IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,846

THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES LENARD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The Petitioner, the State of Florida, was the Appellee in the District Court of Appeal, Third District and the prosecution in the trial court. The Defendant, James Lenard was the Appellant in the District Court and the Defendant below. The parties will be referred to as they stand before this Court. The symbol "A" will be used to designate the Appendix to this Brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On appeal to the Third District, Respondent contended that the trial court erred in failing to conduct an inquiry into systematic exclusion of prospective black jurors by the prosecutor through use of peremptory challenges in violation of article I, Section 16, Florida Constitution. The Third District agreed with Respondent, even though voir dire occurred before State v. Neil, 457 So.2d 481 (Fla. 1984) became final, and reversed and remanded for a new trial for violation of Neil. (A. 1).

QUESTION PRESENTED

WHETHER THE DECISION IN LENARD V. STATE, __ SO.2D __ (FLA. 3D DCA DECIDED OCTOBER 29, 1985), EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) AND THE FIFTH DISTRICT COURT'S DECISION IN WRIGHT V. STATE, 471 SO.2D 1295 (FLA. 5th DCA 1985).

SUMMARY OF THE ARGUMENT

The Third District Court's opinion in Lenard v. State, __ So.2d __ (Fla. 3d DCA decided October 29, 1985) expressly and directly conflicts with the Court's opinion in State v. Neil, supra and the Fifth District Court's opinion in Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985) wherein both courts conclude that cases tried prior to the decisions rendered in State v. Neil were pipeline cases and, as such, the new rule of law developed in State v. Neil would not be applied retroactively.

ARGUMENT

THE DECISION IN LENARD V. STATE, __ SO.2D __ (FLA. 3D DCA DECIDED OCTOBER 29, 1985), EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) AND THE FIFTH DISTRICT COURT'S DECISION IN WRIGHT V. STATE, 471 SO.2D 1295 (FLA. 5TH DCA 1985).

Petitioner would submit that the decision in Lenard v. State, __ So.2d __ (Fla. 3d DCA decided October 29, 1985), expressly and directly conflicts with this Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984) and the recent decision of the Fifth District Court of Appeal in Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985) since by the Third District holding that Neil was violated, clearly held that Neil was applicable to pipeline cases. (A. 1).

In State v. Neil, supra, the Court established a rule of law wherein any "systematic" exclusion of jurors based upon an allegation of racial grounds must be examined by the trial court. The Court in Neil, however, affirmatively held that the application of Neil was not retroactive. The Third District has nevertheless applied Neil retroactively in Lenard v. State, supra, as well as Safford v. State, 463 So.2d 378

(Fla. 3d DCA 1985), cert. granted August 23, 1985: City of Miami v. Cornet, 463 So.2d 399 (Fla. 3d DCA 1985); Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985), cert. granted, August 23, 1985.

In so doing, the Third District Court in Lenard has specifically rejected the retroactive prounouncement of Neil and reached the "merits" in assessing whether relief should be granted.

The instant case also expressly and directly conflicts with Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985), in light of the fact that the Court, in Wright, took issue and rejected the Third District Court's application of Neil to Jones v. State, 466 So. 2d 301 (Fla. 3d DCA 1985) and the Fourth District Court's decision in Franks v. State, 467 So.2d 400 (Fla. 4th DCA 1985). In Wright v. State, the Court, speaking through Judge Upchurch stated:

> The Third District, in Jones v. State, 10 FLW 528 (Fla. 3d DCA February 26, 1985), and the Fourth District in Franks v. State, 10 FLW 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 retro-

> actively, "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 pre-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.

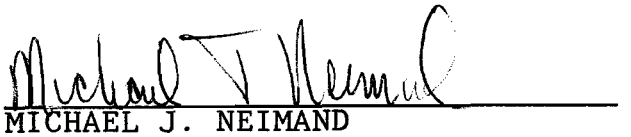
In light of the clear conflict among the districts with regard to the retroactive application of Neil, petitioner would urge this Court to grant certiorari review in the instant cause. Moreover, it should be noted that this very issue has been accepted for certiorari review in Safford v. State, supra; Jones v. State, supra and Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985), cert. granted, Case No. 67,046 August 23, 1985: Whether State v. Neil is to be applied retroactively to "pipeline" cases.

CONCLUSION

Based on the foregoing, Petitioner would urge this Court to accept certiorari review.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON JURISDICTION** was furnished by mail to **MARTI ROTHENBERG**, Attorney for Respondent, 1351 N.W. 12th Street, Miami, Florida 33125 on this 31 day of October, 1985.

MICHAEL J. NEIMAND
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