.

Reversal was mandated in Andrews v. State, supra, since Andrews was a companion case to Neil. Although an argument was made that Andrews represented a "pipeline" case, said argument was properly rejected because of Andrews' "companion case" status. Likewise, in Jones v. State, a death case, the "pipeline" theory was not applicable.[3] See Parker v. State, supra. (death case).

[3]In Jones v. State, supra, this Court found that Neil governs those cases where the issue was preserved below and pending when Neil was decided. In support thereof this

In Neil, much discussion centered on which alternative procedure to Swain should be adopted. Recognizing the tests derived from Wheeler v. State, supra, and Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), and People v. Thompson, supra, this Court stated:

> While quite similar to Wheeler and Soares, People v. Thompson, (cite omitted); charts a more even course in the exercise of peremptory challenges.
>
> One commentator considers Thompson more workable than either Wheeler or Soares, Comment, Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law, 44 U.Pitt.L.Rev. 673 (1983).

The above analysis is particularly applicable to this case, since both the trial judge and the prosecutor specifically relied upon the state of the law at the time for the proposition that the state was not required to justify, on the record, the reasons for its use of peremptory challenges (T.176-177). The trial court stated to defense counsel, after the motion for mistrial concerned herein was made, "Well, until the law changes, Mr. Gerstein, you know that

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Court cited Hoberman v. State, 400 So.2d 758 (Fla. 1981) which applied State v. Sarmiento, 397 So.2d 643 (Fla. 1981) to a pending appeal. However, a clear reading thereof, shows that Hoberman was a companion case to Sarmiento and therefore was an exception to the pipeline theory and therefore Sarmiento was applicable thereto.

the peremptory system does not require, at least at this point, justification for exercising challenges." (T.176). Certainly, the non-retroactive application to "pipeline" cases is the better view.[4]

[4]The State recognizes that the Court in Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied. 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1970) has held, at 387 N.E.2d 518, N. 38, that its rule was held to apply to the defendants in the present case and to the defendants in all cases now pending on direct appeal where the record is adequate to raise the issue. However, since the Florida Supreme Court did not adopt the Soares opinion, the Soares holding on retroactivity is not persuasive and should be rejected for a more workable rule.

II

A MOTION FOR MISTRIAL MADE DUE TO THE ALLEGEDLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES, AFTER THE JURY IS SWORN, IS NOT A TIMELY OBJECTION PURSUANT TO STATE V. NEIL, 457 SO.2D 481 (FLA. 1981).

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). In the case sub judice, the defense did not object to the exercise of any of the State's peremptory challenges (T.1-170). The defense accepted the jury, allowed it to be sworn, and then immediately moved for mistrial in an obvious attempt to place the respondent in a double-jeopardy situation (T.170-177). A mistrial that the defense later represented that they didn't want (T.444).

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. 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). However, this could admittedly be difficult where the objection is to systematic exclusion of jurors from the panel. Nevertheless, Jack Neil met this test while

Jose Castillo did not. State v. Neil, 457 So.2d 481, 482 (Fla. 1984).

However, the rule with regard to objections to the jury panel as a whole, holding that objections to the jury are waived when the parties accept the jury and it is sworn, would appear both appropriate and clearly applicable. 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). Such limitations on objections to jury panels have been specifically upheld by the federal courts. Leggroan v. Smith, 498 F.2d 168 (10th Cir. 1974); Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974); Cert. denied, 427 U.S. 905 (1976).

Certainly, the most reasonable view of the situation is that the defense failed to make a timely objection to the State's alleged misuse of peremptory challenges, as required, where they waited until after the jury was sworn before objecting.

## III

ASKING A DEFENSE WITNESS, DEFENDANT'S MOTHER-IN-LAW, IF SHE WENT TO THE VICTIM'S HOUSE TO OFFER HIM MONEY NOT TO TESTIFY, WAS, IF ERROR, NOT REVERSIBLE WHERE SHE HAD ADMITTED GOING TO THE VICTIM'S HOUSE AFTER HER SON-IN-LAW HAD BEEN ARRESTED.

During the cross-examination of the respondent's mother-in-law, the following took place:

> Q Okay, now, you went out to the house of Mr. Morales, did you not, and spoke to his present wife?
>
> A Yes, I went once.
>
> Q Okay, and you offered him money not to testify against your son-in-law?
>
> A (Witness shaking her head in the negative)
>
> Well, I went there once to speak to her, with her.
>
> Q All right, what did you do?
>
> A With his wife, yes.
>
> Q 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.
>
> 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.

Q (By Mr. Scola) Then what did you go out there for then?

A I went there because I was so happy to know that it was not him.

I felt so happy, so I went there with that idea but not with any other.

(T.517-518).

This exchange evidently disturbed the District Court of Appeal, which said, in its opinion: "We find error also in the state's cross-examination of the defendant'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.[5] See Harris v. State, 447 So.2d 1020, 1020 n.1 (Fla. 3d DCA 1984); see also Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982)."

The case of Harris v. State, 447 So.2d 1020 (Fla. 3d DCA 1984) provides extremely little support of the district court's position since that case involved strong

[5]During oral argument, the Third District panel asked the undersigned if the prosecutor had any basis for this question and specifically requested that he answer both within and dehors the record. The Court was, therefore, aware that, although no basis for the question appears in the record, that Mrs. Morales had informed the prosecutor of the alleged offer prior to the query being made.

implications that the defendant was a procurer and his girlfriend, a witness, was a prostitute in a case involving a close self-defense question. Compare that to this case, in which the allegedly "improper question" implied the bad character of the defendant's mother-in-law, not the defendant; as to a collateral matter, not the crime; in a case which involved no self-defense issue. Additionally, the credibility of the witness concerned had already been virtually destroyed by her contradictions of herself as to the respondent's appearance at different times and her inability to describe him, and was unsupported by any other witness.

Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982) appears to provide even less support, since the Judgement and Sentence of the trial court was affirmed in the case. Further, in the Smith case, the prosecutor, although he never presented impeachment evidence, improperly represented to the trial court that he had personal knowledge of such evidence; a technique that the state could have used in this case, but did not.

Further, examining the cases which have held what kind of prosecutorial comments constitute error and reversible error, it is respectfully submitted that the defense has clearly failed to establish the kind of prejudice which requires reversal. See, O'Callaghan v. State, 429 So.2d 691

(Fla. 1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Breedlove v. State, 413 So.2d 1 (Fla. 1982); Lynn v. State, 395 So.2d 621 (Fla. 1st DCA 1981); Pet. for rev. denied, 402 So.2d 611 (1981); Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980); Pet. for rev. denied, 392 So.2d 1371 (1980).

Also, even if the question constituted error, it was harmless pursuant to F.S. §59.041, United States v. Hasting, 103 S.Ct. 1974 (1983); State v. Murray, 443 So.2d 955 (Fla. 1984). See, also, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985).

The more correct analysis clearly points to the asking of the offending question as, if error, harmless.

## CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this court should reverse the decision of the Third District Court of Appeal and remand the case for reinstatement of the convictions and sentences imposed by the trial court.

Respectfully submitted,

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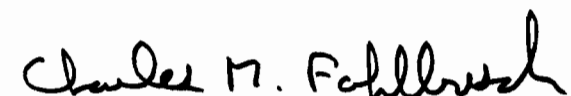
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to PAUL M. RASHKIND and RICHARD E. GERSTEIN, Bailey, Gerstein, Rashkind & Dresnick, 4770 Biscayne Boulevard, Suite 950, Miami, Florida 33137, on this 1st day of October, 1985.



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