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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,846

THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES LENARD,

Respondent.

FILED
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ON PETITION FOR DISCRETIONARY REVIEW
RESPONDENT'S BRIEF ON THE MERITS

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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JAMES LENARD,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the State's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The respondent submits the decision of the Third District Court of Appeal holding that the respondent was entitled to a new trial based on State v. Neil, 457 So.2d 481 (Fla. 1984) is correct and should be affirmed. Since the respondent properly objected at trial to the state's use of peremptory challenges of prospective black jurors allegedly based solely on race and the respondent's direct appeal was pending at the time the Neil

decision was rendered. Application of Neil to pipeline cases such as the instant case is consistent with long-standing Florida law and the most recent pronouncement of the United States Supreme Court in Shea v. Louisiana, ____ U.S. ____, 105 S.Ct. 1065, ___ L.Ed 2d ___ (1985), that the decisional law in effect at the time of the appeal governs a matter on direct appeal.

ARGUMENT

THIS COURT'S DECISION IN NEIL V. STATE, 457 So.2d 481 (FLA. 1984), SHOULD BE APPLIED TO CASES PENDING ON DIRECT APPEAL AT THE TIME NEIL WAS DECIDED IN CONFORMITY WITH THIS COURT'S LONG-STANDING PRACTICE IN CRIMINAL AND CIVIL CASES TO APPLY THE DECISIONAL LAW IN EFFECT AT THE TIME OF APPEAL.

Article I, Section 16, of the Florida Constitution guarantees the right to an impartial jury. In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court held that the discriminatory use of peremptory challenges, i.e. the use of peremptory challenges to exclude an identifiable racial group from a particular jury panel, impedes the selection of an impartial jury guaranteed by the Florida Constitution. As to cases following Neil, this Court stated at page 488:

> 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 (1980).[1]

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[1] Witt v. State, 387 So.2d 922 (Fla. 1980), involved applications of law change to post-conviction challenges to proceedings already final, that is, not on direct appeal. See Linkletter v. Walker, 381 U.S. 618, 622, n. 5, 85 S.Ct. 1731, 1734, 14 L.Ed.2d 601 (1965) ("By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision [in Mapp v. Ohio]"); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985) ("The judgment awarded (Cont'd)

Three District Courts of Appeal have now construed Neil to apply to cases pending on direct appeal, called pipeline cases. See Safford v. State, 463 So.2d 378 (Fla. 3d DCA 1985); cert. granted, Case No. 66,730; Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), cert. granted, Case No. 66,965; Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985), cert. granted, Case No. 67,046; City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA 1985); Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985); Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985).[2] This construction comports with well-established Florida law that the decisional law existent at the time of direct appeal governs "even if there has been a change since time of trial." Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, (Fla. 1985); Dougan v. State, 470 So.2d 697, 701, n. 2 (Fla. 1985); Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983). This principle is also central to the common law.[3] Early in this nation's legal history, Chief Justice Marshall pronounced in United States v. Schooner Peggy 5 U.S. 102 (1 Cranch) (1801):

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was

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. . . is not final until the case has been disposed of on appeal").

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The Fifth District has rejected the application of Neil to pipeline cases. See Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985), cert. granted, Case No. 67,445.

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See "Prospective Overruling and Retroactive Application in the Federal Courts," 71 Yale L. J. 907 (1962).

> erroneous or not. But, if subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation . . . In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside. (Emphasis supplied)

This Court has announced that it will look to the criteria established by the United States Supreme Court for guidance in determining when principles should be applied retroactively. Bundy v. State, 471 So.2d 9, (Fla. 1985); Cf., Witt v. State, 387 So.2d 922, 925 (Fla. 1980). The state's contention that Neil should not be applied retroactively completely ignores the most recent pronouncement of the United States Supreme Court, Shea v. Louisiana, ___ U.S. ___, 105 S.Ct. 1065, ___ L.Ed.2d. ___ (1985).

In Shea, the United States Supreme Court held that retroactive effect should be given on direct appellate review to new constitutional pronouncements, "subject, of course, to established principles of waiver, harmless error, and the like." 105 S.Ct. at 1070, 1074.[4] In so ruling, the Court applied the reasoning of Mr. Justice Harlan set forth

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It is noteworthy that while the decision is by a vote of five to four, one of the dissenting justices, Mr. Justice Rehnquist, approves of this part of the majority's ruling but dissents because of the illogic of not applying the approach so as to exclude collateral attacks. Shea v. Louisiana, 105 S.Ct. at 1074 (Rehnquist, J., dissenting). Hence, as pertaining to the issue presently before this Court, the decision in Shea is essentially by a vote of six to three.

persuasively in two of his early dissenting opinions concerning retroactivity.[5] The Court stated in Shea:

> . . . application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the; new rule.

105 S.Ct. at 1069.

In Andrews v. State, 459 So.2d 1018 (Fla. 1985), this Court already applied the Shea reasoning to the application of Neil. In the present case, the defendant, as in Shea, is on direct appeal, seeking the application of the Neil decision to him. Although the state suggests that non-retroactivity to those on direct appeal is "a more workable rule," (State's Brief, pg. 17), not only does the state offer nothing to substantiate this assertion, but such a suggestion was already rejected in Shea:

> Next, it is said that the application of Edwards to cases pending on direct review will result in the nullification of many convictions and will relegate prosecutors to the difficult position of having to retry cases concerning events that took place years ago. We think this concern is overstated. We are given no empirical evidence in its support. . . . We note, furthermore, that several courts have applied Edwards to cases pending on direct review without expressing concern about lapse of time or retroactivity and without creating any apparent administrative difficulty. And if a case is unduly slow in winding its way through a State's judicial system, that could be as much

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Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1968); Mackey v. United States, 401 U.S. 675, 676, 91 S.Ct. 1171, 1172, 28 L.Ed.2d 404 (1971).

> the State's fault as the defendant's and should not serve to penalize the defendant.

105 S.Ct. at 1070, 1071.

The additional and indeed crucial significance of Shea is that after twenty years of confusion in the federal courts from the Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), decision, Shea returns the federal courts to the common law of retroactivity: the decisional law in effect at the time of appeal governs an issue raised on direct appeal when there has been a change of law since the time of trial. This pronouncement of Shea destroys any purported effectiveness of the lynchpin of the state's suggested rationale to contravene the common law in this case.

The state relies upon Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975), which held nonretroactive its prior pronouncement that excluding women from jury venires (not a petit jury) deprived a criminal defendant of his Sixth Amendment right to trial by an impartial jury. Daniel was discussed in United States v. Johnson, 457 U.S. 537, 551, 102 S.Ct. 2579, 2588, 73 L.Ed.2d 202 (1982), and the test enunciated in Johnson, the "threshhold test," received numerous criticism.[6] In Shea the Supreme Court met the scholarly criticism and unequivocally embraced Justice Harlan's reasoning that "principled decision-making and fairness to similarly situated petitioners requires

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See "United States v. Johnson: Reformulating Retroactivity Doctrine" 69 Cornell L. J. 166, 204 (1983); "Retroactivity and the Exclusionary Rule: A Unifying Approach" 97 Harvard L. Rev. 961 (1984).

application of a new rule to all cases pending on direct review, including cases outside of the Fourth Amendment area." 105 S.Ct. at 105.

It should be noted that in Mackey v. United States, 401 U.S. 675, 681, 91 S.Ct. 1171, 1174, 28 L.Ed.2d 404 (1971), Justice Harlan viewed the failure to apply a newly declared constitutional rule to cases pending on direct review at the time of the decision as violative of three norms of constitutional adjudication. First, it would conflict with the norm of principled decision making and be relegated to an "ambulatory retroactivity doctrine." See also Michigan v. Payne, 412 U.S. 47, 61, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (Marshall, J. dissenting) ("principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity").

Second, Justice Harlan found it difficult to accept the notion that the court, as a judicial body, could apply a "new" constitutional rule entirely prospectively while making an exception only for the particular litigatant whose case was chosen as the vehicle for establishing that rule:

> Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

91 S.Ct. at 1174.

Third, Justice Harlan declared that selective application of new constitutional rules departed from the principle of treating

similarly-situated defendants in a similar fashion:

> When another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law. Desist v. United States, 394 U.S. at 258-259, 89 S.Ct. at 1038-1039 (dissenting opinion).

91 S.Ct. at 1174. These three views expressed by Justice Harlan are now the cornerstone of the Shea opinion.

Justice Harlan's concern have traditionally dominated direct review matters in criminal cases in Florida. For example, this Court has acknowledged the second concern with regard to doing justice to each litigant on the merits of his case in the pipeline context for cases pending on direct review. See Bundy v. State, 471 So.2d 9 (Fla. 1985) ("We further hold that any conviction presently in the appeals process in which there was hypnotically refreshed testimony will be examined on a case by case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction"); Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983) (deciding the applicability of new speedy trial rule, stating that "decisional law and rules in effect at the time that an appeal is decided govern the case even if there has been a change since the time of trial."); Spurlock v. State, 420 So.2d 875, 877 (Fla. 1982) ("We stated in Tascano that parties like respondent that had preserved on appeal the [jury] penalty instruction issue are to have the benefit of our interpretation of Rule 3.390(d)"); Hoberman v.

State, 400 So.2d 758 (Fla. 1981) (applying State v. Sarmiento, 397 So.2d 643 (Fla. 1981), to the application of warrantless electronic eavesdropping in the home, "in light of our recent decision [in Sarmiento], the tape recording of conversations held in the home should have been suppressed, and we therefore reverse");[7] Tascano v. State, 393 So.2d 540, 541 (Fla. 1980) (concerning the application of instructing the jury as to maximum and minimum penalties, "the defendant, as well as all others who have presented this point on appeal, received the benefit of this interpretation of the rules"); Gonzalez v. State, 367 So.2d 1008, 1011 (Fla. 1979) (as to the retroactivity of Dorfman v. State, concerning the propriety of general sentences, decision to be applied" . . . only in cases not yet final on appeal at the time of the Dorfman decision and only where a challenge to the general sentence has been made and properly preserved as the question for appellate review").

In a consistent manner, Florida has likewise applied to civil cases the principle of utilizing the law in effect at the time of direct appeal notwithstanding a change in the law since trial. Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 288 (Fla. 1985) ("an appellate court is generally required to apply the law in effect at the time of its decision"); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467, 468 (Fla. 1978) ("Vining [causation of injury by leaving

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The state claims a "clear reading" of Hoberman shows it "was a companion case to Sarmiento." (State's Brief, pg. 17) A clear reading, however, shows the contrary. See also City of Miami v. Cornett, 463 So.2d 399, n. 1 (Fla. 3d DCA 1985).

key in car ignition and intervening criminal act of driver stealing car] had not been decided when this case was before the trial court. But it controls now since disposition of a case on appeal should be made in accord with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment of appealed was rendered."); Linder v. Combustion Engineering, Inc., 342 So.2d 474, 476 (Fla. 1977) ("as to those cases on appeal in which the applicability of the strict liability rule has been properly and appropriately made a question of appellate review, the strict liability rule should be applicable"); Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973) ("as to the cases on appeal in which the applicability of the comparative negligence rule has been proper and appropriately made a question of appellate review, this opinion shall be applicable"); Florida East Coast Railway Co. v. Rouse, 194 So.2d 260, 262 (Fla. 1967) (applying new law that comparative negligence statute unconstitutional; "We recognize the general and Florida rule to be that an appellate court, in reviewing a judgment of direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed"); Eastern Airlines, Inc. v. Gellert, 438 So.2d 923, 929 (Fla. 3d DCA 1983) (applying this Court's decision of Mercury Motors Express, Inc., v. Smith, 393 So.2d 545 (Fla. 1981) as to the requirement that an employer must be shown by independent proof to have been at fault in order to award punitive damages against the employer for the employee's

misconduct, "but where a change in the state of the law occurs between trial and appeal, we are bound to apply the law as it exists at the time of appeal").

The state suggests that, instead of applying the traditional rule, this Court should adopt the California propsectivity approach which makes exception only for companion and death cases.[8] The arbitrariness of such application and then non-application to defendants whose initial appearance before trial and appellate courts is not yet final is quite simply innappropriate. As Mr. Justice Harlan stated in Mackey v. United States, 401 U.S. 675, 679, 91 S.Ct. 1171, 1173, 28 L.Ed.2d 404 (1971):

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The state's suggestion that Andrews v. State, 459 So.2d 1018 (Fla. 1984), [not a death case] is a "companion" case to Neil v. State, as People v. Johnson, 583 P.2d 774 (Calif. 1978) was to People v. Wheeler, 583 P.2d (Calif. 1978) can not be taken seriously. Aside from the fact that the California Supreme Court called them "companion" cases, each California decision was issued on precisely the same date. See also, City of Miami v. Cornett, 463 So.2d 399, n. 1 (Fla. 3d DCA 1985).

The state acknowledges that not applying Neil to a companion case would be unfair, i.e., not equal. (State's brief, pg. 17) The illogic of that proposition was recognized in Shea v. Louisiana, ___ U.S. ____, 105 S.Ct. 1065, ___ L.Ed.2d ___ (1985); where the court stated:

> In addition, it is said that in every case, Edwards alone excepted, reliance on existing law justifies the nonapplication of Edwards. But, as we have pointed out, there is no difference between the petition in Edwards and the petitioner in the present case. If the Edwards principle is not to be applied retroactively, the only way to dispense equal justice to Edwards and to Shea would be a rule that confined the Edwards principle to prospective application unavailable even to Edwards himself.

> In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

Moreover, notwithstanding California's aberrant retroactivity statement, it is totally at odds with the sound and long-standing principle in Florida that law in effect at the time of appeal governs.

The state in its brief also makes passing reference to extensive official reliance and to non-retroactivity in direct appeal matters as "a more workable rule" not overburding the administration of the criminal justice system. (State's Brief, pg. 17-18). This argument may be relevant to a consideration of whether to apply Neil to collateral attacks in criminal matters already finalized, see Witt v. State, 387 So.2d 922, 926 (Fla. 1980), but has no merit when applied to direct criminal appeals. In collateral attacks, all the state's policy concerns - finality, judicial resources, workability, past reliance - come into focus. See Mackey v. United States, 401 U.S. 675, 689, 91 S.Ct. 1171, 1178, 28 L.Ed.2d 404 (1971) (Harlan, J. concurring) (". . . with few exceptions, the relevant competing policies properly balance out to the conclusion that, given the current broad scope of constitutional issues cognizable on habeas, it is sounder, in adjudicating habeas petitions, generally to apply the

law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation"). But these policy concerns have no place in the consistency and equal mindedness required for those appellate matters still not final but pending on direct appeal.

Furthermore, even applying these policy concerns to the present case, application of Neil is required. This application is mandated because the fairness of the trial itself, as compared with, for example, effective police deterrence, goes to substantive due process and the very bedrock of a trial, that is, a fair and impartial jury. Williams v. State, 421 So.2d 512, 515 (Fla. 1982). ("The rule [applying warrantless eletronic surveillance interception to post-conviction matters] has no bearing on guilt and did not involve an attack on the fairness of the trial because the rule is based on the necessity for an effective deterrent to illegal police action."); City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCA 1985) ("anything less than an impartial jury is the functional equivalent of no jury at all"). See also Commonwealth v. Soares, 387 N.E.2d 499, 518 (Mass. 1979).[9]

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Nor can the state claim that Neil was totally radical and unforeshadowed. While Neil overruled no Florida opinions (other than to quash the appeal from the Third District), several states had used their state constitutions as this Court did in Neil to declare that a person's race is not a valid reason to exclude prospective jurors from service on petit juries.

Surely the area of law was uncertain at the time of the Neil decision as evidenced in the state's citation within its own brief to a 1983 law review article, "Comment, Survery of the Law of Peremptory Challenges: Uncertainly in the Criminal Law,' 44 U. (Cont'd)

This Court's concern in Neil of "trying to second-guess records" is of no concern here. In the present case, immediately after voir dire the prosecutor summarily struck from the jury panel the only two black prospective jurors. (T: 117) They were struck immediately at the first opportunity afforded the prosecutor for peremptory challenges. (T: 117) Defense counsel timely objected to the striking of the two blacks and later renewed his motion to strike the jury panel. (T: 117, 175) The court denied the motion and moved on to conduct the challenges to the remaining prospective jurors. (T: 117-118). Thus, defense counsel properly objected to the State's summary excusal of black prospective jurors and demonstrated a sufficient likelihood of discrimination for the trial court to inquire as to the state's motives.[10] The failure of the trial court to conduct such an

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Pitt. L. Rev. 673, 703 (1983) ("The result of these recent decisions and suggestions, however, has been to create uncertainty in this area of criminal procedure . . . Until such action [judicial or legislative] is taken, the uncertainty is likely to continue for a long time to come."); See also Andrews v. State, 438 So.2d 480, 482 (Fla. 3d DCA 1983) (Ferguson, J. specially concurring).

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Indeed, an examination of the voir dire of the two black prospective jurors, Janette Moss and Lawyer Stanley, reveals nothing that would support such a summary and systematic exclusion of all blacks from the jury, as the state did here.

On voir dire, Ms. Moss stated that she is a divorced mother of a ten year old and that her former husband was an electrician. (T: 25-26) She lives in Opa Locka and has worked for HRS as a clerk typist for nine years. (T: 25) She stated that in her spare time she sews, cleans house and takes care of her little son. (T: 112)

Mr. Stanley stated that he has lived in Florida 27 years and is in the lawn and tree landscaping business. (T. 26) He is married with eight children; his wife is a nurse and one child is a court reporter in Texas, another is in college studying nursing, another is a postman, two are in the U. S. Army, and two are still in school. (T: 27-28) He lives in the northwest (Cont'd)

inquiry was error and the Third District properly reversed the case for a new trial before a new jury.

Article I, Section 16, of the Florida Constitution affords an accused in a criminal case the right to a trial by a fair and impartial jury. Neil gives power to this fundamental right. As the Third District stated in applying the applicable constitutional civil analogue in City of Miami v. Cornett, 463 So.2d 399, 402 (Fla. 3d DCA 1985):

> . . . anything less than an impartial jury is the functional equivalent of no jury at all . . . [T]he requirement of impartiality inheres in any provision granting a right to a jury trial.

The issue was properly preserved below and this Court should apply Neil to the present case which was pending on direct appeal at the time Neil was decided. In so ruling, this Court will be consistent with prior Florida pronouncements and the most recent opinion of the United States Supreme Court that the decisional law in effect at the time of the appeal governs a matter on direct appeal.

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section of Miami. (T: 28) In response to the question whether he knew anyone in government service, Mr. Stanley stated that he had a friend who worked for the American Red Cross. (T: 52) During his free time, Mr. Stanley likes to "eat and sleep and watch a little television," particularly westerns and football games. (T: 112)

Both Ms. Moss and Mr. Stanley stated they had no moral, religious or personal convictions against sitting in judgment as to the guilt or innocence of another person. (T: 56)

CONCLUSION

Based on the foregoing, the respondent respectfully requests this Court to affirm the decision of the Third District Court of Appeal reversing this case and remanding it for a new trial.

Respectfully submitted,

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Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 Northwest Second Avenue, Miami, Florida 33127, this 26th day of February, 1986.

Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender